OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 17 June 1999 *

I — Introduction

1. This rather unusual case, referred for a preliminary ruling by a Finnish court, the Pargas Tingsrätten (District Court, Pargas, hereinafter 'the national court'), raises the question whether national rules governing angling rights on private land can constitute restrictions on the free movement of goods or on the freedom to provide services which are contrary to the EC Treaty.

II — Legal and factual context

2. The present case arises from a dispute between Mr Jägerskiöld, the owner of waters in the commune of Kimito (hereinafter 'the applicant'), and Mr Gustafsson (hereinafter 'the defendant'), who in May 1997 fished with a spinning rod in the applicant's waters.

3. Prior to 1996, the right to engage in fishing and to license others to do so belonged to the owner of the waters. [1] Law No 1045 of 12 December 1996 (hereinafter 'the 1996 Law') changed the position by permitting (subject to exceptions not material to the present case) any person to engage in most forms of angling by rod, reel and bait and the like [2] even in privately owned waters, subject only to payment by anglers aged between 18 and 65 years of a licence fee, either annual or weekly, to the State for every department in which they fish. No licence fee is payable in respect of angling in public waters. [3] The defendant was licensed to fish in the applicant's waters. These changes were designed to serve the interests of recreational anglers, as demand was not being satisfied under the previous regime due to the fragmented ownership of waters. They were also intended to promote fishing tourism and greater exploitation of fishing resources. The national court likens fishing licences to industrial property rights, which are also

* Original language: English.

1 — Paragraph 5 of the Lagen om Fiske of 16 April 1982 (the Finnish Law on fishing, hereinafter 'the 1982 Law').

2 — The agent for Finland stated at the oral hearing that a licence granted under the 1996 Law permitted an angler to use only a single rod and that those who wished to use more than one rod were still obliged to conclude private arrangements with the relevant owners.

3 — Articles 8(1) and 82(2) of the 1982 Law, as amended.

normally limited in their effects to a single national territory.

4. Article 89a of the 1982 Law, as amended by the 1996 Law, provides for the distribution among the owners of fishing waters, proportionately to the burden borne, of the proceeds of licence sales, after deduction of the State's collection costs. No distribution had yet taken place at the time the order for reference was made, but the national court observed that the State licence fees were clearly lower than the market prices prevailing before the 1996 amendments and that, although water owners were still able to sell fishing permits in respect of their waters, sales had fallen sharply. The result was an effective State monopoly. The applicant complains that there is no reliable mechanism to determine the actual level of fishing on each owner's property and that the system tends to reward disproportionately the owners of the less attractive fishing waters.

5. The applicant sought a declaration from the national court that the defendant was not entitled to fish in his waters without his permission. He claimed that the 1996 Law infringed the rules on the freedom of movement of goods contained in the Treaty establishing the European Community and, in the alternative, those on the freedom to provide services. The defendant did not address the question whether there was any conflict between the national law and Community law. The national court referred the following questions to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC):

'1. Are fishing rights or spinning licences "goods" in accordance with the judgment in Case 7/68 *Commission* v *Italian Republic* [1968] ECR 423?

2. Does the amendment in Finland of the Law on Fishing 1045/1996 constitute an obstacle to the free movement of goods according to the criteria laid down in Case 8/74 *Dassonville* [1974] ECR 837?

3. Does a leisure angler's recreational interest constitute a permissible ground under Article 36 of the European Community's basic treaty?

4. Does the present case involve agricultural products within the meaning of Article 37(4) of the Treaty of Rome?

5. Does the aforementioned legal rule have direct legal effect in accordance with the judgment in Case 6/64 *Costa* v *ENEL*?

6. Has sufficient account been taken of farmers' interests?

7. Does such an amendment of the Law on Fishing 1045/1996 concerning spinning contravene or not contravene the rules governing the free movement of goods (or the free provision of services) laid down in the European Community's basic treaty?'

III — Observations

6. Written and oral observations were submitted by the applicant, the Republic of Finland and the Commission. The defendant submitted oral observations only.

IV — Analysis

Admissibility

7. The Commission submits that the request for a preliminary ruling is inadmissible, *inter alia* because no real legal dispute exists: the order for reference states that the defendant did not address the Community-law issues, thereby indicating possible acquiescence. [4] Furthermore, the order for reference is alleged not to contain sufficient factual information or a sufficient explanation of the relevance of the Community-law issues raised by the national court. [5] Finland argues that the case has no cross-border element which would bring it within the scope of Community law. [6]

8. The doubts raised by the Commission have been amplified by the oral observations of the defendant which were all, in effect, critical of the licence regime. Although he formally contested the application, stating that the licence regime was lawful, and stated that he had an interest in knowing whether he had a right to engage in angling under the 1996 Law, he revealed that he too was a landowner with an interest in the private exploitation of fishing rights and in the provision to angling tourists of ancillary services such as holiday accommodation. He observed that it could have an effect on the economic activity of renting holiday cottages to tourists, including those coming from abroad. It was important to know if he could offer fishing opportunities on his property to tourists in the future, as well as to know if he himself could engage in angling in such waters. This, he said, was the reason for his

4 — Joined Cases C-422/93 to C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567.

