# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 25 March 1998 *

## Introduction

1. This reference for a preliminary ruling concerns the compatibility with the Community competition rules of national legislation which allows only a group of recognised workers to perform the operations carried out in a particular port area. According to the national court, the rates of pay applicable to those workers — which all employers are required to apply under a collective agreement — must be classified as unfair by comparison with those applicable to non-recognised workers, who are equally capable of performing at least some of the reserved tasks.

From a strictly economic point of view, the situation in the Port of Ghent is therefore comparable to that which existed in certain Italian sea ports at the time of the judgment in *Merci Convenzionali* v *Porto di Genova*. [1] The same is not true — as I see it — in law.

## The relevant national law

2. Article 1 of the Belgian Law of 8 June 1972 organising dock work ('the 1972 Law') [2] prohibits all such work in port areas from being performed by anyone other than recognised dockers.

3. The definition of dock work and port areas is contained in the Royal Decrees implementing the Law of 5 December 1968 on collective labour agreements and joint committees. [3] The joint committees and subcommittees are composed of an equal number of representatives of employers' and workers' organisations. Their task is, *inter alia*, to participate in the drawing up of the collective labour agreements for which they are responsible. At the request of the relevant joint body, those agreements may be made mandatory by Royal Decree. Once mandatory, collective agreements apply to all the employers and workers covered by the body which drew them up.

* Original language: Spanish.

1 — Case C-179/90 *Merci Convenzionali* v *Porto di Genova* [1991] ECR I-5889 ('*Merci*').

2 — *Staatsblad*, 8 August 1972, p. 8826

3 — *Staatsblad*, 15 January 1969, p. 267.

4. The collective labour agreement relating to the Port of Ghent, of 20 February 1979, was made mandatory by Royal Decree of 11 May 1979. [4] It stipulates, *inter alia*, that contracts of employment for the performance of dock work are not to be subject to the obligation generally requiring contracts of employment to be in writing.

5. The Royal Decree of 12 January 1973 establishing and determining the powers of the Joint Ports Committee ('the 1973 Royal Decree') [5] defines 'dock work' as 'the handling in any form of goods transported by sea-going ship or inland waterway vessel, by railway goods wagon or lorry, and the ancillary services connected with those goods, whether such operations take place in docks, on navigable waterways, on quays or in establishments engaged in the importation, exportation and transit of goods, as well as the handling in any form of goods transported by sea-going ship or inland waterway vessel to or from the quays of industrial establishments' (Article 1).

6. Under Article 3 of the 1972 Law, 'the King shall establish the conditions and procedures for the recognition of dockers, on the advice of the relevant port committee'. For the Port of Ghent, those provisions are contained in the Royal Decree of 21 April 1977 on the conditions and procedures for the recognition of dockers in the Ghent port area ('the 1977 Royal Decree'), [6] which lays down conditions for recognition such as the person's age, good character, state of health, and professional knowledge and ability.

Article 3(2) of the 1977 Royal Decree provides that, in granting recognition, the joint subcommittee is to have regard to labour requirements.

7. Under Article 4 of the 1972 Law, a fine is to be imposed on employers who have caused or permitted dock work to be performed in breach of that law or the decrees implementing it.

## The facts

8. The facts of the main proceedings, as set out in the order for reference, can be summarised as follows.

4 — *Staatsblad*, 28 June 1979, p. 7378.

5 — *Staatsblad*, 23 January 1973, p. 877.

6 — *Staatsblad*, 10 June 1977, p. 7760.

9. NV SMEG, a Belgian company, operates a grain warehousing business in the Ghent port area, as defined in Article 1 of the 1973 Royal Decree and in Article 2 of the Royal Decree of 12 August 1974 establishing and determining the appointment, powers and numbers of members of joint subcommittees for ports. [7]

10. SMEG's activities consist, on the one hand, in the loading and unloading of grain boats and, on the other, in the storage of grain on behalf of third parties. Goods are transported to and from its premises by boat, rail or lorry.

