OPINION OF ADVOCATE GENERAL LENZ
delivered on 11 May 1994 *

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Mr President,
Members of the Court,

A — Introduction

1. The present request for a preliminary ruling is concerned with questions relating to the compatibility with Community law of national provisions concerning environment protection in the sphere of maritime navigation.

2. The questions were raised by the Pretore di Ravenna (District Magistrate, Ravenna) in criminal proceedings brought against Matteo Peralta, an Italian national. Mr Peralta is the master of the tanker *Acrux*, which flies the Italian flag and is operated by the shipping company Diego Calì & Figli, established at Genoa, Italy. The vessel is especially equipped for transporting chemicals. Mr Peralta, in his capacity as the master of the vessel, is accused of repeatedly discharging into the sea between January and March 1990 water which had been used to flush tanks which had previously contained caustic soda. It appears from the case-file that the vessel was outside territorial waters when it carried out those operations, generally in an area between 12 and 24 nautical miles from the Italian base line.

3. Such conduct is an offence under Articles 16, 17 and 20 of Italian Law No 979 of 31 December 1982 on the protection of the sea. Article 16(1) prohibits, *inter alia*, all vessels from discharging into the sea within Italian territorial waters substances listed in Annex A to that law (including caustic soda). Article 16(2) provides that the prohibition applies to *vessels flying the Italian flag, even outside territorial waters*. Article 17 refers to the following articles of the Law as regards the applicable penalties.

4. According to Article 20(1), a master of a vessel flying the Italian flag (and the operator and the owner of the ship if they participated in the offence) who infringes Article 16 is liable to a term of imprisonment ranging from two months to two years and a fine of between LIT 500 000 and LIT 10 million; those penalties are to be reduced by half in the event that the offenses are due to negligence. Under Article 20(2), masters of vessels flying a foreign flag are liable to the same penalties.

5. In the event that the master is found guilty of an offence under Article 20(1), Article 20(3) provides that, if the master is an Italian national, his master's certificate is to be suspended in accordance with Article 1083 of the Codice di Navigazione [Navigation Code] . According to that provision, suspension of the master's certificate has the effect of depriving the person concerned for a period of between two weeks and two years of the right to perform any duty or to render any services for which such a certificate is required.

6. In order to comply with the ban on discharges into the sea so defined, it is necessary, for instance, after cleaning the tanks as in this case, to use other methods of disposal. Mr Peralta refers in his observations to installations in which the waste water is treated before disposal. [1] According to Mr Peralta, however, such installations are available in certain Italian ports only, but not in ports in other countries, or at least not in the case of water used to flush the tanks of the type at issue in this case. The waste water in question has to be kept on board in special containers until the vessel itself or smaller tankers can transfer them to the aforementioned installations.

7. Before the national court, Mr Peralta claimed that the aforementioned Italian provisions were not applicable in his case, and asked that the questions at present before the Court of Justice be referred to it for a preliminary ruling. Those questions, along with the claims of the parties to the proceedings which submitted observations, explain the context of the objections to the Italian provisions. It turns out that the *International Convention for the Prevention of Pollution from Ships, 1973*, in the version of the Protocol of 1978, [2] (hereinafter referred to as the 'MARPOL Convention') did not prohibit the conduct of which Mr Peralta stands accused as such, provided that certain conditions were fulfilled. Mr Peralta maintains, moreover, that this is why there are no installations of the type described above in ports in other countries.

8. It should be observed that, in accordance with a Council Recommendation, [3] the MARPOL Convention has been signed by almost all [4] the Member States, including Italy. The Community itself is not a party to the Convention. According to Article 3(1) of the Convention, it applies, *inter alia*, to ships entitled to fly the flag of a Party to the Convention. In accordance with the objective set out in its preamble of eliminating or reducing pollution of the marine environment by oil and other harmful substances through rules having universal purport, it introduces a whole series of prohibitions and restrictions on the discharge of such substances into the sea. The prohibitions set out in the

1 — It appears from a report proposing the amendment of the aforementioned provisions that the shore installations discharge into the sea the treated water used to flush out the tanks.

2 — *United Nations Treaty Series*, Volumes 1340 and 1341, No 22484.

3 — Council Recommendation 78/584/EEC of 26 June 1978 on the ratification of Conventions on safety in shipping, OJ 1978 L 194, p. 17.

4 — Ireland and Luxembourg have not acceded to the Convention.

provisions are governed by Article 4, which reads as follows:

'(1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration [5] of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.

(2) Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party. Whenever such a violation occurs, that Party shall either:

(a) cause proceedings to be taken in accordance with its law; or

(b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred.

(3) Where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence, and the Organization, of the action taken.

(4) The penalties specified under the law of a Party pursuant to the present Article shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur.'

9. Annex II to the MARPOL Convention lays down (with regard to substances other than hydrocarbons) the conditions in which tank washings of the kind at issue in this case may be discharged into the sea.

10. Regulation 3(1) of Annex II divides liquid substances into four categories, A to D, corresponding to decreasing degrees of harmfulness. According to information provided by the Commission, at the material time caustic soda was classed in Category C (but has since been downgraded to Category

5 — Article 2(5) of the Convention defines 'Administration' as the Government of the State under whose authority the ship is operating.

D). Regulation 3(1)(c) defines Category C substances as follows:

'Noxious liquid substances which if discharged into the sea from tank cleaning or deballasting operations would present a minor hazard to either marine resources or human health or cause minor harm to amenities or other legitimate uses of the sea and therefore require special operational conditions.'

11. As regards that category of substances, Regulation 5(3) of Annex II provides as follows:

'The discharge into the sea of substances in Category C as defined in Regulation 3(1)(c) of this Annex or of those provisionally assessed as such, or ballast water, tank washings, or other residues or mixtures containing such substances shall be prohibited except when all the following conditions are satisfied:

(a) The ship is proceeding en route at a speed of at least 7 knots in the case of self-propelled ships or at least 4 knots in the case of ships which are not self-propelled;

(b) The procedures and arrangements for discharge are approved by the Administration. Such procedures and arrangements shall be based upon standards developed by the Organization [6] and shall ensure that the concentration and rate of discharge of the effluent is such that the concentration of the substance in the wake astern of the ship does not exceed 10 parts per million;

(c) The maximum quantity of cargo discharged from each tank and its associated piping system does not exceed the maximum quantity approved in accordance with the procedures referred to in subparagraph (b) of this paragraph, which shall in no case exceed the greater of 3 cubic metres or 1/1000 of the tank capacity in cubic metres;

(d) The discharge is made below the waterline, taking into account the location of the seawater intakes; and

(e) The discharge is made at a distance of not less than 12 nautical miles from the nearest land and in a depth of water of not less than 25 metres.'

6 — According to Article 2(7) of the Convention, 'Organization' means the Inter-Governmental Maritime Consultative Organization.

12. Regulation 5(9) lays down special — stricter — conditions for the discharge of Category C substances in 'special areas'. However, only the Baltic Sea Area and the Black Sea Area (Regulation 1(7)) are regarded as special areas within the meaning of Annex II.

13. Apparently, there are no other sources of international law, including provisions of Community law, apart from the MARPOL Convention, which might be used as a criterion against which to judge Mr Peralta's conduct.

