COMMISSION

COMMISSION DECISION

of 21 October 1997

pursuant to Article 90 (3) of the EC Treaty on the provisions of Italian ports legislation relating to employment

(Only the Italian text is authentic)

(Text with EEA relevance)

(97/744/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Having given the Italian authorities, Associazione Nazionale Compagnie e Imprese Portuali (ANCIP), Compagnia Unica fra i Lavoratori delle Merci Varie del Porto di Genova (CULMV), Federazione Italiana Imprese di Servizi (Ausitra), the Comitato Nazionale degli Utenti e degli Operatori Portuali, Associazione degli operatori dei magazzini e deposito merci e delle imprese operanti nel settore della logistica (Assologistica) and Associazione degli operatori terminalisti (Assotop) the opportunity to make known their views concerning the objectives of the Commission of the provisions of Italian legislation relating to dock work and port operations,

Whereas:

1. THE FACTS

1.1. Background

(1) In its judgment of 10 December 1991 in Case C-179/90 *Convenzionali Porto di Genoa* ('Port of Genoa judgment'), in reply to a reference for a preliminary ruling, the Court of Justice of the European Communities ruled that 'Article 90, 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 organize dock work and require it for that purpose to have recourse to a dock-work company formed exclusively of national workers' [1].

(2) Following that judgment, and finding that Italy had not amended its legislation, the Commission sent the Italian Government on 31 July 1992 a letter of formal notice under Article 90 (3) of the Treaty requesting it to state the measures it intended to take in this respect.

(3) Following the Commission's letter, the Italian Government adopted, in succession, a decree-law, renewed eight times, law No 84 of 28 January 1994 on port reform, then a further decree-law which amends that law, was renewed some fifteen times and most recently on 21 October 1996, and was converted in Law No 647 on 23 December 1996.

(4) On 7 May 1997 the Commission, taking the view that the Italian ports legislation, that is Law No 84/94, as amended by 647/96 (hereinafter 'Law No 84/94') continued to be incompatible with Community competition law, sent a further letter of formal notice to the Italian Government. The latter replied by letter of 7 July 1997.

1.2. Italian port legislation prior to Law No 84/94

(5) This procedure concerns port handling operations in Italy. Port operations means the activities listed in Article 16 (1) of Law No 84/94, that is the

[1] [1991] ECR I-5889.

loading, unloading, embarkation, disembarkation, storage and transhipment of all types of goods.

(6) At the time of the Port of Genoa judgment, the market for port operations, as regulated by the Codice della Navigazione, took the form of a dual monopoly:

— on the one hand, a monopoly for the organization of port operations: an undertaking (generally controlled by the port authority) was granted an exclusive right to carry out port operations; in practice, although several undertakings were granted the right in each port, the right was always limited to a specific market segment (various goods, containers, fresh produce, etc.) which justifies the conclusion that it was indeed an exclusive right (on the reference market); however, those undertakings were not authorized to use their own workforce to carry out the operations,

— on the other hand, a monopoly for carrying out port operations: in each port, a port company was granted the exclusive right to supply (to the undertakings referred to in the first indent) the necessary labour to carry out the port operations in question,

— in addition, it was prohibited for a vessel to load or unload using its own crew.

(7) In the Port of Genoa judgment, the Court of Justice examined specifically the question of port operations involving ordinary freight at the Port of Genoa and found that the undertakings in question had a legal monopoly over a substantial part of the common market (for the sectors of the organization and of the performance of dock work respectively).

(8) It then concluded that the undertakings enjoying exclusive rights in accordance with the procedures laid down by the national rules in question had occasion, as a result, either to demand payment for services which had not been requested, to charge disproportionate prices (infringements under Article 86 (a)), to refuse to have recourse to modern technology (which has the effect of limiting technical development within the meaning of Article 86 (b)) which involved an increase in the cost of the operations and a prolongation of the time, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers (which is contrary to Article 86 (c)).

(9) The Court of Justice therefore concluded that: 'in these circumstances it must be held 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 (. . .), which are capable of affecting trade between Member States' [1].

1.3. Port legislation following Law No 84/94

(10) Law No 84/94 modified the operation of the market in question.

The amendments only partly satisfied the objections raised in the letter of formal notice of 31 July 1992 and, furthermore, introduce fresh distortions of competition that are incompatible with the Treaty.