11. At the material time, Mr Becu, then a director of SMEG, had certain duties in the Ghent port area performed by eight non-recognised workers.

12. At the same time, Mrs Verweire, then a manager of the company NV Adia Interim, had certain tasks in the Ghent port area carried out by five non-recognised workers.

13. It is common ground that dock work as defined in the aforementioned articles of the respective Royal Decrees is carried out on SMEG's premises. Accordingly, SMEG is subject to the 1972 Law on dock work.

14. It is likewise clear, and has not been disputed, that, during the period at issue, SMEG had certain operations carried out by non-recognised dock workers, despite the fact that, under the 1972 Law, such work may be performed only by recognised dockers.

15. The *Openbaar Ministerie* (Public Prosecutor's Department) brought criminal proceedings against Mr Becu and Mrs Verweire, and against the undertakings they administer, on the ground that they had committed the offenses provided for in the 1972 Law (see point 7 above). The court of first instance (the *Correctionele Rechtbank* (Criminal Court), Ghent) acquitted the first two defendants and at the same time held that the undertakings managed by then had no case to answer.

Referring to the first paragraph of Article 85 and to point (a) of the second paragraph of Article 86 of the EEC Treaty, as well as to the documents produced in the case, which showed that the hourly wage of those employed by SMEG was BEF 667, whilst an ordinary docker's minimum wage was BEF 1 335, the court of first instance

7 — *Staatsblad*, 10 September 1974, p. 11020.

held that such a wage disparity had to be regarded as unfair, since, under the 1972 Law, even ordinary maintenance operations on SMEG's premises were to be performed by recognised dockers.

## The questions referred

16. Before ruling at second instance on the substance of the case, the Hof van Beroep, Ghent, considered it appropriate to refer the following two questions to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty:

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

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

## The first question

17. As formulated, the first question seeks only to ascertain whether Article 90(1), in conjunction with Articles 6,[8] 85 and 86 of the EC Treaty, is capable of creating individual rights which are directly enforceable by nationals, or, which amounts to the same thing, whether those provisions

8 — Article 7 in the version prior to the Treaty on European Union.

are — to use the term of art — 'directly effective'.

18. Because of the way in which the first question is worded, the answer to it must be in the abstract, although — as the Belgian Government rightly points out in its observations — this does not in any way mean that the provisions at issue are irrelevant to the main proceedings. Accordingly, the conformity of the relevant national provisions with the Treaty can be examined in the answer to the second question.

19. Another possibility, of course, would be to reformulate the question along the same lines as the Court of Justice did in paragraph 8 of its judgment in *Merci*, on the ground that the referring court wishes to ascertain not only whether the Treaty provisions which it cites have direct effect, but also whether the situation at the Port of Ghent is compatible with those provisions. However, in view of the particular characteristics of this case, I am inclined to prefer the first of those two options, inasmuch as it will make for a clearer account of the arguments involved.

20. Furthermore, for reasons which I shall explain later (see point 26 below), I do not consider that an interpretation of Article 6 is necessary in order to resolve the dispute in the main proceedings.

21. Accordingly, the answer to the first question referred by the Belgian court does not raise any serious problems. It is, after all, the settled case-law of the Court of Justice that the prohibitions contained in Articles 85(1) and 86 of the Treaty 'produce direct effects in relations between individuals and create direct rights in respect of the individuals concerned which the national courts must safeguard'.[9] In so far as Article 90(1) extends the Community competition rules and, in particular, Articles 85 and 86 of the Treaty to public undertakings and to undertakings which enjoy special or exclusive rights, the national court will have to apply those rules in accordance with exactly the same criteria. This is the case despite the fact that the wording of Article 90(1) ('Member States shall neither enact nor maintain in force...') might suggest that the prohibition which it contains is of a different legal nature from those laid down in Articles 85(1) and 86 ('The following shall be incompatible with the common market and shall be prohibited:...'), and despite the fact that, in the context of Article 90, the Commission has a special duty to exercise supervision for which neither of the other two provisions at issue provides.[10]

The Court of Justice has allowed that interpretation in the context of abuse of a dominant position, stating that 'even within the framework of Article 90, Article 86 has direct effect and confers on individuals rights which the national courts

9 — See, *inter alia*, Case 127/73 *BRT* [1974] ECR 51, paragraph 16; Case 37/79 *Marty* [1980] ECR 2481, paragraph 13; Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 45; Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 39; and Case C-59/96 P *Koelman* v *Commission* [1997] ECR I-4809, paragraph 43.

