OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 8 November 1989 *

Mr President,
Members of the Court,

1. My opinion on the question referred to the Court by the French Cour de cassation (Court of Cassation) on 23 February 1989 is as follows. I refer the Court to the Report for the Hearing for the details of the case.

2. *1.* The question referred to the Court is formulated in very general terms.[1] However, that does not exclude a certain limitation of the subject-matter in the light of the facts of the case in so far as the Court has been made aware of them. That has frequently occurred in the Court's previous decisions. Let me refer here merely to the preliminary rulings made in Cases 13/68,[2] 51/70[3] and 53/81.[4]

3. In my opinion, the same should be done in this case, since the procedure under Article 177 of the EEC Treaty does not involve the formulation of abstract legal opinions but is intended to provide concrete help in arriving at a decision by interpreting Community law in regard to a given set of facts. From that point of view, it is important that, as can be seen from the application of 18 January 1982, the main proceedings are concerned only with the recovery of passenger taxes levied — unlawfully, it is alleged — since 19 May 1981 under the Decree of 12 May 1981 (in the amount of FF 836 071.25). The obvious thing to do, therefore, is to deal only with the legal position at that time (1981/82) and consider the situation under Community law at the time in question in regard to the facts of the case before the national court.

4. *2.* If the problem to be resolved is limited in that way, let me say at once that I find the Commission's position convincing. It argues that at that time a Member State was not prohibited from levying charges on the arrival and departure of passengers on ships using port facilities in its island territory where the passengers were coming from or going to ports in other Member States although such charges were levied in regard to journeys between two ports situated in national territory only upon departure from the island port.

* Original language German

1 — 'Must the EEC Treaty, in particular Articles 59, 62 and 84, be interpreted as meaning that a Member State is authorized, in connection with the use by a ship of harbour installations situated in its island territory, to levy charges on the embarkation and disembarkation of passengers travelling to or arriving from a port situated in another Member State, whilst in the case of travel between two ports situated within national territory those charges are levied only on embarkation at the island port?'

2 — Judgment of 19 December 1968 in Case 13/68 *Salgoil* v *Italian Ministry of Foreign Trade* [1968] ECR 453

3 — Judgment of 3 March 1971 in Case 51/70 *Alfons Lutticke* v *Hauptzollamt Passau* [1971] ECR 121

4 — Judgment of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035

5. That is the conclusion which must be drawn from the provisions of the EEC Treaty relevant to this case, namely Article 61, in Title III, Chapter 3 (Services), which provides as follows:

'Freedom to provide services in the field of *transport* shall be governed by the provisions of the title relating to transport.'

The decisive factor in that regard is the fact that at that time no measures had been adopted for the introduction of freedom to provide services, that is to say, no use had been made of Article 84(2) of the EEC Treaty, which provides that the Council may, acting unanimously,[5] decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea transport. As the Court has seen, the only relevant measure is Council Regulation No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries[6] and it was only from the time at which that regulation entered into force (1 January 1987, in accordance with Article 12 thereof) that it was clear that 'freedom to provide maritime transport services between Member States and between Member States and third countries [was to] 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' (Article 1(1)).

6. *3.* It is easy to demonstrate that the contrary view, put forward by the plaintiff in the main proceedings, is incorrect.

7. (a) It is to my mind clear that the plaintiff's argument that Chapter 3 of Title III of the EEC Treaty, containing provisions on the abolition of restrictions on freedom to provide services, was applicable to sea transport at a time when the Council had adopted no measure under Article 84(2) of the EEC Treaty (that is to say, no measure implementing a maritime transport policy and thereby making Title IV applicable to that area) is contrary to the overall structure of the Treaty. That would mean that the general provisions of Article 59 *et seq.* would be immediately applicable to an area which the authors of the Treaty regarded as particularly delicate, namely shipping (to which not even the provisions concerning the common transport policy, by means of which the objectives of Chapter 3 of Title III are to be achieved in the field of transport, are in themselves applicable). That cannot be right, and in that connection the judgment in Case 4/88[7] is of a certain interest inasmuch as it was decided that in 1982, in the absence of special measures in regard to transport policy, it was not possible to rely on Article 59, and the Council's failure to act in regard to transport policy did not make that article directly applicable.