5 — Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023; Case C-196/96 *Lahlou* [1996] ECR I-3945.

6 — Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42; Case C-299/95 *Kremzow* v *Austrian State* [1997] ECR I-2629, paragraph 15.

agreeing with the applicant on the necessity of seeking a preliminary ruling in the present case. He agreed with the applicant's submission that the method of distribution of licence fees among owners takes no account of the differing levels of use of the affected waters by anglers.

9. The Court addressed the consequences of a collusive national action resulting in a request for a preliminary ruling in the *Foglia* v *Novello* cases. [7] The national proceedings before the Italian courts concerned a French charge on the importation of wines, which was raised in the context of the enforcement of a clause, common to two interconnected contracts for the export and the transport of wine from Italy to France, providing that a specified party to each contract would not be liable for any charges should they be imposed contrary to Community law. In *Foglia* v *Novello 1*, the Court observed that the attitude of one party in the national proceedings had been neutral, that he had stated in the oral proceedings before the Court that he was participating in view of the interest of a certain category of traders in the outcome of the case and that the parties had both argued before the Court that the French legislation at issue, of which they gave essentially identical descriptions, was contrary to Community law. [8] The Court concluded that the national proceedings, between parties who were in agreement as to the result to be attained, were an artificial expedient. Giving a ruling in such a case on the compatibility with Community law of charges such as those imposed by France would jeopardise the whole system of legal remedies provided to individuals by Community law and fell outside the jurisdiction of the Court to provide interpretations of Community law to national courts which were necessary to the disposal of genuine disputes. [9]

10. In *Foglia* v *Novello 2*, the Court elaborated on the reasons for this conclusion. Whilst the Court must, in the light of its relationship of cooperation with the national court, be able to place as much reliance as possible on the assessment by the latter of the need for a response to the questions submitted, it must, none the less, be able to check whether it has jurisdiction; it could not, therefore, remain indifferent to such assessments in the exceptional cases where these might affect the proper working of the preliminary ruling procedure. In particular, it had no jurisdiction to give advisory opinions on general or hypothetical questions; its role was to assist in the administration of justice in the Member States. [10]

11. The connection between lack of jurisdiction in cases of collusive or orchestrated actions and the wider rule against the delivery of advisory opinions on general

7 — Case 104/79 [1980] ECR 745 (hereinafter '*Foglia* v *Novello 1*'); Case 244/80 [1981] ECR 3045 (hereinafter '*Foglia* v *Novello 2*').

8 — Loc. cit., paragraphs 6, 9 and 10.

9 — Ibid., paragraphs 10 and 11.

10 — Loc. cit., paragraphs 14 to 19.

or hypothetical questions [11] has been confirmed in *Gmurzynska-Bscher*, in which the Court stated that it would question a national court's assessment of the need for a ruling:

'only in cases where either it appears that the procedure of Article 177 of the Treaty has been misused and been resorted to, in fact, in order to elicit a ruling from the Court by means of a spurious dispute or if it is obvious that the provisions of Community law submitted for the interpretation of the Court cannot apply.' [12]

12. The Court stated in the *Bosman* Case that 'where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, *bound* to give a ruling'. [13] The Court then referred to its function, which was not to deliver advisory opinions on general or hypothetical questions, [14] with the result that it had no jurisdiction to give a preliminary ruling on a question submitted by a national court 'where it is *quite obvious* that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose'. [15]

13. The primary role of the national court in determining the need for a preliminary ruling in any given case and the corresponding obligation in principle of the Court to give a ruling leads me to conclude that the stated requirement that the general or hypothetical nature of questions be obvious in order for the Court to decline jurisdiction should also be expressly extended to the related context of alleged collusion or acquiescence. As I stated in my Opinion in *Celestini* v *Saar-Sektkellerei Faber*, [16] the principle that preliminary rulings ought not to be given where there has been 'misuse' of that procedure should be applied most sparingly and with the utmost caution. It is possible to entertain doubts about the genuineness of the dispute in the present case, but there is, in my view, insufficient evidence to support a conclusion that the proceedings are obviously artificial or collusive. Although the observations of the two parties to the national proceedings are both critical of the 1996 Law and the defendant has not commented

11 — Circumstances where a request for a preliminary ruling only becomes hypothetical in the course of the proceedings, because one party to the national proceedings concedes to the other on the subject-matter of the dispute, as occurred in *Zabala Erasun*, loc. cit., seem to me to be a distinct case of the application of this general rule.