14. It should be observed in this connection that, in the case of rules on the protection of the sea against pollution, a distinction is made between two — albeit closely related — types of pollution: first, pollution resulting from 'discharges' from ships and, secondly, what is usually termed 'dumping', that is to say, the disposal of waste at sea. [7] As appears from Article 1(1) of the MARPOL Convention, it deals with discharges. Article 2(3)(b)(i) clearly indicates that the term 'discharge' does not cover dumping within the meaning of the Convention of London on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. Conversely, the term 'dumping' within the meaning of the Convention of the London does not cover the disposal at sea of wastes or other matter incidental to, or derived from, the normal operations of vessels (Article 3(1)(b)(i) of the Convention of London). It follows that if the MARPOL Convention applies to the situation at issue, it cannot also be caught by the Convention of London.

15. As far as Community law is concerned, reference should be made in the first place to the Convention, concluded by Council Decision of 25 July 1977, [8] for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of the pollution of the Mediterranean Sea by dumping by ships and aircraft. The aforementioned distinction between discharge and dumping also underlies those instruments. The protocol governs the dumping of various categories of substances on the basis of the definition of dumping set out in the Convention of London. In answer to a question from the Court, the Commission confirmed that the provisions of the Protocol are not applicable in this case. As for discharges within the meaning of the MARPOL Convention, the Community Convention confines itself, in Article 6, to a general clause and does not go so far as to lay down criteria independent of those adopted by the MARPOL Convention.

7 — See Churchill/Lowe: *The law of the sea*, Manchester, 1988, p. 243. See also Articles 210 and 211 of the United Nations Convention on the Law of the Sea, adopted at New York on 30 April 1982 and opened for signature on 10 December 1982 at Montego Bay, Jamaica (Third United Nations Conference on the Law of the Sea — *Official documents*, Volume XVII, 1984, document A/62/122 and corrigendum, pp. 157 to 231).

8 — OJ 1977 L 240, p. 1.

16. Mention should also be made of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community. [9] That directive is applicable to inland surface water, territorial waters, internal coastal waters and ground water, with the exception, however, of operational discharges from ships in territorial waters and dumping from ships in territorial waters.

17. Lastly, the Council has adopted a decision establishing a Community information system for the control and reduction of pollution caused by the spillage of hydrocarbons and other harmful substances at sea. [10] Neither does that decision contain any criteria of potential relevance to the conduct of which Mr Peralta stands accused in the main proceedings.

18. In view of that *de jure* and *de facto* situation, the Pretura Circondariale di Ravenna has referred the following questions to the Court for a preliminary ruling:

'(1) Do the provisions of Articles 16 and 20 of Italian Law No 979/82 constitute restrictions within the meaning of Articles 7, 48, 52 and 59 of the EEC Treaty and are they consequently prohibited by Article 62 of the same Treaty in so far as they are not justified by objective reasons relating to the protection of the public interests of the State in question?

(2) Under Community law as it now stands and in the light of the Community provisions referred to in Question 1, is a rule of a Member State compatible with Community law if it prescribes treatment — even a criminal penalty — (for the nationals of that State) by reason of their nationality, but not for nationals of the other Member States for identical conduct?

And is such a rule of criminal law compatible with the principle of proportionality guaranteed by Community law inasmuch as it entails, *inter alia*, for the master of the vessel the automatic and mandatory additional penalty of the temporary suspension of the exercise of his professional activity and work?

(3) Under Community law as it now stands, can the Member States' retention of competence for matters concerning criminal law affect the fundamental liberties guaranteed by the EEC Treaty, such as the free movement of goods and the freedom of movement of persons and, in particular, do the provisions of Articles 16 and 20 of Law No 979/82 constitute an obstacle to the exercise of those liberties?

9 — OJ 1976 L 129, p. 23, as subsequently amended.

10 — Decision 86/85/EEC of 6 March 1986 (OJ 1986 L 77, p. 33), as amended by Decision 88/346/EEC of 16 June 1988 (OJ 1988 L 158, p. 32).

(4) Do the principles defended by the Community legal order in the field of the environment, in particular the principle of prevention laid down in Article 130r et seq. of the Treaty, preclude a law of a Member State which, by imposing on national vessels an absolute prohibition against discharging hydrocarbons and harmful substances into the high seas, has, in practice, the effect of forcing such vessels to use an alternative method of discharge, which is inefficient from every point of view and, in any case, contrary to the obligations which that State has undertaken at an international level and in respect of which the Community has adopted implementing measures?

(5) Do the Community principles designed to guarantee that competition between persons supplying shipping and port services in the Community is free, but at the same time fair and not artificially distorted, and that the demand for services is satisfied with the least possible damage to the environment, and in particular Articles 3f and 84 of the EEC Treaty, preclude a national rule such as the one laid down in Articles 16(17) and 20 of Law No 979/82, which, by imposing an absolute prohibition against the discharge of tank-flushing liquids into the high seas only on vessels registered in the State in question, even though those vessels are equipped with the extremely expensive decontamination equipment prescribed by international agreements ratified by the Community, distorts competition among seaports and shipping companies in the Community?

(6) Is Article 30 of the Treaty compatible with a rule of a Member State which, by imposing an absolute prohibition against discharging hydrocarbons and harmful substances into the high seas exclusively on national vessels, even though they are equipped with the extremely expensive technologies prescribed by the agreements applicable in that field, forces those vessels to utilize special technologies and to use an alternative method of discharge, which is inefficient, costly and, in any case, in breach of the obligations which that State has undertaken at the international level and in respect of which the Community has adopted implementing measures?

In particular, can the criminal penalties in question and the economic burdens which fall exclusively on the national fleet, in a way which is manifestly discriminatory and entirely irrational, be regarded as measures having an effect equivalent to quantitative restrictions on imports, since those burdens give rise to additional costs with consequences for the price of the goods transported, as well as affecting imports?'

B — Appraisal

Meaning and scope of the national court's questions

19. *1.* As the Commission correctly points out, the national court seeks to establish whether the prohibition on discharging waste at sea as laid down by Italian law,

which is subject to sanctions, including suspension of authorization to work, is compatible with the provisions and principles of Community law mentioned by that court.

20. It seems doubtful to me whether the Pretore di Ravenna also intended to raise the question whether the suspension of authorization to work is compatible as such with Community law. The second question, which might possibly contemplate that issue, is worded rather vaguely. In any event, I shall also be tackling that issue later in this Opinion so as to deal with the whole area covered by the request for a preliminary ruling.

21. 2. In addition, it seems worth specifying the scope of the questions referred for a preliminary ruling in the light of the facts which have been disclosed to the Court.

22. In the first place, the prohibition on discharging 'hydrocarbons' mentioned in the fourth question is irrelevant in this context, since caustic soda is not a hydrocarbon. It follows in particular that Annex I to the MARPOL Convention is not applicable (although the provisions of Annex II which are set out at the beginning of this Opinion are applicable). Secondly, although they are drafted in general terms, questions 1, 2 and 3 have to be considered in the context of the actual breach which is supposed to have taken place, *ratione loci*, in *extra-territorial waters*, as appears from the wording of questions 4, 5 and 6 and from the particulars provided by Mr Peralta in his observations. [11]

Admissibility of the national court's questions

23. Nobody has questioned the admissibility of the national court's questions. The Commission has merely referred to the cases in which the Court has consistently held that, whereas the Court has not jurisdiction in Article 177 proceedings to rule on the compatibility of national legislation with Community law, it may nevertheless provide the criteria for the interpretation of Community law which will enable the national court to solve the legal problem with which it is faced. [12]

24. I would add that, in my view, neither can the national court's questions be regarded as inadmissible on the ground that its order is insufficiently reasoned. Admittedly, according to the Court's *Telemarsicabruzzo* case-

11 — See section 2, above.