(11) Analysis of Law No 84/94 should be based on the provisions of Law No 1369 of 23 October 1960 (hereinafter 'Law No 1369/60') which prohibits recourse to all forms of intermediary for the supply of labour and regulates the use of labour in subcontracted work:

(a) Article 1 of Law No 1369/60 states that 'the contractor shall be prohibited from contracting out ... labour ...'. In the event of failure to comply, the law imposes fines on both the contractor having recourse to such labour and the firm supplying the labour.

(b) In the present case, the effect of the Law is to prevent port undertakings, in principle, from using temporary labour to absorb surges in demand or from placing their surplus workers at the disposal of competitors when there is a lull in demand.

(c) In addition, Italian case-law appears to have extended the ban on temporary labour to the supply of temporary labour for subcontracted work where such work is characterized by a 'high labour content'. As regards ports, therefore, the Italian courts consider that Article 1 of Law No 1369/60 prohibits subcontracting (both active and passive) of loading, unloading and transhipment operations (see for example the reference for a preliminary ruling by Pretura di La Spezia to the Court of Justice, Case C-163/96 *Criminal proceedings against Silvano Raso,* still pending).

[1] Judgment cited above, at paragraph 20.

This means in particular that terminal operators cannot sub-contract certain operations with a high labour content and, similarly, that port undertakings cannot be subcontracted to supply such services. On the other hand, the subcontracting of operations with a high capital content and low labour content is not covered by the general ban.

(d) The Italian Government informed the Commission of the fact that on 18 June 1997 the Italian Parliament had approved a new law on the liberalization of temporary work. This was Law No 196 of 24 June 1997 (hereinafter 'Law No 196/97'). According to information acquired by the Commission and the reply given by the Italian Government on 7 July 1997, however, it would seem that the new Law is not as yet applicable in the ports for two reasons:

(i) First, Law No 196/97 does not repeal Law No 1369/60 but sets up a derogatory scheme by which the Minister for Labour licenses certain undertakings to supply temporary labour. Law No 84/94, however, establishes a specific scheme of derogation from Law No 1369/60 for the ports sector. Thus the derogation from Law No 1369/60 that is applicable in the ports should be the derogation provided for by Law No 84/94 and not that provided for in Law No 196/97;

(ii) Second, even if Law No 196/97 were theoretically applicable in ports, the objective constraints provided for in the Law considerably restrict its scope as regards port work. On the one hand it would seem that port undertakings cannot be issued an operating licence as, under Law No 196/97, only undertakings with the sole object of supplying labour are entitled to do so (Article 2 (2) (a) of Law No 196/97). On the other hand, small firms, which play an important part in the operation of a port, are excluded (because only firms offering temporary labour in at least four separate regions are eligible pursuant to Article 2 (2) (b)) and, lastly, because Article 12 of Law No 196/97 makes it impossible to employ temporary labour less than 10 days after the first time. These rules would thus make it impossible to meet two peaks of demand within a 10-day period.

(12) The main characteristics of the market after Law No 84/94 may be summarized as follows:

(a) From an administrative point of view, the new Law creates Port Authorities, which replace the port managers as the administrative authority. Unlike the managers, the Port Authorities are not authorized to supply port services, either directly or indirectly;

(b) Vessels may now perform their own port handling operations (Article 16 (3)), provided they are authorized by the Port Authority;

(c) The market for port work on behalf of third parties is open to competition, provided that authorization is issued by the Port Authority (Article 16). However, the Port Authority may limit the number of authorized firms in order to take account of the characteristics of the port and traffic, whilst continuing to guarantee a maximum degree of competition. Unlike in the past, firms authorized under Article 16 may use their own workforce to carry out port work (Article 27, which repeals Article 110 (4) of the *Codice della Navigazione*). However, until 31 December 1996, they were required to recruit members of the former port companies first.

Under Article 18 of Law No 84/94, the port authorities may also grant dock or partial dock concessions to firms authorized under Article 16. In general, an undertaking holding a concession for part of the port is a terminal operator. Terminal operators may use their own workers to carry out port work (Article 27, which repeals Article 110 (4) of the *Codice della Navigazione*). Here too, the obligation when recruiting to give priority to former port company members ended on 31 December 1996.