10 — Article 90(3) provides that 'the Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States'.

must protect'. [11] There is no reason why that reasoning cannot also be applied to Article 85. [12]

22. In short, the answer to the first question referred by the Hof van Beroep should be that Article 90(1) of the Treaty, in conjunction with Articles 85 and 86, creates for individuals rights which national courts must protect.

## The second question

23. By its second question, the Hof van Beroep, Ghent, wishes to ascertain whether dockers may be deemed to constitute an undertaking entrusted with the operation of a service of general economic interest and, if so, whether, for the purpose of performing the specific task assigned to that undertaking, they should be exempt from the prohibitions in relation to competition applicable by virtue of the combined provisions of Articles 85, 86 and 90(1) of the Treaty.

11 — See Case 155/73 *Saachi* [1974] ECR 409, paragraph 18; Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 57; and *Merci*, cited above, paragraph 23.

12 — See, in that connection, point 24 of the Opinion of Advocate General Van Gerven in *Merci*, cited above.

The national court refers to the similarities that exist between this case and the proceedings which led to the judgment in *Merci*, cited above. I therefore consider it useful to take that precedent as the basis for my analysis.

### *The Porto di Genova case*

24. In that case, the Tribunale di Genova (District Court, Genoa) sought a preliminary ruling as to whether the monopoly on dock work held by certain dock-work companies in Italy and guaranteed by penalties under criminal law was compatible with the EEC Treaty. For our purposes here, the Court of Justice held that Article 90(1) of the Treaty, in conjunction with Articles 30, 48 and 86 thereof, precludes rules of a Member State which require an undertaking established in that State to have recourse, for the performance of dock work, to a dock-work company formed exclusively of national workers. On the basis of the information available to it, the Court likewise found that, for the purposes of Article 90(2) of the Treaty, such dock-work companies could not be regarded as being entrusted with the operation of services of general economic interest.

25. There are manifest differences between the present situation at the Port of Ghent and that which prevailed at the Port of Genoa.

26. First of all, the Belgian legislation at issue, unlike the Italian, does not impose a nationality requirement. Indeed, apart from a reference in the order from the national court to Article 7 (read Article 6) of the Treaty, which is probably explained by the fact that the Hof van Beroep, Ghent, based its question on the earlier question from the Tribunale di Genova, there is no evidence in the contested national legislation, in the file forwarded with the order, or even in the observations submitted by the various parties, of any discrimination on grounds of nationality in the recognition of dockers at the Port of Ghent. It is not therefore relevant to examine the case from the point of view of Article 6 or, for the same reasons, Article 48 of the Treaty.

27. Secondly, as the referring court rightly points out, the legislation in the present case recognises only the occupation of dockers and entrusts the performance of all dock work exclusively to them; it does not grant any special or exclusive rights to undertakings or companies.

28. Notwithstanding those differences, there is no doubt that both situations lead to a similar result, that is to say the imposition, within a particular port, of unreasonable prices for the provision of a given service.

29. In those circumstances, I think it is necessary, first of all, to ascertain what legal lessons can be drawn from the judgment in *Merci* and, then, to determine which of them can be applied to this case.

30. Paragraphs 8 to 24 of the judgment in *Merci* seem to show that the Court considered the maintenance of exclusive rights in favour of a particular undertaking to be incompatible with the Treaty in three respects.

31. First, the Court found that the rules governing the Port of Genoa, by which a Member State reserved to its own nationals the right to work in an undertaking established in its territory, were inherently contrary to Article 48 of the Treaty.