12 — See, for example, the judgment in Case C-150/88 *Parfümerie-Fabrik 4711* v *Provide* [1989] ECR 3891, paragraphs 11 and 12.

law, [13] the grounds of the order for reference have to satisfy certain minimum requirements so as to enable the Court to arrive at an interpretation of Community law which will be of use to the national court. Such an interpretation is possible in this case, even though the national court has not set out the relevant factual and legal circumstances exhaustively in the order for reference. [14]

25. The — not very complicated — circumstances of the conduct which led to the criminal proceedings brought against Mr Peralta are set out in the order for reference. The only matter warranting confirmation is that the presumed infringements of the Italian environment-protection legislation took place in extra-territorial waters. As for the legal situation, the Italian court cites the applicable provisions of Italian law. As appears from the wording of the questions, these provisions give rise to criminal sanctions, '[impose] an absolute prohibition against the discharge of tank-flushing liquids into the high seas only on vessels registered in the State in question' [15] and '[entail], *inter alia*, for the master of the vessel the automatic and mandatory additional penalty of the temporary suspension of the exercise of his professional activity and work'. [16]

26. The questions do not, however, reveal the precise consequences flowing from the prohibition on vessels flying the Italian flag from discharging tank-flushing liquids at sea. [17] Mr Peralta provided the Court with additional particulars on this point during the written procedure. It may be doubted whether those particulars are sufficiently connected with those set out in the order for reference. But even if that were not the case, the request for a preliminary ruling would not be inadmissible in its entirety as a result. The other facts can be substantively severed from this aspect and may also be legally reviewed on a separate basis. A possible absence of a connection between the particulars provided by Mr Peralta and those set out in the order for reference would therefore merely mean that the former particulars could not be taken into account when considering the questions raised in the order for reference. [18]

27. Neither has the national court specified the international legal context. On the contrary, it merely refers to 'international agreements' ('applicable in that field' or 'ratified by the Community') and to 'the obligations which [the] State [concerned] has undertaken at an international level'. However, I consider that, where the facts may be discerned, as in this case, sufficiently precisely, the Court may, where necessary with the help of

13 — Judgment in Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* v *Circostel* [1993] ECR I-393; see also the orders in Case C-157/92 *Banchero* [1993] ECR I-1085 and in Case C-386/92 *Monin Automobiles* [1993] ECR I-2049.

14 — For a similar case, see the judgment in Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 13. See also my Opinion in Case C-2/93 *Exportslachterijen van Oordegem* [1994] ECR I-2283, at I-2285, paragraph 10.

15 — See question 5.

16 — See question 2.

17 — See section 6, above.

18 — Judgment in Case 247/86 *Alsatel* [1988] ECR 5987.

the Member States and the Commission, identify the provisions sufficiently clearly, with the result that there is no reservation in this respect about the admissibility of the preliminary questions. [19]

28. All in all, I therefore consider that the preliminary questions are admissible.

Answers to the preliminary questions

29. *I* — It should first be checked whether the MARPOL Convention as such forms part of Community law and may therefore cause the national provisions at issue to be inapplicable. That question should be answered in the negative, as the Commission suggests in its observations. As I have already mentioned, [20] the Community itself is not a party to the MARPOL Convention. Consequently, the Convention could form part of Community law only if the Treaty had transferred to the Community the competence on the basis of which the Member States signed that convention. [21] However, it is clear from Article 130r of the Treaty in the version resulting from the Single European Act (and the Maastricht Treaty) that the Member States remain competent in the field of the environment, in any case so long and in so far as the Community does not act itself under the combined provisions of Article 130r and Article 130s. [22]

30. Consequently, the MARPOL Convention does not form part of Community law and is not, as such, capable of constituting a criterion for reviewing national provisions.

31. *II* — Let us therefore turn to the other provisions and principles of Community law cited by the national court. In this connection, it should be observed that at the material time the EEC Treaty in the version set out in the Single European Act was applicable. In so far as I deem it appropriate I shall refer at certain points to the version of the Treaty set out in the Maastricht Treaty.

19 — See, for example, the judgment in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019.

20 — See section 8, above.

21 — Judgments in Joined Cases 21/72 to 24/72 *International Fruit* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219, paragraphs 10 to 18, and in Joined Cases 267/81 to 269/81 *Amministrazione delle Finanze dello Stato* v *SPI and Sami* [1983] ECR 801, paragraph 17.

22 — See Opinion 2/91 (ILO Convention No 170) [1993] ECR I-1061, paragraph 9.

(i) *Articles 84 and 130r of the EEC Treaty*

32. These provisions lay down rules for action by the *Council* in the field of sea and air transport (Article 84(2)) and the environment (Article 130r).

33. Consequently, they are, generally speaking, incapable of affording any criterion for action by the *Member States* in those fields. This is true in particular of the prohibition set out in Article 130r, to which the national court refers in question 4. In that connection, action by the Member States cannot in any event be criticized in so far as it does not affect the effectiveness of the powers conferred on the Council (including the means of action provided for by the Treaty, which includes the principle of protection). There is nothing to suggest that such a situation is involved here.

34. More generally, the Italian legislation does not encroach upon the competence which is reserved to the Council in the sphere of sea transport or the environment.

35. In conclusion, I maintain that neither Article 130r nor Article 84 of the Treaty preclude the application of the contested Italian provisions.

(ii) *Article 3(f) of the EEC Treaty* [23] *(in conjunction with Article 85 et seq. of the EEC Treaty)*

36. According to Article 3(f) of the EEC Treaty, the activities of the Community are to include the institution of a system ensuring that competition in the common market is not distorted. The basis for that system is Article 85 et seq. of the Treaty which, as the Court has repeatedly held, also applies to the transport sector. [24]

37. However, only in precisely defined cases do the Member States' activities fall within the Treaty provisions on competition. Those cases are governed in the first place by Articles 90 and 92 of the Treaty, the requirements for the application of which are manifestly not satisfied in this case.

23 — Now Article 3(g) of the Maastricht Treaty.

24 — Judgments in Joined Cases 209/84, 210/84, 211/84, 212/84 and 213/84 *Asjes* [1986] ECR 1425, paragraphs 27 to 42, and in Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 12.

38. In the second place, the Court has held that in some cases the 'provisions relating to undertakings' set out in Articles 85 and 86, which, as a general rule, are applicable only to undertakings, [25] preclude, regard being had to Article 5, the application of public measures laid down by the Member States. The measures in question are measures which could deprive the rules applicable to undertakings of their effectiveness. [26] That will be the case where a Member State imposes or encourages the conclusion of agreements contrary to Article 85 or reinforces the effects of such agreements, or removes the State character of its own rules by delegating to private operators the responsibility for taking decisions to intervene in the economic field. [27] This is also true, *mutatis mutandis*, of conduct of Member States which may affect the effectiveness of the prohibition of abuses of dominant positions set out in Article 86. [28]

39. In this case, there is nothing to suggest that conduct on the part of undertakings is infringing the competition rules or even that there is a dominant position. Consequently, the Italian provisions cannot reinforce the *effects* of such circumstances.

