REPORT FOR THE HEARING
delivered in Case C-49/89 *

I — Facts and procedure

1. Article L.211-1 of the French code des ports maritimes provides that harbour dues may be levied in seaports on commercial operations or visits by ships there. With regard to merchant vessels, Article L.211-2 requires shipowners to pay a tax on passengers embarked, disembarked or transferred.

In regard to Corsican seaports, Article R.212-20 levies a charge on all passengers travelling to Corsica from mainland France or Sardinia and a charge at an identical rate on all passengers travelling to or from a port situated in Europe.

The single tax scheme which applied to traffic between Corsica and Italy following the adoption of the Decree of 27 January 1969 was repealed by the Decree of 12 May 1981, which once again placed journeys to Italy, with the exception of Sardinia, under the general rules applying to international traffic whereby taxes are levied both on arrival in and departure from a Corsican port.

2. Corsica Ferries (France), which operates three ships between Corsica and certain Italian ports, brought an action against the customs authorities for recovery of the amounts paid under the abovementioned provisions, alleging that the French legislation discriminates between ships plying between Corsica and ports in continental France, which are required to pay passenger tax only when leaving the Corsican port, and ships plying between Corsica and ports situated in EEC Member States other than France, which are liable to the tax both on arrival and on departure.

3. Its application having been dismissed by the tribunal de grande instance (Regional Court) and the cour d'appel (Court of Appeal), Bastia, Corsica Ferries appealed to the Cour de cassation (Court of Cassation).

4. Since it considered that the dispute involved the interpretation of certain articles of the EEC Treaty, the Cour de cassation, by judgment of 17 January 1989, decided to stay proceedings until the Court of Justice had given a preliminary ruling under Article 177 of the EEC Treaty on the following question:

'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?'

* Language of the case: French.

5. The judgment of the Cour de cassation was received at the Court Registry on 23 February 1989.

6. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 12 May 1989 by the Commission of the European Communities, represented by its Legal Adviser Jean Amphoux, and on 22 May 1989 by Corsica Ferries, the appellant, represented by Mr Thouvenin, of the Paris Bar, and Mr Scapel, of the Marseilles Bar.

7. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

8. Under Article 95(1) and (2) of the Rules of Procedure, the Court, by decision of 21 June 1989, assigned the case to the Second Chamber.

II — Written observations submitted to the Court

1. Corsica Ferries, the appellant, states that under the French legislation in force from 1969 to 1981 ships plying between Italy and Corsica suffered no discrimination in relation to those sailing between continental France and Corsica. It was only in 1981 that the French authorities introduced the present discriminatory rules, which, moreover, apply in all French seaports.

Article 84 of the EEC Treaty excludes maritime transport from the rules of the common transport policy, which are the subject of Title IV of Part Two of the Treaty. The question therefore arises to what extent the provisions of the Treaty concerning freedom to provide services contained in Articles 59 to 66 of Title III of the Treaty apply to that mode of transport.

Even if those provisions are not directly applicable, the general principles of the Treaty prohibit rules of the type adopted in France.

Freedom to provide services

Article 61(1) of the EEC Treaty provides that freedom to provide services in the field of transport is to be governed by the provisions of the title relating to transport. The question therefore arises whether that provision, read together with Article 84, precludes the application of the general rules of the Treaty on the provision of services to national rules on maritime transport. A positive reply may be deduced from the judgment of the Court of 4 April 1974 in Case 167/73 *Commission* v *France* [1974] ECR 359, in which the Court accepted that although, under Article 84(2), sea and air transport, so long as the Council has not decided otherwise, are excluded from the rules of Title IV of Part Two of the Treaty relating to the common transport policy, they remain, on the same basis as the other modes of transport, subject to the general rules of the Treaty. In that judgment the Court applied Articles 48 to 51 of the Treaty to sea transport. In the judgments of 12 October 1978 in Case

156/77 *Commission* v *Belgium* [1978] ECR 1881 and of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes* [1986] ECR 1457, it applied the provisions of the Treaty concerning State aid and competition to transport.

Article 1 of 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 (Official Journal 1986, L 378, p. 1) lays down the principle of freedom to provide maritime transport services. The French rules infringe the prohibition of discrimination inherent in the freedom to provide services.

Under Article 62 of the EEC Treaty, the Member States are required not to introduce new restrictions on the freedom to provide services which has in fact been attained. Whereas the French legislation in force in 1969 provided for equal treatment for ships plying between continental France and Corsica and ships plying between Italy and Corsica, the legislation adopted in 1981 introduced discriminatory treatment. No argument may be based on the fact that on 1 January 1958, the date on which the EEC Treaty entered into force, similar discrimination existed and that the 1981 rules do not constitute a new restriction compared to the situation in 1958. Article 62 imposes a standstill obligation, which means not merely an obligation on the part of Member States not to introduce new restrictions on the freedom attained at the date of the entry into force of the Treaty but also an obligation not to re-establish restrictions abolished during the transitional period.