32. Second, the Court held that the undertakings which had been granted exclusive operating rights were induced by the national legislation to abuse their dominant position, and that that legislation therefore infringed Article 86 since it affected trade between Member States.

33. Thirdly, the Court pointed out that national legislation which facilitates the abuse of a dominant position capable of affecting trade between Member States is

generally incompatible with Article 30 of the Treaty, which prohibits quantitative restrictions on imports and any other measure having equivalent effect, since such legislation makes more difficult and hence impedes imports of goods from other Member States. The Court of Justice went on to say that 'it may be seen from the national court's findings that the unloading of the goods could have been effected at a lesser cost by the ship's crew, so that compulsory recourse to the services of the two undertakings enjoying exclusive rights involved extra expense and was therefore capable, by reason of its effect on the prices of the goods, of affecting imports'. [13]

34. That citation can be transposed almost word for word to the circumstances of the present case. It is clear from the referring court's findings that the handling of the goods could have been effected at a lesser cost by non-recognised labour. Furthermore, compulsory recourse to the recognised labour force, on the ground that it enjoys exclusive rights, must have involved extra costs capable of affecting imports.

35. To what extent, therefore, can the findings contained in *Merci* be applied to this case?

13 — *Merci*, cited above, paragraph 22.

36. As I stated earlier, there is nothing in the documents before the Court to show that pursuit of the activities covered by an exclusive right is subject to a specific nationality requirement. The grounds of challenge based on Article 48 of the Treaty must therefore be dismissed in this case.

37. However, the same does not appear to be true of the other grounds of challenge. It is therefore appropriate to examine whether considerations based on Article 86 of the Treaty are applicable. That is to say whether, as in *Merci*, the facts of this case reveal an infringement of the prohibition of abuse of a dominant position. If so, it will be necessary to determine whether the national rules at issue also infringe Article 30 of the Treaty in so far as they represent an obstacle to the free movement of goods. It is appropriate, finally, to take into account — albeit merely for analytical purposes — Article 86, an interpretation of which has been requested by the national court.

*The possible existence of an infringement of the competition rules*

38. Both the Commission and the Belgian Government have submitted that the Community competition rules are not applicable to the present case, since recognised dockers cannot be regarded as 'undertakings' within the meaning of the EC Treaty.

39. The provisions of Community law which the Belgian court seeks to have interpreted are indeed contained in Part Three, Title I, Chapter 1, Section 1 of the EC Treaty, entitled 'Rules applying to undertakings'. Furthermore, the provisions contained in Articles 85 and 86 are expressly concerned with undertakings. They prohibit 'agreements between *undertakings*', 'decisions by associations of *undertakings*', and any 'abuse by one or more *undertakings* of a dominant position'. Also, Article 90(1) prohibits Member States from enacting or maintaining in force any measures contrary to the rules contained in the Treaty, in particular to those rules provided for in Articles 6 and 85 to 94, 'in the case of public *undertakings* and *undertakings* to which Member States grant special or exclusive rights'.

In order for Articles 85, 86 and 90 to be applicable, therefore, it is essential that the obstacle to free competition should be attributable to one or more undertakings.

40. At this stage of the analysis, it is necessary to specify what particular conduct may, in the present case, be classified as an obstacle to competition. In other words, assuming that we are dealing with undertakings, with which of the practices prohibited by the Treaty would the facts of this case have to be identified?

41. To my mind, the only category, if any, in which the situation in the Port of Ghent could be placed is that of abuse of a dominant position by an undertaking holding special or exclusive rights. I do not, therefore, consider Article 85 to be relevant.

42. It is certainly true that the wages of recognised dockers are laid down in agreements concluded through collective-bargaining negotiations between employers' and employees' representatives. It could be argued in this respect that these are agreements which directly or indirectly fix prices or other trading conditions and that they fall within the scope of Article 85(2)(a). However, the agreements in question would be relatively innocuous if it were not for the combined effect of coercive provisions which, on the one hand, allow only duly recognised dockers to perform dock work, and, on the other, make the outcome of the aforementioned collective-bargaining negotiations binding *erga omnes*.