40. Neither does it appear to me that those provisions are *requiring* or *fostering* anti-competitive practices.

41. Lastly, no more does it appear that the Italian provisions are abdicating to private operators responsibility for taking decisions to intervene in the field of the economy.

42. All in all, therefore, it cannot be shown that those provisions infringe Article 3(f) of the EEC Treaty.

(iii) *Article 30 et seq. of the EEC Treaty*

43. As regards in the first place the scope of the preliminary questions, account should be taken, not only of the wording of question 6, which is based on Article 30 of the Treaty and the prohibition of measures having an effect equivalent to quantitative restrictions on imports, but also of the wording of question 3. In that question, the Pretore di Ravenna refers in general terms to the fundamental principle of the free movement of

25 — As the Court has consistently held; this has been emphatically confirmed by the three judgments of 17 November 1993 in Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14, *Reiff*, cited in the preceding footnote, paragraph 14, and Case C-245/91 *Ohra Schadeverzekering* [1993] ECR I-5851, paragraph 10. As far as Article 86 is concerned, see, for example, the judgment in Case C-339/89 *Alsthom Atlantique* [1991] ECR I-107, paragraph 11.

26 — See the judgments cited in the preceding footnote.

27 — See paragraph 14 of the judgments in *Meng* and *Reiff* and paragraph 10 of the judgment in *Ohra*.

28 — See the judgments in Case 13/77 *GB-INNO-BM* [1977] ECR 2115, paragraphs 33 and 34, in Case 254/87 *Syndicat des Librairies de Normandie* v *L'Aigle Distribution* [1988] ECR 4457, paragraph 14, in Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, paragraph 52, in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraphs 26 and 27, and in Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 35, 36 and 37.

goods. That freedom also covers the guarantee secured by Article 34 of the Treaty, which must therefore also be regarded as forming an integral part of the preliminary questions.

44. Basically, one might be tempted to view the Italian legislation from the point of view of the field of application of both Article 30 and Article 34.

45. As far as Article 30 is concerned, according to the well-known form of words used in the judgment in *Dassonville*, 'all trading rules ... which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' [29] are to be considered as measures having an effect equivalent to quantitative restrictions. Might it not be argued that the prohibition on Italian-registered ships' discharging certain substances into extra-territorial waters makes imports carried by those ships more expensive and hence affects intra-Community trade at least indirectly?

46. A similar question might also be asked with regard to Article 34 of the Treaty. Ever since the judgment in *Groenveld*, [30] the Court of Justice has understood as being measures having equivalent effect within the meaning of Article 34 national measures 'which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States.' The question would be, should not any increase in the cost of exports (in so far as they are carried in Italian-registered ships) as a result of the Italian legislation be regarded as being a 'specific restriction of patterns of exports', since it affects primarily external trade and to a lesser degree domestic trade?

47. Apart from any questions as to the *de facto* situation as regards the exact economic consequences resulting from the Italian legislation, in particular if a comparison is made between cabotage and transport carried out between Italy and other Member States, I take the view that that legislation should not be considered in the light of Article 30 et seq. of the Treaty, but against the background of the Community rules on the freedom to provide services.

48. The legislation in question imposes on ships flying the Italian flag certain environmental constraints with which those ships have to comply in carrying out their *transport activities*. However, as appears indi-

29 — Judgment in Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, paragraph 5.

30 — Judgment in Case 15/79 *Groenveld* [1979] ECR 837, paragraph 5.

rectly from a reading of Article 61(1) of the Treaty itself, such activities, which, moreover, are covered by the definition set out in the first paragraph of Article 60, must be regarded as services. [31] However, restrictive national legislation in that services sector invariably affects the price of imported or exported goods, since imports and exports have to be carried by means of transport. Systematically to appraise such legislation in the light of the provisions governing the free movement of goods would be incompatible with the rules set out in Article 59 et seq. of the Treaty. According to the first paragraph of Article 60, services are to be considered 'services' within the meaning of the Treaty where they do not fall within other fundamental freedoms, including the free movement of goods. It follows that a given barrier to the exercise of a cross-border economic activity cannot in principle be caught both by the provisions governing free movement of goods and the provisions applicable to services at the same time.

49. That remark is particularly relevant to the transport sector. Freedom to provide services in this sphere is governed, according to Article 61, by the provisions of the title on transport. It follows that, in the transport sector, the objective laid down in Article 59 of the EEC Treaty of abolishing during the transitional period restrictions on freedom to provide services should have been attained in the framework of the common policy provided for in Articles 74 and 75. [32]

50. If the Council has not yet achieved freedom to provide services in a specific transport sector, it would be contrary to the spirit of Article 61 to review against Article 30 et seq. a national provision which submitted economic activities carried out by individuals to constraints. If that approach were taken, the Council's common transport policy would be replaced by the application of the provisions on the free movement of goods.

51. In order to demarcate in such cases the scope of the provisions on the movement of goods, on the one hand, from the provisions on the movement of services, on the other, I propose to connect to the provisions governing the movement of services all situations in which the barrier to the movement of goods is merely the reflection of a barrier to (cross-border) services.

52. That is precisely the case here. Any barriers to the free movement of goods which may arise as a result of the Italian legislation

31 — Cf. also the judgment in Case C-49/89 *Corsica Ferries France* v *Direction Générale des Douanes Française* [1989] ECR 4441, paragraph 7.

32 — See the judgments in *Asjes*, cited above, paragraph 37, and in *Corsica Ferries*, cited in the preceding footnote, paragraph 11.

do not go beyond that of a possible barrier to transport services.

53. Consequently, this case does not fall within the scope of Article 30 et seq. of the Treaty.

(iv) *Article 48 of the EEC Treaty*

54. In considering this article, which, as a general provision of the Treaty, also applies to sea transport, [33] it is appropriate, as I have already mentioned, to review both the principle of the punishment of the master (for infringements of the ban on discharges at sea) and the fact that the penalty of suspension of his master's certificate is prescribed only where the master is an Italian national.

55. To my mind, Article 48 of the Treaty is not applicable to this case from any of these angles, since it is confined, having regard to Mr Peralta's capacity as an employed person, to the territory of a single Member State, and is not connected with any one of the situations contemplated by Community law. [34]

56. Since Mr Peralta is an Italian national, he could not rely, as against the Italian State, on the rights granted to employees of other Member States except in so far as he was, as regards his State of origin, in a situation which 'may be equated with that of any other person benefiting by rights and freedoms guaranteed by the Treaty'. [35] The information available to the Court, however, contains no evidence that he was in such a situation.

57. In particular, it is not claimed that Mr Peralta resided in another Member State, let alone that he acquired his professional qualification in another Member State.

58. Furthermore, the offence, if any, was committed on a vessel flying the Italian flag. Under the 1958 Convention on the High Seas (Article 5), [36] the rules of which are regarded generally as corresponding to the usages of international law, [37] ships have the nationality of the State whose flag they are entitled to fly; that State must exercise its

33 — Judgment in Case 167/73 *Commission* v *France* [1974] ECR 359.

34 — Cf. the judgments in Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, paragraph 16, in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraphs 15 and 16, and in Case C-332/90 *Steen* [1992] ECR I-341.

35 — See the judgment in *Kraus*, cited in the preceding footnote, paragraph 15.

36 — *United Nations Treaty Series*, Volume 450, pp. 11, 169.