The former port companies have been dissolved and converted into firms which, amongst other activities, perform port work (Article 21). In principle, the former companies compete with each other. However, the Law gives them certain advantages in relation to their competitors (see (d)), as well as granting them aid.

(d) The Law provides for the following derogations from Law No 1369/60 under which temporary work and the subcontracting of work with a high-labour content are prohibited:

(i) on the one hand, as regards the subcontracting of services with a high-labour content, Article 17 (3) of Law No 84/94 grants the former port companies the exclusive right to derogate from the general ban, thus granting them a monopoly for the supply of such services. The Law does not specify the point at which dock work becomes an operation 'with a high-labour content', so that it is difficult to determine the exact limits of the monopoly;

(ii) on the other hand, as regards temporary work to meet surges in demand, the Port Authority:

— either favours the formation of a consortium within which the Port Authority itself will designate one or more firms authorized to subcontract labour to its competitors, or

— sets up an agency for the supply (subject to the monopoly) of temporary labour to port undertakings; until such an agency is set up, the monopoly is held by the former port company.

2. ASSESSMENT OF LAW No 84/94

(13) Although Law No 84/94 introduces changes in relation to the preceding organization of the market, it has not fully complied with the requirements set out in the letter of formal notice of 31 July 1992 and has introduced new elements that are incompatible with Article 86 of the Treaty. Law No 196/97 does not alter this assessment. The reasons are set out below.

(14) This assessment does not concern the compatibility with Community law of Law No 1369/60.

2.1. General legal framework

2.1.1. *Relevant services markets*

(15) The changes brought about by Law No 84/94 have altered the organization of the markets.

The relevant services markets are as follows:

(a) the market for port work on behalf of third parties (the list of port operations is contained in Article 16 of Law No 84/94).

As in practice all these operations are complementary to each other and each one can be provided by a different operator, each operation can be considered to give rise to a market in itself. Nevertheless, for the sake of simplification, in this procedure all these services will be treated as constituting a single market.

(b) the market for temporary labour (Article 17 (2) and (3) of Law No 84/94)

Following the reform, port undertakings were able to recruit workers to carry out port operations. However, in addition to their own workforce, port undertakings also engender demand for temporary labour. This is due to the fact that they have structured their workforce to be below the number needed to cover demand in peak periods (fluctuating demand is inherent to dock work as it is tied to the arrival of ships). Thus, in peak periods, port undertakings (including terminal operators) must either refuse work or recruit temporary labour;

(c) the market for the subcontracted supply of services with a high labour content (Article 17 (3) of Law No 84/94)

Port undertakings offering a complete service (terminal operators) can either carry out all the work using their own equipment and workforce (possibly recruited on temporary contracts), or subcontract certain operations. The decision whether to subcontract has considerable implications in terms of organization of work, investments in training and equipment, recruitment, etc. In addition, for the short term at least, own performance or subcontracting are not fully substitutable.

Thus, there is a specific market for subcontracted port operations (more precisely, a specific market for each subcontracted operation). The relevant market in the context of this procedure is limited to operations with a high labour content.

(16) The Italian Government has objected that the definition of the latter two markets is too 'technical'. It considers that the market for the supply of temporary labour (b) and the market for the subcontracted supply of services with a high labour content (c) constitute a single market, i.e. the market for port services. The reason given is that both temporary labour and the supply of services with a high labour content satisfy the same demand.

Temporary labour and services with a high labour content may, in certain circumstances, satisfy the same demand. However, the two are not sufficiently substitutable to be regarded as constituting one and the same market. This is true as regards both demand and supply.

— In the first place, the use of temporary labour constitutes a purchase of 'means', whereas recourse to a subcontractor is a purchase of a 'result'. The difference in the impact on the organization of the undertaking is obvious: the use of temporary labour does not alter the organization of the undertaking in question, since it has extra workers only for a specific period. The extra workers provide their services like any other employee of the firm in question, in accordance with the firm's own procedures. In addition, the firm continues to be responsible for organizing and managing the work. On the other hand, an undertaking which entrusts certain tasks to a subcontractor is delegating some of the responsibility for organization and management. The workers in question perform the loading and unloading under the orders and in accordance with the procedures (and know-how) of the subcontractor.

— Secondly, temporary labour and subcontracting satisfy different demands for flexibility.