43. In practice, the national legislation creates for recognised dockers collectively special or exclusive rights capable of affording them a dominant position. That is a situation to which the Community competition rules would be applicable if, collectively, they were deemed capable of constituting an undertaking. I therefore consider it necessary to clarify further the scope of the issue under consideration: for the purposes of the present case, only Article 86 in conjunction with Arti-

cle 90(1) and (2) can be relevant. As I said before, those provisions will be applicable only if the conduct prohibited is attributable to undertakings.

*The meaning of 'undertaking' in Community competition law*

44. The first definition of the term 'undertaking' given by the Court of Justice dates back to a judgment of 22 March 1961. [14] It held then that the concept of an undertaking within the meaning of the Treaty could be identified with a natural or legal person and that, consequently, several companies each having separate legal personality could not constitute a single undertaking within the meaning of the Treaty, even if those companies were economically integrated to the highest degree. [15] The judgment in *Klöckner-Werke and Others* emphasises similar criteria, although this time it introduces the important economic dimension into the definition. [16] 'An undertaking', the Court then held, 'is constituted by a single organisation of personal, tangible and intangible elements, attached to an autonomous legal entity and pursuing a given long-term economic aim'. [17] On both occasions, the Court was at pains to highlight the importance of the formal criterion of independent legal personality when determining whether a subsidiary is to be regarded as an undertaking separate from its parent company. The relevant law in both cases was the system of rules governing the financing of scrap laid down by the High Authority of the ECSC.

45. In relation to the harmonisation of social legislation in the transport sector, the Court again preferred an interpretation which placed primary emphasis on the legal and organisational autonomy of the entity in question. In that context, 'undertaking' was to be understood as 'an autonomous natural or legal person, irrespective of legal form, regularly carrying on a transport business and empowered to organise and control the work of drivers and crew'. [18]

46. The usefulness of such a definition in resolving the present dispute is, to say the least, limited, in my view, since both the context in which it was given and the purposes for which the interpretation was intended bear no relation to this case. [19]

47. The Court's first definition of the term 'undertaking' in the context of competition law came in 1984. In answer to a reference

14 — Joined Cases 42/59 and 49/59 *SNUPAT* [1961] ECR 53).

15 — ECR 54.

16 — Joined Cases 17/61 and 20/61 *Klöckner-Werke and Others*[1962] ECR 325. See also the judgment of the same date in Case 19/61 *Mannesmann* [1962] ECR 357, based on the same legal grounds.

17 — ECR 341.

18 — Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371, paragraph 9.

19 — It is thus not surprising that, when interpreting Article 85 of the Treaty, for example, the Court of First Instance has preferred to adopt a form of words which draws more on economics and is less concerned with the legal foundation of the entity concerned. See, in this connection, the judgment of the Court of First Instance in Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraphs 311 and 315.

for a preliminary ruling on the interpretation of Community legislation concerning exemption for certain categories of exclusivity agreements, the Court held that 'in competition law, the term "undertaking" must be understood as designating an economic unit for the purposes of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal'. [20]

More recently, the Court held — in what was to become a standard form of words — that, in the context of competition law, '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.' [21]

In relation to competition, the key feature of the definition thus shifts from criteria associated with the entity's autonomy to considerations of economic unity. Nonetheless, as I shall explain further later, the entity in question must at the same time enjoy a certain degree of — essentially economic — autonomy.

48. It is true that, in interpreting the phrase 'an entity engaged in an economic activity', the Court of Justice has been asked to comment on the economic nature of the activity in question rather than on the meaning of the term 'entity'. Uncertainties in this area have largely revolved around whether or not certain activities are to be classified as falling within the powers of the public authorities: employment procurement; [22] management of the public social security system; [23] control and policing of air space; [24] management of an optional supplementary old-age insurance scheme. [25]

49. I do not consider, however, that classification of the dock work at issue in the present case as an economic activity can reasonably be called in question. 'Any activity consisting in offering goods and services on a given market is an economic activity'. [26] Dockers offer, for remuneration, services consisting in various dock duties: loading, unloading, trans-shipment, storage. The question is whether such dockers may be regarded as a significant entity for the purposes of applying the Community competition rules.