37 — See the judgment in *Poulsen* (cited in footnote 19), paragraph 10.

control in particular in social matters over ships flying its flag. Consequently, Mr Peralta's activity on the *Acrux* must be regarded as being, for the purposes of Article 48 of the Treaty, as being an activity as an employed person carried out in the State of which he is a national, regardless of the place at which the ship is located. [38]

59. Admittedly, it is true to say that the suspension of the professional qualification provided for by the Italian legislation may, when it is ordered by a court or tribunal, constitute a barrier to the 'emigration' of an employed person such as Mr Peralta: it might possibly prevent him from exercising the occupation which that qualification enables him to carry out in another Member State (during the period for which the suspension is operative). However, in the judgment in *Moser*, which relates to a similar case, the Court refuted that reasoning as follows:

'A purely hypothetical prospect of employment in another Member State does not establish a sufficient connection with Community law to justify the application of Article 48 of the Treaty.' [39]

60. As regards the possibility of carrying out an occupation in another Member State, a connection between the criminal legislation and Community law could come into being at the very most by reason of the fact that carrying out such an occupation is made specifically more difficult than carrying out an activity in the national territory. [40] But that does not seem to have been the case here either.

61. Lastly, there is the fact that the professional qualification may be suspended only in the case of a master of Italian nationality. However, such 'reverse discrimination' does not alter the fact that this case is not connected with any of the situations contemplated by Community law. [41]

62. For all those reasons, there can have been no infringement of Article 48 of the Treaty.

(v) *Article 52 of the EEC Treaty*

63. As far as Article 52 of the EEC Treaty is concerned, it is necessary to consider the situation of Calì & Figli as the company operating the vessel on which the alleged infringement was committed. However, the condition for the implementation of the

38 — See also the judgments in *Commission* v *France*, cited in footnote 33, and in Case C-37/93 *Commission* v *Belgium* [1993] ECR I-6295.

39 — Judgment in Case 180/83 *Moser* v *Land Baden-Württemberg* [1984] ECR 2539, paragraph 18.

40 — With regard to Article 52 of the Treaty, see the judgment in Case 81/87 *Daily Mail* [1988] ECR 5483, paragraph 19.

41 — Judgment in Case 44/84 *Hurd* [1986] ECR 29, paragraphs 55 and 56.

rights of the free movement of workers enshrined in the Treaty, namely the existence of a specific connection with Community law, also applies to Article 52:

'It should be noted that the rules of the EEC Treaty governing freedom of establishment ..., may be relied upon only by a national of a Member State of the Community who wishes to establish himself on the territory of another Member State or by a national of that State where there is a connecting factor between his circumstances and any of the circumstances envisaged by Community law.' [42]

64. That condition, however, is not fulfilled in this case. According to the information available to the Court, the fact that Calì & Figli is established in Italy and carries on its business (in the circumstances with which this case is concerned) from Italy establishes no connection with an activity which might previously have been carried out as from an establishment located in another Member State. No more can it be seen to what extent the contested legislation might have prevented Calì & Figli from exercising its right to establish itself in another Member State. [43]

65. Consequently, Article 52 of the Treaty is not applicable either.

(vi) *The principle of freedom to provide services*

66. 1. As I have already indicated, Article 59 of the Treaty, on which the national court relies, is not an adequate basis for the free movement of services in the sphere of transport in accordance with Article 61 of the Treaty. In that area, it is for the Community to abolish restrictions on the freedom to provide services under the common policy defined in Articles 74 and 75. [44]

67. As far as sea transport is concerned, the Council adopted on 22 December 1986, pursuant to Article 84(2) of the Treaty, Regulation (EEC) No 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third coun-

42 — Judgments in Case C-147/91 *Ferrer Laderer* [1992] ECR I-4097, paragraph 7, and in *Kraus*, cited in footnote 34, paragraph 15.

43 — See footnote 40.

44 — See section 49 above.

tries. [45] Article 1(1) of that regulation reads as follows:

'Freedom 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.'

68. Consequently, that provision does not define only the scope *ratione materiae* of the relevant freedom to provide services (transport between Member States and between Member States and third countries, as specified in Article 1(4)), but also reproduces virtually verbatim the criterion for that freedom set out in the first paragraph of Article 59 of the EEC Treaty, according to which it is accessible to nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

69. Article 8 of the regulation transposes, within the field of application of the regulation, the principle laid down in the second paragraph of Article 60 of the Treaty, and provides as follows:

'Without prejudice to the provisions of the Treaty relating to right of establishment, a person providing a maritime transport service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

70. Articles 2, 3 and 4 of the regulation set out transitional provisions on 'unilateral national restrictions ... on the carriage of certain goods' and 'cargo-sharing arrangements contained in existing bilateral agreements concluded by Member States with third countries'. [46] Such arrangements may be concluded in future only if the conditions set out in Articles 5 and 6 are met. For the rest, the regulation lays down no restrictions on the freedom to provide services granted by Article 1. In particular, except for the abovementioned exceptions, there is no transitional period, with the result that the principle of freedom to provide services has been in force since 1 January 1987, that is to say, the day following that on which the regulation was published (Article 12).

71. 2. In view of those provisions, the principle of freedom to provide services was applicable to transport services of the type described in the regulation in the material period (January to March 1990). The question whether that principle precludes the application of the Italian legislation at issue depends in any case on whether the transport operations which resulted in Mr Peralta's carrying out the acts of which he stands accused fall within the scope *ratione mate-*

45 — OJ 1986 L 378, p. 1.

46 — Article 9 of the regulation, which reproduces Article 65 of the Treaty, is explained by those provisions.

riae of the regulation. [47] This excludes cabotage, among other things. That mode of transport is a purely internal arrangement, [48] and falls in any case outside the scope of Regulation (EEC) No 4055/86. It was not until the adoption of Council Regulation (EEC) No 3577/92 [49] that that type of transport operation became subject to the free movement of services. There is nothing in the case-file to indicate the nature of the transport operations to which the charges brought against Mr Peralta relate. Admittedly, the bills of lading of which he produced copies to the Court related, *inter alia*, to shipments of caustic soda effected on the *Accrux* on each occasion between ports in two different Member States. However, those bills of lading were issued in December 1991 [50] and 1992, [51] and hence the shipments to which those documents relate can have no connection with the charges made in the main proceedings.

72. This being so, it does not seem appropriate to check any further whether there was any infringement of the principle of freedom to provide services. However, the Court should draw the national court's attention to the fact that that principle has applied in the field of the carriage of goods between Member States and between Member States and third countries since 1 January 1987. It should also point out that the national court should establish whether the transport operations to which the main proceedings relate was carried out between Member States or between Member States and third countries, and hence falls within the scope of the regulation.

73. *3.* If the Court should decide not to take up that proposal, it would be necessary to consider the other conditions in the light of which it may be determined whether the principle of freedom to provide services precludes the application of the Italian legislation.

74. As has already been seen, Article 1(1) of the regulation, taking its lead from Article 59 of the Treaty, also requires that the person providing the services should be a national of a Member State *'established in a Member State other than that of the person for whom the services are intended'*. Does that mean that the application of the principle of the freedom to provide services is systematically excluded — and hence also in this case — where the operator of the vessel as the provider of the services and the person for whom the services are intended are established in the same Member State? I take the view that this is not the case. In so far as it took over virtually verbatim the wording of the first paragraph of Article 59 and the second paragraph of Article 60 of the Treaty when it drew up Articles 1 and 8 of the regulation, the Council intimated, to my mind, that the transport operations liberalized by the regulation must be subjected to the provisions of the Treaty. But the application of those provisions does not inevitably suppose that the provider of the services and the person for whom the services are intended must be established in different Member States. The Court ruled as follows in its judgments

47 — See section 67 above.