By subcontracting services, a contractor is able to entrust an entire operation to a third party. The subcontracting agreement ends with the performance of the service. The use of temporary labour, on the contrary, enables port undertakings to make use of extra workers for a specific period. Thus it can determine the number of port workers it wishes to have (which may be less than the number of dockers needed to carry out a task) and the period for which they are required (which will generally be different from the time needed for an operation).

— Thirdly, it is clear from the preceding paragraph that the type of demand is different: in practice, although any kind of port undertaking authorized to carry out port operations under Article 16 of Law No 84/94 may use temporary labour to satisfy peak demand, it is likely that the main demand for subcontracting work will come from the terminal operators. Similarly, while the demand for temporary labour has the stated aim of meeting peak demand, the demand for subcontracted services may also form part of an industrial policy of tertiarization of activities, which cannot be satisfied by a temporary workforce.

— Fourthly, the conditions governing access to the two markets (supply side) are different.

Temporary labour could in theory be supplied by any temporary employment agency, for instance the agency provided for in Article 17 (1) (b). However, subcontracted port work can be carried out only by a port undertaking with the necessary know-how and a licence to carry out port work issued under Article 16 of Law No 84/94.

The legislation in question should also be examined on the basis of three separate, although adjacent, markets.

2.1.2. *Substantial part of the common market*

(17) The Court held in its Port of Genoa judgment that, having regard to the volume of traffic, the port in question constituted a substantial part of the common market.

(18) In its letter of formal notice of 31 July 1992 the Commission extended that concept to the ports of Taranto, Venice, Livorno, Naples and Ravenna.

(19) The legislation in question establishes the same organization of the market in all Italian ports, the organization comprising similar dominant positions in each of the principal Italian ports. This situation is liable to create a distortion of competition throughout Italy.

(20) The Court, however, held in Case C-323/93 *Centre d'insemination de la Crespelle* v. *Coopérative de*

Mayenne [1] that 'By thus establishing (...) a contiguous series of monopolies territorially limited but together covering the entire territory of a Member State, those national provisions create a dominant position, within the meaning of Article 86 of the Treaty, in a substantial part of the common market'. It may therefore be concluded that the Italian legislation should be assessed not only in the light of its impact on the Port of Genoa or the ports of Genoa, Taranto, Venice, Livorno, Naples and Ravenna (which already account for a substantial part of the common market), but in respect of all the Italian ports dealing with intra-Community traffic, as stated in the supplementary letter of formal notice of 7 May 1997.

(21) The Italian Government disputed the Commission's assessment concerning the 'substantial part of the common market'. The main argument put forward is that the markets for temporary labour and subcontracted port work with a high labour content are very small compared with the market for port operations. They are two separate markets which cannot be substituted for one another or for the market for port operations. As stated above, however, the Italian ports legislation establishes, for those markets, the same market organizations for the whole of Italy.

The fact that the relevant markets are relatively small, from a financial point of view, compared with the larger market of port operations does not affect the fact that a substantial part of the common market is involved. For example, the Court held in Case C-18/93 *Corsica Ferries* v. *Corpo dei piloti del porto di Genova* [2] that the market for piloting services in the Port of Genoa may be regarded as constituting a substantial part of the common market even though the cost of piloting represents only a marginal part of the cost of operating the ferries.

2.1.3. *Effect on trade between Member States*

(22) One of the effects of the legislation in question has been to influence the cost of port operations, irrespective of the nationality of the beneficiary of the service.

(23) As the Court held in the Port of Genoa judgment, the extra expense of unloading is 'capable, by reason of its effect on the prices of the goods, of affecting imports [3]' and hence of affecting trade between Member States.

2.2. Article 90 of the Treaty

(24) The infringements of and situations infringing the Treaty competition rules described below are the result of a State measure, Law No 84/94, in conjunction with Law 1369/60. In adopting such a measure, Italy infringed Article 90 (1), read in conjunction with Article 86, of the Treaty.

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

(26) Undertaking(s) authorized to supply temporary labour or to carry out port operations with a high labour content by way of derogation from Law 1369/60 are undertakings to which the State grants special or exclusive rights within the meaning of Article 90 of the Treaty.

(27) The Port Authority is a public body entrusted with carrying out public authority duties in the port. Under Article 12 of Law No 84/94, it comes under the aegis of the Transport Ministry. Its administrative acts (including acts pursuant to Article 17 of Law No 84/94) are State measures within the meaning of Article 90 of the Treaty.