8. (b) The plaintiff's position is certainly not supported by any other relevant judgment. It is true that in Case 167/73[8] it was stated in general terms that sea and air transport are subject to the general rules of

5 — The procedural rules have been amended by the Single European Act.

6 — OJ 1986, L 378, p. 1.

7 — Judgment of 13 July 1989 in Case 4/88 *Lambregts Transportbedrijf PVBA* v *Belgian State* [1989] ECR 2583.

8 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359.

the Treaty even though, so long as the Council has not decided otherwise, they are not subject to the rules of Title IV relating to the common transport policy. It should not be forgotten, however, that that case was concerned only with the rather different problem of the application of Articles 48 to 51.

9. In any event, it is quite clear from the judgment of 30 April 1986 in Joined Cases 209 to 213/84 [9] that under Article 61 of the EEC Treaty freedom to provide services in the field of transport is governed not by the provisions of the chapter on services but by the provisions of the title relating to the common transport policy. The objective laid down in Article 59 of abolishing restrictions on freedom to provide services must be attained (as is emphasized in paragraph 37) in the framework of the common policy provided for in Articles 74 and 75.

10. (c) Reference may also be made in this connection to Regulation No 4055/86, which I have already mentioned. The statement in the second recital in its preamble to the effect that in accordance with Article 61 of the Treaty freedom to provide services in the field of maritime transport is to be governed by the provisions of the title relating to transport means that the implementation of that freedom must be carried out through measures under that title, and direct reliance on Article 59 *et seq.* is excluded.

11. The plaintiff's argument in regard to that regulation, to the effect that it merely clarifies and confirms a legal position which may be derived directly from the Treaty is certainly not acceptable. It must not be forgotten that that regulation, as can be seen from the statement of the reasons on which it is based, is a measure adopted under Article 84(2) of the EEC Treaty, that is to say, a measure laying down new rules (which is also demonstrated by the fact that in Article 12 the time for the entry into force of the regulation is provided). It is also interesting to note that it is clearly stated in the 11th recital in its preamble that 'therefore the principle of freedom to provide services should *now* be applied to maritime transport between Member States and between Member States and third countries so as progressively to abolish existing restrictions and prevent the introduction of new restrictions'.

12. (d) Finally, it is also immediately clear to me that in the circumstances of the main proceedings reference cannot be made to the general principles of the Treaty (unity of the common market; prohibition of discrimination in Article 7).

13. The application and realization of those principles in the area with which the Court is concerned is provided for in Chapter 3 of Title III. Since that chapter makes a clear exception for the entire field of transport (in the form of the reference in Article 61 to the title relating to transport), it would be contrary to the overall structure of the Community rules to counter that exception by relying on the principles laid down in Part One of the Treaty (the principles laid down in Article 7 do not come into consideration because, as has been demonstrated to the Court, the French provisions

9 — Judgment of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Ayes* [1986] ECR 1457.

at issue in this case do not involve any discrimination on grounds of nationality).

14. (e) It cannot therefore be said that at the time material to the main proceedings, namely 1981 and 1982, the difference between the French provisions on the levying of passenger taxes in Corsican ports on transport between French ports on the one hand and on transport between Corsican and Italian ports on the other is incompatible with Article 59 of the Treaty.

15. (f) We need not therefore consider the question of the effect of the standstill provision in Article 62 with regard to the fact that the unequal treatment which existed at the time when the Treaty came into force was abolished by a Decree of 27 January 1969 and was reintroduced only by the Decree of 12 May 1981, because according to Article 61(1) that provision is not applicable.

16. *4.* If these remarks are not in themselves sufficient and it is desired to examine the question as referred to the Court, in the general terms in which it is formulated, without limitation in time (and it would appear that the contested French rules are still being applied today), then I consider that the Commission's view should be upheld, that is to say, it should be decided that the French rules constitute a restriction on freedom to provide services within the meaning of Article 59 of the EEC Treaty and that since the entry into force of Regulation No 4055/86, which implemented freedom to provide services in maritime transport, such rules are no longer lawful.