48 — This would be so in any case if Calì & Figli was commissioned to carry out such transport operations by a customer established in Italy. See, however, sections 74 to 77 below.

49 — Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ 1992 L 364, p. 7.

50 — No 38 of the first bundle of annexes to Mr Peralta's observations: besides, the shipment was of a substance other than caustic soda.

51 — See the first bundle (preceding footnote), Nos 34 to 37 and 112 to 120.

of 26 February 1991 in the 'tourist guide' cases:

'Although Article 59 of the Treaty expressly contemplates only the situation of a person providing services who is established in a Member State other than that in which the recipient of the service is established, the purpose of that article is nevertheless to abolish restrictions on the freedom to provide services by persons who are not established in the State in which the service is to be provided (see judgment in Case 76/81 *Transporoute* v *Minister of Public Works* [1982] ECR 417, at paragraph 14). It is only when all the relevant elements of the activity in question are confined within a single Member State that the provisions of the Treaty on freedom to provide services cannot apply (judgment in Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, at paragraph 9).

Consequently, the provisions of Article 59 must apply in all cases where a person providing services offers those services in a Member State other than that in which he is established, wherever the recipients of those services may be established.' [52]

75. Regard being had to that case-law, the essential connection with Community law is present in the scope of Regulation No 4055/86 where the sea transport in question starts or ends in a Member State (B) other than the Member State in which the provider of the services is established (A). In such a case, part at least of the service is provided in Member State (B). In such case, the latter is bound to comply with the provisions of Regulation No 4055/86, whether or not the operator of the ship is established in a different Member State than his customer. [53]

76. Consequently, the connecting factor with Community law as so defined exists for all transport operations carried out from or to ports in other Member States. It is absent in the case of transport operations carried out between the State where the provider of services is established and a third country.

77. Consequently, the national court should draw the following conclusion: in order to establish the essential connection between the transport operations linked with the charges brought against Mr Peralta and Community law, it is sufficient to 'sever' transport operations coming within the

52 — Judgments in Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraphs 9 and 10, in Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraphs 9 and 10, and in Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraphs 8 and 9.

53 — That approach is, moreover, quite consonant with the origin and objectives of Regulation No 4055/86. It appears from Articles 2 to 5 of the regulation that it was designed primarily as a response to rules — whether unilateral or agreed with third countries — which result in the Member States concerned discriminating against providers of services from other Member States. That discrimination related in particular to the possibility of shipping, on certain sea crossings, cargoes to other Member States or from those States to ports in the Member State concerned (see the examples set out in document COM(85)90 final, paragraph 35). The regulation would not fulfil that function if it were confined to cases in which the establishments of the two parties to the provision of services were in different Member States.

scope of the regulation and operations carried out between Italy and third countries.

78. *4.* If it should turn out that the transport operations in question were carried out from or to ports in other Member States, it should also be asked whether the Italian legislation constitutes an unlawful restriction on the freedom to provide services conferred by Regulation No 4055/86. In order to answer that question, regard must be had to the specific features of that legislation and its effects or its potential effects.

79. *(a)* I need only briefly consider Mr Peralta's claim that the absolute prohibition imposed by the Italian legislation on discharging caustic soda into the sea is not laid down by legislation in other Member States. As regards Article 7 of the EEC Treaty (Article 6 of the EC Treaty), the Court has held that it does not apply to any disparities in treatment or distortions which may result for persons and undertakings subject to the jurisdiction of the Community from the application by a Member State of measures that are stricter than those applied in the same sphere by other Member States. [54] This should also apply to the prohibition of discrimination set out in the second paragraph of Article 60 of the EEC Treaty and Article 8 of Regulation No 4055/86, since those provisions pursue in their own sphere the same objective as the general rule set out in Article 7 of the EEC Treaty. [55] It follows that a provider of services is not entitled to rely on the freedom to provide services in order to contest provisions of the State in which he is established merely on the grounds that they are stricter than those of other Member States (in which competing operators may be established).

80. *(b)* Next, it is appropriate to consider the fact that the Italian legislation imposes the prohibition on discharging only on vessels flying the Italian flag in so far as it extends beyond Italian territorial waters. This is referred to in particular in the national court's questions 5 and 6.

In this connection, it is observed in the first place that that particular feature is determined by the limits on Italian sovereignty. According to the mutually consistent information provided by the Italian Government and the Commission, the Italian State does not have an exclusive economic zone within the meaning of Article 55 of the United Nations Convention on the Law of the Sea. Article 211(5) and (6) of that convention, which relate to coastal States' rights in the sphere of environment protection in their exclusive economic zones, is therefore not applicable. In addition, the Commission has informed the Court that the Italian State has not laid down provisions on any 'contiguous zone' (within the meaning of Article 24 of the Convention on the Territorial Sea and

54 — Judgment in Joined Cases 251/90 and 252/90 *Wood and Cowrie* [1992] ECR I-2873, paragraph 19, and before that already, the judgment in Case 14/68 *Walt Wilhelm* [1969] ECR 1, paragraph 13.

55 — See the judgment in Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 12.

the Contiguous Zone [56] and Article 33 of the United Nations Convention on the Law of the Sea). The rights conferred by those conventions on coastal States in the contiguous zone do not relate to the sphere of environment protection. Consequently, if the Italian legislation confines the prohibition of discharges at sea outside Italian territorial waters only to vessels flying the Italian flag, there cannot even be any question of a difference of treatment: under Article 5 of the Convention on the High Seas, only vessels flying the Italian flag are within Italian jurisdiction outside Italian territorial waters. That reason alone is sufficient to rule out any infringement of the rule set out in Article 8 of Regulation No 4055/96.

81. Secondly, if that were not the case what would be involved is reverse discrimination which is not sufficient in itself for taking issue with conduct of a Member State from the point of view of a fundamental freedom (with regard to its own nationals). [57]

82. *(c)* Consequently, as the Italian legislation entails no discrimination contrary to the principles of the freedom to provide services, it should now be considered whether, as non-discriminatory legislation, it detracts from the freedom to provide services of persons in the situation of Calì & Figli.

83. *(aa)* In order to answer that question, it must first be emphasized that the case-law on non-discriminatory restrictions introduced by a State other than the Member State of establishment cannot simply be transposed to cases such as the one at issue. Admittedly, that case-law, which may regarded as definitive at least since the judgments in *Collectieve Antennevoorziening Gouda*, [58] *Commission* v *Netherlands* [59] and *Säger*, [60] also submits non-discriminatory provisions of the sort which I have mentioned to the same 'test' of Article 59. It checks whether the provisions in question are justified by imperative requirements relating to the public interest and whether the principle of proportionality has been complied with. However, that test relates specifically to the provisions of a State (the State in which the service is provided) other than the State of establishment, with the legislation of the State in which the service is provided being applied in addition to that of the State of establishment:

'In the absence of harmonization of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise ... as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation.' [61]

56 — *United Nations Treaty Series*, Volume 516, p. 205.

57 — See section 61 above.

58 — Case C-288/89, [1991] ECR I-4007.

59 — Case C-353/89, [1991] ECR I-4069.

60 — Case C-76/90, [1991] ECR I-4221.