2.3. Article 90 in conjunction with Article 86 of the Treaty

2.3.1. *The voluntary consortium provided for in Article 17 (1) (a) of Law No 84/94*

(28) Under the Article in question, the Port Authority promotes the formation of a voluntary consortium open to all port undertakings (see Articles 16, 18 and 21), the sole purpose of which is to enable its members to use temporary workers, by way of derogation from the general ban imposed by Law No 1369/60. To that end, the Port Authority will appoint one or several members of the consortium who will be authorized to supply temporary labour to the other members.

(29) The Law thus allows the Port Authority to license only a limited number of undertakings (one or more) to supply labour to the other undertakings.

[1] [1994] ECR I-5077, paragraph 17.
[2] [1994] ECR I-1783, 1812.
[3] Paragraph 22.

(30) The exercise by the Port Authority of this facility could lead to infringements of Article 86 of the Treaty; if the Port Authority does not license all the members of a consortium to supply temporary labour to the other undertakings, it could lead to abuses within the meaning of Article 86. Such abuses are due to the fact that the undertaking(s) licensed to supply temporary labour are thus in a position of being able unduly to benefit from the following competitive advantages in relation to other undertakings on the market for port operations:

(a) First, the decision of the Port Authority to license only a limited number of undertakings has the effect of enabling the undertaking(s) authorized to supply temporary labour to pass on part of their labour costs to their competitors, when the latter have recourse to temporary workers. An unauthorized undertaking, however, would not be able when demand is slack to hire out its surplus workers to other undertakings.

(b) Secondly, if the Port Authority licenses only one undertaking to supply labour to other undertakings, the licensed undertaking is placed in a situation of conflict of interest as it becomes the sole supplier of its competitors.

In practice, the undertaking licensed to supply temporary labour will have the monopoly and will thus hold a dominant position within the meaning of Article 86 of the Treaty on the market for temporary labour and could abuse that position, for example by charging (its competitors on the market for port operations) excessive prices for the supply of temporary labour or by supplying its competitors with the less efficient workers.

(c) The conflict of interest described in (b) is inherently an abuse. It is not necessary to wait until undertakings actually commit such abuses before action can be taken against them. It is sufficient for them to be legally placed in a position in which they are induced to commit abuses if they have an interest in so doing [1].

The Italian Government and ANCIP disputed this point, on the ground that compliance with the competition rules would in any event be closely monitored both by the Port Authority and, if necessary, the Commission.

The Commission does not doubt the ability of the Port Authority to enforce compliance with the law. It is the law itself that is incompatible with the Treaty.

There is a body of consistent case-law on this problem, for example the judgment in Case C-18/88 *RTT* v. *GB-Inno-BM* [2] in which the Court held that a conflict of interest is inherently abusive. The Court was asked to decide on rules that conferred on the dominant telephony operator, which also sold telephone equipment, the right to approve the telephone installations of its competitors. The Court held that 'a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors. In those circumstances, the maintenance of effective competition requires that the drawing up of technical specifications (...) and the granting of type-approval must be carried out by a body which is independent (...)' [3].

In response to the arguments of the RTT, the Court also stated [4] that the fact that the RTT had not itself committed an abuse could not be invoked to justify the rules in question.

(d) As to the possibility of the Port Authority designating several undertakings licensed to supply temporary labour, this would not suffice to prevent the emergence of an undertaking in a dominant position on the market and the eventual abuse of its position. The Commission notes that, in view of Article 17 (1) (a) of the Law, the Port Authority will include among the undertakings it licenses at least the former port company which, in view of its current size, will easily hold the largest share of the market. Under that Law, the undertakings licensed by the Port Authority to supply temporary labour will be 'only those members of consortiums which have adequate staff and own resources with staff competence for port activities taking account of the surplus capacities resulting from the process of rationalization and conversion stemming from this Law'. In practice, only the former port companies meet these criteria.

The Italian Government stated in its reply of 7 July that it planned to promulgate an interpretative ministerial circular asking the port

[1] See also the recent Judgment of 17 July 1997 in Case C-242/95 *GT-Link AS* v. *De Danske Statsbaner*, paragraphs 33 *et seq.* Not yet published.