The general principles of the Treaty

The prohibition of discrimination is contained in Article 59 of the Treaty, concerning freedom to provide services, but it also constitutes a fundamental principle of Community law which is essential for the establishment of a common market. Maritime transport is subject to the general principles of the Treaty. The Treaty prohibits not merely discrimination on grounds of nationality, referred to in particular in Article 7, but all forms of discrimination based on the localization of an economic activity which hinder the establishment of a unified economic area. Thus, in regard to social security, the Court has held unlawful the payment of different benefits depending on whether or not the insured person is in the territory of the State to which the insurer belongs (judgment of 19 March 1964 in Case 75/64 *Hoekstra* v *Bedrijfsvereniging Detailhandel* [1964] ECR 177). Similarly, in regard to freedom to provide services, it has held discrimination on grounds not of nationality but of place of residence to be unlawful (judgment of 3 December 1974 in Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299). In the judgment of 15 January 1986 in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 17, it declared invalid certain provisions of Regulation No 1408/71 which precluded the award to employed persons subject to French legislation of French family benefits for members of their family residing in the territory of another Member State and thereby impliedly upheld the prohibition of discrimination on geographical grounds.

The argument that shipping companies which are required to pay the tax can recover it in the fares charged to passengers is irrelevant. First, the plaintiff in the main proceedings itself paid the taxes at issue; furthermore, the Treaty prohibits not merely discrimination against those who provide services but also discrimination

against the persons who receive those services.

Consequently, Corsica Ferries proposes that the Court should reply as follows to the question referred to it:

'The Treaty prohibits a Member State from levying taxes for the use by ships of port facilities situated in its territory which are calculated on the basis of the number of passengers disembarked or embarked if the ship is plying between that port and a port situated in another Member State if it levies taxes calculated only on the basis of the number of passengers embarked where the voyage is between two ports in its own territory.'

2. The Commission considers that an analysis of the scope of the national provisions at issue in the light of the rules of Community law makes it clear that they are discriminatory. However, the discrimination is not based on the nationality of the passengers, the flag under which the ship is registered or the nationality of the shipowner or the Member State in which he is established. None the less, that discrimination is likely to prejudice freedom to provide services in the domain of passenger transport by sea. By making transfrontier services within the Community subject to a financial charge greater than that levied on purely national services the French legislation is analogous in its effect to a tax having an effect equivalent to a customs duty in the context of intra-Community trade in goods. It is therefore an instance of discrimination which must be abolished, regardless of the seriousness of the effects which it produces.

The Court's case-law on the free movement of goods, which prohibits any measure affecting exports or imports specifically by reason of the fact that they cross a frontier, has laid down principles which are equally valid in regard to freedom to provide services.

The prohibition of restrictions of fundamental liberties contained in the Treaty apply independently of the category into which the measures involved fall in national law. It is true that, in the judgment of 21 September 1988 in Case 267/86 *Van Eycke* v *ASPA* [1988] ECR 4769, the Court accepted that Articles 95 to 97 of the Treaty concern only taxes and charges on goods. None the less, fiscal discrimination affecting the free movement of persons or freedom to provide services must also be covered by the provisions of the Treaty dealing with those freedoms. Furthermore, in the judgments of 28 January 1986 in Case 270/83 *Commission* v *France* [1986] ECR 273 and of 6 July 1988 in Case 127/86 *Ministère public* v *Ledoux* [1988] ECR 3741, the Court accepted that the fact that a measure is fiscal in nature does not take it outside the scope of the prohibitions resulting from the rules concerning the free movement of persons or freedom to provide services.

However, this case raises the question of the extent to which transport is subject to the general rules of the Treaty, having regard, in particular, to Article 84. In the judgment of 4 April 1974, cited above, the Court accepted that sea and air transport are subject to the general rules of the Treaty. In the judgment of 30 April 1986, cited above, it applied the competition rules in the Treaty to air transport. However, the principle that transport is subject to the general rules of the Treaty remains subject to any express provisions to the contrary in the Treaty. Such an express exception is provided for in Article 61(1), which the

Court interpreted in the judgment of 30 April 1986 as meaning that 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 effective implementation of that policy is subject to the adoption of measures on the basis of Article 84(2) of the Treaty.

In that context, Regulation No 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries has provided for the application to maritime transport of the freedom to provide services.

On the basis of current Community legislation, discrimination of the kind applied in France would be contrary to Community law. However, the facts in the case before the Cour de cassation arose before the adoption of Regulation No 4055/86 and the rules of the Treaty concerning freedom to provide services had not at that time been applied to maritime transport.

Under those circumstances, the Commission proposes that the Court should reply as follows to the question referred to it:

'The provisions of the EEC Treaty are to be interpreted as meaning that they do not prohibit a Member State, before the entry into force of Regulation No 4055/86, from levying charges, in connection with the use by a ship of harbour installations situated in its island territory, on the disembarkation and embarkation of passengers coming from or going to a port situated in another Member State, whilst in the case of travel between two ports situated in national territory those charges are levied only on embarkation at the island port.'

III — Oral procedure

The Government of the French Republic, which had not submitted written observations, argued first that there were two different kinds of maritime traffic, namely coastal traffic between domestic ports and international traffic. Since they constitute two distinct legal categories, different tax rules are fully justified.

The principle of freedom to provide services has been applicable to maritime transport only since 1 January 1987, the date on which Regulation No 4055/86 entered into force. Moreover, according to Article 1 of that regulation, it applies to intra-Community shipping services and to traffic with non-member countries, and until such time as a regulation is adopted on maritime transport within the Member States special legislation may be applied to domestic coastal traffic.

F. A. Schockweiler
Judge-Rapporteur