17. (a) Clearly the reply to the only relevant question, namely whether different, less favourable conditions for the levying of passenger tax apply to transport services crossing frontiers, such as those provided by the plaintiff between Corsica and Italy, with effect from the entry into force of the Decree of 12 May 1981 must be in the affirmative, because it is only in that case, unlike that of transport entirely within France, that passenger tax is levied both upon the arrival and upon the departure of the ship. It is therefore already clear that the measure before the Court is a restriction of freedom to provide services within the meaning of Article 59, because the same conditions do not apply to transport services crossing a frontier as are applied to those which are purely internal.

18. The French Government's argument that transport services between Italian and Corsican ports cannot be compared to purely internal French services (because the economic conditions, such as the possibility of making duty-free purchases, liability to value-added tax or the application of the rules applying to public utilities, are different) must be regarded as irrelevant since those are matters which are not covered by the rules under consideration and are moreover in part only loosely connected with the actual provision of transport services.

19. (b) The Commission is also right when it says that it is possible that differing rules concerning the levying of passenger tax have an effect on the passengers' choice of route and therefore on the volume of traffic.

Even if, as has been said, they are not directly passed on to the passengers, passenger taxes should be regarded as a factor in the calculation of costs which therefore influence competition, in regard to which the distance between the Italian and the French port probably does not play a decisive role.

20. I must also agree with the Commission when it goes on to emphasize that the extent of the disadvantage to transport services between Member States (according to the amounts in question) is not decisive and the fact that the measure involved is fiscal in nature is of no significance. On the first aspect reference may be made to the meaning of the principle of freedom to provide services, which quite simply requires the abolition of discrimination (as has been emphasized, for example, in the case-law on freedom of establishment — Case 270/83 [10]), and regard should also be had to the case-law on the abolition of restrictions on the free movement of goods, from which it is clear that even minor restrictions are unlawful (Joined Cases 51 to 54/71 [11]).

21. In relation to the second aspect, it is sufficient to draw attention to the judgment in Case 127/86 [12] (which was concerned with the problem of freedom of movement in connection with fiscal discrimination) and, once again, to the judgment in Case 270/83.

10 — Judgment of 28 January 1986 in Case 270/83 *Commission v French Republic* [1986] ECR 273

11 — Judgment of 15 December 1971 in Joined Cases 51 to 54/71 *International Fruit Company NV and Others v Produktschap voor groenten en fruit* [1971] ECR 1107

12 — Judgment of 6 July 1988 in Case 127/86 *Ministère public and Ministre des Finances du Royaume de Belgique v Ledoux* [1988] ECR 3741

22. With regard to the question whether discriminatory rules such as the French rules under consideration are contrary to Regulation No 4055/86, with the best will in the world I can detect no problem in the terms of the regulation, Article 1 of which quite clearly provides:

'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.'

23. The French Government's argument that traffic to and from Corsica is to be regarded as French coastal shipping and that freedom to provide services must first be applied in that respect, as a proposal for a regulation made by the Commission shows, is certainly not pertinent. If I have correctly understood the abovementioned proposal for a regulation, the rules contained therein deal only with the abolition of obstacles in maritime transport *within* Member States (that is to say, as Article 1 puts it, transport by sea of passengers and goods between ports in *one* Member State). To that extent, that is to say, in regard to the right of undertakings whose registered office is in another Member State to provide such services, there is still a need for rules. However, the proceedings before the Cour de cassation deal with transport between two Member States (Italy and France) and in that regard all that is necessary for the application of freedom to provide services is already contained in Regulation No 4055/86.

24. 5. On the basis of the foregoing, I propose that the Court should reply as follows to the question referred to it by the French Cour de cassation:

'In Community law, prior to the entry into force of Regulation No 4055/86, the Member States were not prohibited from levying charges, in connection with the use by a ship of harbour installations situated in its island territory, on the arrival and departure of passengers coming from or going to a port in another Member State, although such charges were levied only on the departure of passengers from the island port in the case of travel between two ports in national territory.'