61 — Paragraph 12 of the judgment in *Collectieve Antennevoorziening Gouda* and paragraph 16 of the judgment in *Commission* v *Netherlands*, cited above. See also paragraph 12 of the judgment in *Säger*.

84. Such a situation in which a provider of services contests the additional constraints imposed by the legislation of the State in which the services are provided [62] does not arise where the provider of services calls in question the legislation of the State in which he is established.

85. Comparison of the case-law on Article 30 and Article 34 confirms that view.

86. According to the *Dassonville* [63] and the *Cassis de Dijon* [64] case-law, the legislation of the Member State of importation may infringe Article 30 even where there is no discrimination based on the origin of the goods where it impedes intra-Community trade and is not justified on imperative public-interest grounds. The judgment in *Keck and Mithouard* [65] seems to confirm that that case-law (which foreshadowed to a degree the judgments of 25 July 1991 in *Collectieve Antennevoorziening Gouda*, *Commission* v *Netherlands* and *Säger*) does in fact cover barriers caused by divergent legislation in the State of origin, on the one hand, and the State of importation, on the other. [66]

87. Since the aforesaid problem of the existence of divergent legislation in two Member States does not arise in this way when considering measures taken by the *State of exportation*, Article 34 has been interpreted differently in the case-law than Article 30, that is say, in terms of the aforementioned form of words used in the judgment in *Groenveld*, [67] according to which the decisive criterion is that the measures in question should have as their 'specific object or effect the restriction of patterns of exports' and thereby establish a 'difference in treatment' between domestic trade and export trade.

88. The test to be employed (in the case of freedom to provide services) in accordance with the principles set out in the judgments in *Collectieve Antennevoorziening Gouda*, *Commission* v *Netherlands* and *Säger* presupposes that the restriction is specifically linked to the cross-border nature of the provision of services: it is not the constraints resulting from the legislation itself that are the subject of the test, [68] but those caused by the co-existence of the legislation of two Member States. The cross-border nature of the provision of services is reflected in that co-existence of two sets of provisions. If it were sought systematically to assess the legislation of the State of establishment in the

62 — Provisions of the State in which the services are provided which result in an absolute prohibition of the provision of services in question are a special case. But there is no need to consider them here.

63 — See footnote 29.

64 — Judgment in Case 120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

65 — Judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.

66 — See the Opinion of Mr Van Gerven in Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske* [1994] ECR I-2199, at I-2201, section 20.

67 — See section 46 above.

68 — See, however, footnote 62.

light of the criteria of 'imperative public-interest grounds' and proportionality, this would cover also restrictions with no specific link with cross-border services. Such an approach, however, would go beyond the guarantee afforded by the freedom to provide services.

89. Consequently, if it is impossible to pray in aid the judgments in *Collectieve Antennevoorziening Gouda*, *Commission* v *Netherlands* and *Säger* in order to resolve the question as to whether the legislation at issue detracts from the freedom to provide services of persons in the situation of Calì & Figli, what criterion should be applied? In my view, the answer to that question must be given in accordance with the considerations set out above: there must be a specific link between the restriction and a cross-border element affecting the provision of services in question. This will be the case where the restriction attaches treatment to a provision of services embodying that element which is more unfavourable than the treatment given to a comparable provision of services lacking that cross-border element. That answer is confirmed by consistent determinations in the judgments in *Corsica Ferries* [69] (concerning freedom to provide services) and in *Daily Mail* [70] (concerning Article 52 of the Treaty) and the *Groenveld* case-law. They show that, provided that the aforementioned condition is satisfied, even measures taken by Member States which are, in a manner of speaking, 'on this side' of the border crossed by individuals may be tested against the touchstone of fundamental freedoms.

90. In the judgment in *Corsica Ferries*, what was at issue was French legislation which imposed lower harbour dues on sea transport between Corsica and the French mainland than it imposed on sea transport between Corsica and ports in other Member States. Corsica Ferries France contested that legislation. Admittedly, during the material period, Regulation No 4055/86 was not yet in force, and hence an infringement of the principles governing freedom to provide services did not at first sight arise for consideration. Nevertheless, the Court held as follows:

'The French legislation at issue in the main proceedings may constitute a restriction on freedom to provide services within the Community within the meaning of the first paragraph of Article 59 of the EEC Treaty in so far as it discriminates between persons providing transport services between a port situated in national territory and a port situated in another Member State of the Community and persons providing transport services between two ports situated in national territory.' [71]

91. That excerpt shows that the Court submits even the provisions of the Member State of establishment to the test based on the principles governing the freedom to provide

69 — See footnote 31.

70 — See footnote 40.

71 — Paragraph 7 of the judgment in *Corsica Ferries*.

services where those provisions mean that a provision of services involving a cross-border element is treated more unfavourably than a provision of services lacking that element. It describes this — in a non-technical sense — as discrimination.

92. A similar idea may be derived from the judgment in *Daily Mail*, where the following is stated with regard to Article 52 et seq.:

'Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. As the Commission rightly observed, the rights guaranteed by Article 52 et seq. would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State. In regard to natural persons, the right to leave their territory for that purpose is expressly provided for in Directive 73/148 ... .'

93. As I have already explained, the case-law on Article 34 is based on differential treatment of exports and domestic trade. Here too, an operation involving a cross-border element is being compared with another operation lacking that element.

94. In this case, the cross-border element of the transport operations carried out by carriers in Italy lies in the fact that the transport operations are carried out from or to ports in other Member States. It follows that the legislation at issue constitutes a restriction on freedom to provide services where it affects the performance, by such operators, of transport operations from and to ports in other Member States more severely than the performance of other transport operations, in particular, domestic operations.

95. *(bb)* As far as the application of that test to the instant case is concerned, it should be observed in the first place that, according to its wording, the Italian legislation at issue makes no distinction between the various categories of transport operations. Nevertheless, it might have more severe effects on transport operations from and to ports in other Member States that it does on purely domestic transport operations. It cannot be told from the order for reference whether this is the case. Admittedly, the prohibition on discharges which is at issue is mentioned therein, but not the ensuing practical consequences for domestic transport operations as compared with the cross-border transport operations which I have mentioned.

96. Having regard to the supplementary particulars provided by Mr Peralta, [72] it is not altogether improbable that the Italian legislation might entail such consequences. The rule that discharges must take place on-shore might cause vessels going from and to ports in other Member States to have to make detours and/or incur additional costs (relatively small ones in the case of tankers who take up water at sea for the purpose of flushing their tanks), constraints which domestic operators do not incur, or incur to a lesser extent: in any event, it seems that some Italian ports make installations for the elimination of pollutants available to ships.

97. In that connection, the first question which arises is whether the Court may take account of those additional particulars in its deliberations. The prohibition of discharges mentioned in the order for reference necessarily means that the water used to flush tanks must be eliminated on-shore. The particulars provided by Mr Peralta in this connection as regards the conditions under which this takes place are not a new fact, but are closely connected with the order for reference. [73] In particular, they are not at odds with it. [74] Moreover, observations on those claims could have been submitted at the hearing which the Court held in this case. With a view to giving a useful answer to the questions referred for a preliminary ruling, [75] the Court should, in the event that it does not take up my earlier suggestion, [76] take account of Mr Peralta's observations in formulating its answers. Naturally, it is for the national court to make the necessary findings of fact.