12 — Case C-231/89 [1990] ECR I-4003, paragraph 23. See also Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 40. It is also worth noting that the Court treated Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871 as a case of a request for a hypothetical ruling (at paragraph 30), even though it found (at paragraph 18) that the two parties to the case took a similar view of the Community-law issue and that the applicant's contentions would have the result that his action should be rejected. Advocate General Tesauro expressed the view, at paragraph 5 of his Opinion, that the proceedings had been visibly orchestrated by the applicant, leading to doubts as to the very existence of a dispute.

13 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59, emphasis added.

14 — Ibid., paragraph 60.

15 — Ibid., paragraph 61, emphasis added. The requirement that the lack of such a relationship be *obvious* was first set out in Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 6, and was repeated in a number of cases in the intervening period. It can be presumed that the Court used this term advisedly in *Bosman*, as Advocate General Lenz had speculated in his Opinion about the significance of its omission in a small number of cases; loc. cit., paragraphs 78 to 80 of the Opinion.

16 — Case C-105/94 [1997] ECR I-2971, paragraph 24.

directly on the Community-law issues raised in this case, he has formally contested the case and he has affirmed that he has an interest in the outcome *qua* angler as well as *qua* landowner, an assertion which is not contradicted by the evidence. [17] The fact that the parties agreed on the need for a reference is not inconsistent with the existence of a dispute as to the proper interpretation of the Community-law rules at issue. As a result, I do not recommend that the request for a preliminary ruling be held to be inadmissible on this ground.

14. Nor do I think the case should be held to be inadmissible for lack of sufficient information or of a sufficient explanation of the relevance of the Community-law issues either. Although the explanation in the order for reference of the question regarding services is brief, it seems to me to be sufficient in that it relates to a subsidiary argument of the applicant, and in that his arguments regarding goods also apply to services.

Substance

15. It is clear that the first six questions are dependent on the first, namely whether fishing rights or licences are 'goods' for the purposes of Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

16. The applicant contends that fishing rights and permits constitute goods, as defined in Case 7/68 *Commission* v *Italy*, because they can be the subject of commercial transactions and have a money value, similar to intellectual property rights. [18] A law restricting the free disposal, or the fixing of the price, of such assets is, thus, a restriction on the free movement of goods within the scope of the test set down by the Court in *Dassonville*, because of its discriminatory effects on, for example, owners who had invested heavily in their fishing waters. [19] The restriction is not justified under Article 36 of the EC Treaty (now, after amendment, Article 30 EC) or pursuant to general interest grounds such as environmental protection, because of the failure to take into account the interests of water owners, the discriminatory manner in which licence income is to be distributed and the suppression of price competition through the imposition of a standard licence fee. The national rules are also contrary to Article 37(4) of the EC Treaty (now, after amendment, Article 31(3) EC), as they create a monopoly in the distribution of fish and do not take sufficient account of the interests of water owners,

17 — The fact that both parties to national proceedings may have, at least in part, a shared material interest in a particular outcome from a request for a preliminary ruling does not invariably mean that the action must be seen as abusive — see, for example, the claim and counterclaim, in similar terms, in Case C-33/97 *Colim* v *Bigg's Continent Noord* [1999] ECR I-3175.

18 — Loc. cit., page 428, last paragraph.

19 — Loc. cit.

who are, for the most part, farmers. If the case is seen as concerning the sale of fishing permits rather than the right of property in fishing rights as such, the applicant argues, in the alternative, that the rules constitute a new restriction on the provision of services, contrary to Article 62 of the EC Treaty (repealed by the Treaty of Amsterdam). The case is not governed by Article 222 of the EC Treaty (now Article 295 EC), because the Finnish constitutional committee held that the 1996 amendments did not infringe private ownership rights.

17. Finland argues that the licence regime established by the 1996 Law does not relate to goods capable of being exchanged. Furthermore, it is part of the Finnish system of property ownership and is, therefore, protected by Article 295 EC. It submits that the rules on recreational fishing are far removed from the area of application of the common fisheries policy [20] and pursue, in any event, entirely different objectives which are compatible with that policy. [21] Finally, no possible effect on intra-Community trade has been established by the applicant [22] and the protection of property rights as part of the fundamental rights guaranteed under the general principles of Community law does not extend to situations which themselves fall outside the scope of Community law. [23]

18. The Commission contends that the mere fact that the exercise of a right to fish may result in the capture of, and trade in, fish is not sufficient to bring the national rules in question within the scope of the Community rules on the free movement of goods. [24] The case relates to a right which can only be exercised in Finland, not to goods which can be packaged and distributed. This conclusion is not affected by the fact that physical evidence of the right to fish may be provided by a physical docu-

20 — See Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture, OJ 1992 L 389, p. 1, and Council Regulation (EEC) No 3759/92 of 17 December 1992 on the common organisation of the market in fishery and aquaculture products, OJ 1992 L 388, p. 1.