[2] [1991] ECR I-5941.
[3] Paragraphs 25 and 26.
[4] Paragraphs 23 and 24.

authorities to issue, if possible, a licence to supply temporary labour to all consortium undertakings with surplus workers.

Irrespective of any considerations as to the legal significance of a circular in relation to the Law to which it refers, the Italian Government's proposal to distribute a ministerial circular does not constitute a satisfactory response to the supplementary letter of formal notice sent by the Commission on 7 May 1997 since, in view of the facts described, only the former port companies satisfy the criteria set out by the Law.

(e) The Italian Government and the ANCIP objected that Law No 84/94 will not necessarily entail a conflict of interest for the former port company since, under Article 21 of Law No 84, it would have to become two separate entities: one to carry out port operations and the other to supply temporary labour.

This argument is not satisfactory since it is not correct to state that Article 21 of Law No 84/94 requires former companies to become two separate undertakings. The Article in question states that the former port companies must change into one or more undertakings, the obligation thus relating only to the minimum requirement of forming one undertaking. Article 21 also states that the formations must take place no later than 18 March 1995, a deadline which, according to the information in the possession of the Commission, was not kept to or monitored by the Italian authorities. In addition, it is not mandatory under Law No 84/94 to make a distinction between the two roles (port undertaking and supplier of temporary labour to port undertakings). On the contrary, it allows a confusion of the roles and, therefore, a conflict of interest and abuse of a dominant position. The information in the Commission's possession indicates that such confusion of roles is already evident at the Port of Genoa.

(f) Lastly, even separating the two roles would not be sufficient if it occurred within the same group. It would be necessary for the two undertakings with separate roles to be entirely independent.

(g) In view of that situation, it must be concluded that Law No 84/94 has the effect of restoring the former port companies to their dominant position although the Court of Justice held in the Port of Genoa judgment that such a situation led to abuses and there are no grounds for believing that such abuses will cease.

(31) In such circumstances, the undertaking(s) licensed to supply temporary labour would be led to infringe Article 86 of the Treaty.

(32) In the present case, the conduct of the undertakings in question is the result of State measures. As a result, Article 17 (1) (a) of Law No 84/94, which requires the Port Authority to promote the voluntary formation of undertakings having the sole object of allowing temporary labour to be made available by one or more undertakings licensed to that end by the Port Authority to other undertakings constitutes an infringement of Article 90 (1) in conjunction with Article 86 of the Treaty.

2.3.2. *The agency provided for in Article 17 (1) (b) of Law No 84/94*

(33) According to Article 17 (1) (b), if a voluntary consortium is not set up, the Port Authority may set up an agency holding a monopoly for the supply of temporary labour. However, the law does not specify the procedures for setting up or running such an agency, such details being left to a subsequent Ministerial decree. It is possible that questions affecting the Commission's assessment concerning the legality of such an agency under Community law could arise.

(34) The Commission will analyse the market situation after any such decree is adopted and reserves the right to take action at that time if necessary.

2.3.3. *The transitional period provided for in Article 17 (2) of Law No 84/94*

(35) Article 17 (2) states that until such time as a consortium or agency is set up, the former port company will hold the monopoly for the supply of temporary workers to other port undertakings.

(36) The former company, which is present on the market for port operations, thus becomes the sole distributor of its competitors and is encouragd to abuse its dominant position within the meaning of Article 86 of the Treaty. Reasoning analogous to that set out in Chapter 2.3.1 applies.

(37) The Court further held in the Port of Genoa judgement: '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. However, the Court has had occasion to state, in this respect, that a Member State is in breach of the prohibitions contained in those two provisions if the undertaking in question, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position (...) or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses' ([1]).

(38) Such is the case here. The rule which requires the former companies to hold the exclusive right to supply temporary labour during the transitional period is a State measure contrary to Article 90 (1) in conjunction with Article 86 because it places the former company in a position of benefiting unduly from the advantages described above in paragraph 30.

2.3.4. *The market for subcontracted services (Article 17 (3) of Law No 84/94)*

(39) Article 17 (3) provides that subcontracted services supplied by the former port companies, including services with a high labour content, are not covered by the ban in Article 1 of Law No 1369/60. In practice, this means that the former company holds a monopoly, by virtue of the exclusive rights granted it by Law No 84/94 in conjunction with Law No 1369/60, on the market for the supply of subcontracted services with a high labour content.