98. On this basis, the next question is whether it is sufficient that the national legislation creates — if not according to its wording, at least by reason of its practical consequences — separate rules for the two categories of provisions of services. On the basis of the case-law on Article 34, I consider that this question can be answered in the affirmative. According to that case-law, it is sufficient for the measure in question to 'have as its specific effect' [77] the restriction of patterns of exports. I cannot see why any other criterion should be applied in this case. It is therefore enough if relatively more severe constraints should bear upon cross-border services as a practical result of the measure in question, even if that should not appear from the wording of the legislation.

99. For completeness' sake, I would add that the special constraint which Mr Peralta claims is imposed on ships flying the Italian flag because under the Italian legislation they are bound both to be fitted with equipment enabling them to comply with the provisions of the MARPOL Convention and to comply with the obligations imposed by the Italian prohibition on discharges at sea has no bearing on that test. The fact that that is so is

72 — See section 6 above.

73 — See footnote 18.

74 — Cf. the judgments in Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4, and in Case 17/81 *Papst and Richarz* [1982] ECR 1331, paragraph 12.

75 — See the judgment in *Ferrer Laderer*, cited in footnote 42, paragraph 6.

76 — See section 72 *supra*.

77 — See section 46 *supra*.

attributable to the provisions of Italian law only and therefore, as far as I can see, has no specific connection with *cross-border* provisions of services.

100. *(cc)* If in the light of the test set out above the Italian legislation constitutes a restriction on freedom to provide services, the further question arises as to whether it is sufficiently justified. As far as I can see, only grounds based on environment protection qualify in this connection.

101. Is the State of establishment entitled to rely on such grounds in a case such as this?

102. In the case of discriminatory rules of host States, the Court has held that they are compatible with Community law only if 'they can be brought within the scope of an express exemption, such as that contained in Article 56 of the Treaty'. [78] On the other hand, other restrictions resulting from the application of the legislation of the host State to persons providing services may be justified by overriding reasons relating to the public interest. [79]

103. To my mind, in a case such as this, the latter rule should prevail. If it should turn out that the Italian provisions affect the provision of cross-border services to other Member States more severely than the purely domestic provision of services, this would be attributable to the divergent rules of the Member States. This would be due, as Mr Peralta maintains, to the absence in ports in other Member States of installations enabling particular substances to be eliminated. The criterion of overriding reasons relating to the public interest is perfectly suited to a conflict of this kind. It should therefore be applied in this case.

104. I shall be brief as regards the substance. Protection of the environment has been recognized as being an overriding interest relating to the public interest in the field of the free movement of goods. [80] The position cannot be different as regards freedom to provide services. [81]

105. The criterion of proportionality determines whether or not that reason justifies the Italian legislation. The legislation must be apt to secure the achievement of the objective which it seeks to attain and must not go beyond that which is necessary to attain it. [82]

78 — Judgment in *Collectieve Antennevorziening Gouda*, paragraph 11.

79 — Paragraph 13 of *Collectieve Antennevoorziening Gouda*.

80 — Judgment in Case C-302/86 *Commission* v *Denmark* [1988] ECR I-4067, paragraph 8 et seq.

81 — See also the judgment in Case 240/83 *Procureur de la République* v *ADHU* [1985] ECR 531, paragraph 9.

82 — Paragraph 15 of the judgment in *Collectieve Antennevoorziening Gouda*.

106. In this case account should be taken of the fact that Italy signed the MARPOL Convention, the application of which does not lead to different constraints for domestic transport operations and transport operations from and to ports in other Member States. The Italian legislation is intended to secure greater environment protection than the Convention.

107. Consequently, the national court should verify first whether the Italian legislation will protect the environment better than the MARPOL Convention. In that connection, account should be taken of the fact that, in the field of environment protection, the advantages and risks of the various methods of eliminating harmful substances may be the subject of dispute in scientific circles. Consequently, the Member States have a degree of leeway in assessing these matters.

108. In addition, the Italian Government has drawn attention to the special situation of the Mediterranean, which, in its view, warrants special protection on the grounds of the low rate of renewal of its waters. If the protection of the Mediterranean (or of any comparable waters) were to be the sole aim of such measure, it should in any case be regarded as being disproportionate with regard to other seas without that particular characteristic.

Article 7 of the EEC Treaty

109. Since the legislation in question embodies no discrimination on grounds of nationality in the field of application of Article 48 of the Treaty or in the field of freedom to provide services, there cannot be any infringement of Article 7 in this regard either. [83] Nor does it appear that there are any other infringements of the prohibition set out in Article 7 on discrimination on grounds of nationality in situations governed by Community law.

The principle of proportionality

110. Although this principle forms part of the Community legal order, [84] it cannot be applied as such to facts which do not fall within that legal order. [85] Apart from the relevant rules relating to freedom to provide services in connection with which I have

83 — See the judgment in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 11.

84 — See, for example, the judgment in Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21.

85 — As the Court has consistently held with regard to fundamental rights recognized by the Community legal order; see, most recently, the judgment in Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd* and *Stephen Grogan and Others* [1991] ECR I-4685, paragraph 31.

considered the principle of proportionality, there is, as far as I can see, no rule of Community law which is applicable to this case the application of which would necessitate a review in the light of the principle of proportionality.

C — Conclusion

111. For all the foregoing reasons, I consider that the reply to be given to the Pretura Circondariale di Ravenna should be as follows:

(1) Neither Article 3(f) of the EEC Treaty (Article 3(g) of the EC Treaty) nor Articles 84 and 130r of the Treaty preclude the application of a national provision which prohibits, subject to criminal sanctions, discharging harmful substances at sea, even outside territorial waters.

(2) Articles 48 and 52 of the EEC Treaty are not applicable to a situation which exhibits no connecting factor with any of the situations envisaged by Community law. In a situation such as this, therefore, those provisions do not preclude the application of legislation of the type described in (1) above.

(3) Article 30 et seq. of the EEC Treaty is not applicable to situations in which legislation of a Member State governs the conditions to be complied with when services, in particular transport services, are provided where any barrier to the carriage of goods caused by such legislation constitutes merely a reflection of the barrier imposed on the provision of services. In such case, Article 30 et seq. of the EEC Treaty does not preclude legislation of the type described in (1) above.

(4) In the field of sea transport between Member States and between Member States and third countries, the Council has introduced the principle of freedom to provide services within the meaning of Article 59 of the EEC Treaty by adopting Regulation (EEC) No 4055/86 with effect from 1 January 1987. It is for the national court to establish whether the transport operations which gave rise to the alleged offenses at issue in the main proceedings were carried out between Member States or between Member States and third countries.

In the alternative

The principle of freedom to provide services set out in Regulation (EEC) No 4055/86 precludes, in a situation of the type arising in the instant case, the application of legislation of the type described in (1) above where it is established (by the national court) that:

— the legislation has more severe effects on transport operations from or to ports in other Member States than it has on other transport operations, in particular those carried out between ports in the Member State in which the operator is established, and

— the legislation, having regard to the provisions of international law binding on the Member State in question, is inappropriate or unnecessary in order to achieve the intended objectives in the field of environment protection.

(5) Article 7 of the EEC Treaty (Article 6 of the EC Treaty) does not preclude the application of legislation of the type described in (1) above where that legislation effects no discrimination on grounds of nationality within the field of application of Community law.

(6) The principle of proportionality enshrined in Community law does not preclude the application of legislation of the type described in (1) above in a situation not contemplated by Community law.