50. The only precedent capable of providing any guidance in this respect is — in my

20 — Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11.

21 — Regarding the term 'undertaking' within the meaning of Articles 85 and 86 of the Treaty, see, *inter alia*, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 17; Case C-364/92 *Eurocontrol* [1994] ECR I-43, paragraph 18; and Case C-244/94 *Fédération Française des Sociétés d'Assurances* [1995] ECR I-4013, paragraph 14.

22 — *Höfner and Elser*, cited above.

23 — *Poucet and Pistre*, cited above.

24 — *Eurocontrol*, cited above.

25 — *Fédération Française des Sociétés d'Assurances*, cited above.

26 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7.

view — the judgment in *Commission* v *Italy*,[27] in which the Court held that Italy had failed to fulfil its obligations under Articles 5 and 85 of the Treaty by permitting the adoption of a compulsory tariff for all customs agents. I shall refer only to those aspects of that judgment which I consider relevant to this case.

51. In support of the argument that Article 85 was not applicable, the Italian Government maintained in that case that, although, since they exercise a liberal profession like lawyers, surveyors or interpreters, customs agents were independent workers, they nevertheless could not be regarded as being undertakings because the services they provide are of an intellectual nature and because the practice of their profession requires authorisation and entails compliance with certain conditions. It stated that the Treaty distinguishes between independent workers and undertakings, so that not all self-employed activity is necessarily carried on in the context of an undertaking. In addition, the indispensable organisational element is lacking, that is to say the combination of human, material and non-material resources permanently assigned to the pursuit of a specific economic goal.

52. The Court of Justice had no difficulty in explaining how the activity pursued by customs agents is economic in nature. With regard to the other precondition, namely that the economic operators in question should have sufficient unity or autonomy, the Court of Justice held that customs agents assume the financial risks involved in the exercise of that activity and, if there is an imbalance between expenditure and receipts, they have to bear the deficit themselves. Consequently, the Court concluded that 'the fact that the activity of customs agent is intellectual, requires authorisation and can be pursued in the absence of a combination of material, non-material and human resources, is not such as to exclude it from the scope of Articles 85 and 86 of the Treaty'.[28]

53. It is that ability to take on financial risks which gives an operator sufficient significance to be capable of being regarded as an entity genuinely engaged in trade, that is to say to be regarded as an undertaking. In other words, recognition as an 'undertaking' requires, at least, the existence of an identifiable centre to which economically significant decisions can be attributed.

54. For that reason, employees do not constitute undertakings. An undertaking and its auxiliary organs together form an economic unit.[29]

55. I consider it important to emphasise here the autonomous nature of any defini-

27 — Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851.

28 — Paragraph 38, [1998] ECR I-3896.

29 — See, in this respect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* [1975] ECR 1663, paragraph 539.

tion of undertaking within the meaning of the competition rules contained in the Treaty. Classification as such under national law must be seen only as a further factor to be taken into account by the Community judicature. Negative classifications under national law are likewise inconclusive. That is to say that an entity which pursues an economic activity does not cease to be an undertaking for our purposes here because national law does not recognise it as such. Accordingly, that fact that, under a particular system of law, a legal relationship is classified as a contract of employment is not sufficient to exempt it from the Community rules relating to undertakings. As with the very meaning of 'undertaking', regard must be had to the service actually provided and its specific characteristics, rather than to the legal form it takes.

56. The rules governing recognised dockers in the Port of Ghent exhibit certain specific characteristics which set them apart from what could be called a standard employment relationship. First of all, the dockers in question are casual workers attached to the employer by — what are classified under national law as – contracts of employment for short or even very short periods. Secondly, those contracts do not have to be in writing (see paragraph 4 above).

I do not think that those two factors in themselves are sufficient to support the view that, in the context of the present case, the contracts in question are inaccurately classified under Belgian law as contracts of employment, and are more akin to contracts for the provision of independent services.