(40) The situation resulting from the application of Article 17 (3) of Law No 84/94 is in breach of Article 86 of the Treaty.

(41) It may be concluded, on the same basis as the reasoning set out in section 2.3.3 concerning the temporary labour market, that the former company is enabled to abuse its dominant position on the market for subcontract port work. It not only holds the monopoly for subcontracted services with a high labour content but is also present on the larger market for port work. It is thus the exclusive supplier of its competitors and, as such, is in a position to abuse its dominant position, as stated *mutatis mutandis* in section 2.3.1.

(42) By analogy with the reasoning in section 2.3.3, Article 17 (3) of Law No 84/94, which states that subcontracted services with a high labour content supplied by the former port company are not caught by the ban in Article 1 of Law No 1369/60, constitutes a State measure contrary to Article 90 (1) in conjunction with Article 86.

(43) According to ANCIP, the Commission is mistaken in its interpretation. Article 17 (3) of Law No 84/94, it claims, does not have the effect of conferring on the former company a monopoly on the market for the supply of subcontracted services with a high labour content, but only a monopoly on the market for the supply of temporary labour.

Althouth ANCIP's view cannot be shared, it must be considered that a State measure having the scope described by ANCIP would also be a State measure contrary to Article 90 (1) in conjunction with Article 86, in accordance with the conclusions reached in sections 2.3.1. and 2.3.3.

(44) In its reply of 7 July 1997, the Italian Government informed the Commission that it considered it advisable to repeal Article 17 (3) of Law No 84/94. It did not state when it would take such a step, or how it intended to define the concept of 'high labour content'. The significance of a statutory amendment such as this will have to be assessed as and when it takes place.

2.4. Article 90 (2)

(45) The Italian authorities have not invoked the exception in Article 90 (2) of the Treaty to justify authorizing one or more enterprises to derogate from Article 1 of Law No 1369/60, authorizing only the former port company to derogate from Article 1 of the same Law during the transitional period and exempting the former company from the ban on the subcontracted supply of services with a high labour content.

(46) It should also be pointed out that, as the Court held in its Port Genoa judgement, 'it does not appear either from the documents supplied (...) or from the observations submitted to the Court of Justice that dock work is of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities' ([2]).

([1]) Paragraphs 16 and 17.

([2]) Paragraph 27.

(47) Lastly, even if it were accepted that the supply of temporary labour to carry out dock work or subcontracted dock work constituted a public service, in the present case the application of the competition rules would not obstruct the performance of a particular public interest task by a port company.

(48) The exception provided for in Article 90 (2) is not therefore applicable.

CONCLUSION

It can be concluded from the foregoing that the State measure referred to in sections 2.3.1, 2.3.3 and 2.3.4 constitutes an infringement of Article 90 (1) of the Treaty in conjunction with Article 86,

HAS ADOPTED THIS DECISION:

Article 1

The following provisions of Italian Law No 84/94, as last amended by Law No 647/96 (hereinafter 'Law No 84/94'), are incompatible with Article 90 (1) in conjunction with Article 86:

(a) the provision stating that the Port Authorities are to promote the setting-up of a voluntary consortium open to all undertakings licensed to operate in the ports for the sole purpose of dealing more efficiently with unforeseeable fluctuations in the demand for labour and, to that end, are to licencse one or more members of the consortium, insofar as they have the appropriate workforce and own resources with the specific vocational skills to carry out port operations, as well as the surplus workforce resulting from rationalisation and restructuring under Law No 84/94, to provide other consortium members with manpower services (Article 17 (1) (a));

(b) the provision stating that, until the consortium or agency is set up to provide temporary labour in each Italian port, the undertakings provided for in Article 21 (b) of Law No 84/94, namely the former port companies are to have the monopoly for the for the supply of temporary labour to other port undertakings (Article 17 (2));

(c) the provision giving the monopoly to the former port companies for the supply of subcontracted services, including those with a high labour content, to other port undertakings (Article 17 (3)).

Article 2

Italy must bring to an end the infringements referred to in Article 1 and inform the Commission of the measures it has taken to that end within two months of the notification of this Decision.

Article 3

This Decision is adressed to the Italian Republic.

Done at Brussels, 21 October 1997.

For the Commission

Karel VAN MIERT

Member of the Commission