From the information available to the Court, it does not seem possible to infer that dockers at the Port of Ghent, considered individually, operate in such a way as to support the presumption that there is in each of them an identifiable centre to which economic decisions can be attributed. Although they offer their services to various customers, they receive orders from them and do not bear any commercial risk. It must therefore be concluded that, from a social point of view, dockers perform a functionally different activity from that of any undertaking engaged in the provision of services. [30] The concept of a worker presupposes that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. That was the finding reached by the Court specifically with respect to Italian dockers. [31] I see no evidence to support a different conclusion with regard to Belgian dockers.

57. Separate from the question whether dockers are to be regarded as workers

30 — See, in this respect, the Opinion of Advocate General Jacobs in Cases C-67/96, C-115/97, C-116/97, C-117/97 and C-219/97 [1999] ECR I-5751, I-6025, I-6121.

31 — *Merci*, cited above, paragraph 13.

when considered individually is the question whether, collectively, they conduct themselves in matters of trade like an entity capable of being regarded as an undertaking for the purposes of Community competition law. That would be the case, for example, if a worker, whilst being linked to an undertaking by a relationship of employment, were linked to the other workers of that undertaking by a relationship of association. [32]

58. The order for reference clearly does not contain any evidence of the existence of an association between the dockers. The Court therefore put to the parties a question to be answered in writing. They were asked to explain precisely how dockers at the Port of Ghent organised themselves for the purposes of offering, concluding contracts for, and providing their services and, in particular, whether they had a joint management or administrative structure or whether they took the form of associations or corporations for the purposes of performing the tasks entrusted to them or ensuring discipline.

The answers given by the Belgian Government and SMEG's representatives show that there is, at least formally, no organisation between recognised dockers for the purposes of offering, concluding contracts for, and providing their services. In order to make it easier to offer and conclude contracts for their services, recognised dockers have *ad hoc* employment offices. These, however, are merely branches of the public employment procurement agency (namely, the *Vlaamse Dienst voor Arbeidsbemiddeling).*

Nor do recognised dockers appear to have constituted or to be capable of constituting an independent body for the purposes of managing or administering the services they are called upon to provide. Although they are members of trades union associations, like any other worker, their participation in management or administrative activities is confined to electing delegates to represent them on the joint committees and subcommittees. The joint (sub)committees are in turn responsible for exercising discipline, in so far as such discipline relates to matters extending beyond the framework of an individual employment relationship, it being otherwise a matter for the relevant employer.

59. It is true that, in their written answer, SMEG's representatives, while not seeking to deny that that is indeed the situation, refer to numerous covert agreements and practices which paint an altogether different picture of the way in which the performance of dock work is organised at the Port of Ghent.

60. It is not for the Court of Justice, however, within the context of a reference

32 — Ibid.

for a preliminary ruling, to verify the truth of assertions such as those made by SMEG's representatives, in so far as they relate to facts which are neither recorded in the order for reference nor result from the legislation to which the action in the main proceedings relates. I therefore consider that they should not be taken into account when answering the Belgian court's questions.

61. In those circumstances, having found nothing to show that the legal relationship under which the dockers provide their services is anything other than an employment relationship, nor any evidence of a form of organisation capable of being regarded as an undertaking for the purposes of the Community competition rules, I am bound to conclude that those rules are not applicable to these proceedings.

## Conclusion

62. For the foregoing reasons, I propose that the Court's reply to the reference for a preliminary ruling from the Hof van Beroep, Ghent, should be as follows:

(1) Article 90(1) of the Treaty, in conjunction with Articles 85 and 86, creates for individuals rights which national courts must protect.

(2) The documents before the Court contain nothing to show that the legal relationship under which the recognised dockers in the Ghent port area provide their services is anything other than an employment relationship, nor any evidence of a form of organisation capable of being regarded as an undertaking for the purposes of the Community competition rules. Articles 85, 86 and 90(1) are not therefore applicable.