21 — Joined Cases 141/81 to 143/81 *Holdijk* [1982] ECR 1299, paragraph 12; Case 118/86 *Openbaar Ministerie* v *Nertsvoederfabriek Nederland* [1987] ECR 3883, paragraph 12; Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraph 20.

22 — Case 355/85 *Driancourt* v *Cognet* [1986] ECR 3231, paragraph 10; Case 52/79 *Procureur du Roi* v *Debauve* [1980] ECR 833, paragraph 9; Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37; Case C-134/95 *USSL No 47 di Biella* v *INAIL* [1997] ECR I-195, paragraph 19.

23 — *Annibaldi*, loc. cit., paragraphs 21 to 23; *Kremzow*, loc. cit.

24 — On the definition of goods, see Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431; Case 155/73 *Sacchi* [1974] ECR 409; Case C-275/92 *Schindler* [1994] ECR I-1039; Case C-393/92 *Almelo* [1994] ECR I-1477; Case C-213/96 *Outokumpu* [1998] ECR I-1777.

ment which can be traded. The Community has not exercised its competence to extend the common fisheries policy to recreational freshwater fishing, which, thus, remains within the competence of national legislatures. The Commission states that a person, such as a tourist, who purchases the right to fish in waters in another Member State can be considered to be the recipient of a cross-border service. [25] However, no such cross-border element can be identified in the present case.

19. It seems to me to be beyond doubt that the angling-licence regime established by the 1996 Law does not fall within the scope of the Treaty provisions on goods. The definition of goods in Case 7/68 *Commission* v *Italy* as 'products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions' [26] cannot be understood as placing in that category anything of value which is capable of being traded. That definition, it should be recalled, was formulated in response to an argument that articles of an artistic, historical, archaeological or ethnographic nature were not subject to Treaty provisions, which were alleged only to apply to 'ordinary merchandise'. The Court was also careful to employ the term 'products'.

20. Goods, in the common connotation of the term, possess tangible physical characteristics. The Treaty contains separate provisions in respect of the free movement of goods and services. In those cases where the Court has had to resolve the issue, it has followed a functional approach and has avoided an exhaustive definition. A television signal 'must, by reason of its nature, be regarded as provision of services'. [27] Lottery activities also essentially involve the provision of services; the sending of tickets, advertising material and application forms not being 'ends in themselves'. [28] On the other hand, waste, whether recyclable or not, constitutes goods, as 'objects which are shipped across a frontier for the purposes of commercial transactions are subject to Article 30, whatever the nature of the transaction'. [29] It might, therefore, appear

25 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377; Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195.

26 — Loc. cit., p. 428, last paragraph.

27 — *Sacchi*, loc. cit., paragraph 6.

28 — *Schindler*, loc. cit., paragraph 22.

29 — *Commission* v *Belgium*, loc. cit., paragraph 26. See also paragraphs 27 and 28 of the judgment.

surprising that the Court has treated electricity, despite its intangible character, as goods.[30] In so doing, the Court had regard to its treatment as goods in Community law and in the laws of the Member States as well as in the Community's tariff nomenclature. To my mind, electricity must be regarded as a specific case, perhaps justifiable by virtue of its function as an energy source and, therefore, its competition with gas and oil.

21. I do not think that the analogy with intellectual property rights assists the applicant's case. It is true, of course, that a variety of intellectual property rights may affect trade in goods: patent, copyright and trademark law all play such a role. However, Community law does not classify intellectual property rights themselves as a form of goods. On the contrary, in *Phil Collins and Others* it treated them as having a character *sui generis*, which none the less fell within the scope of the Treaty because of their economic effects:

'It follows that copyright and related rights, which by reason in particular of their effects on intra-Community trade in goods and services, fall within the scope of application of the Treaty, are necessarily subject to the general principle of non-discrimination laid down by the first paragraph of Article 7 of the Treaty, without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty.'[31]

22. The activity of granting to others the right temporarily to use land or waters for leisure purposes seems to me clearly to constitute the provision of a service which, if supplied to persons established in another Member State, would come within the Treaty provisions on services. It can be readily compared to the hiring out of sporting facilities, of hotel accommodation, or of other rights in respect of the temporary enjoyment of immovable property.[32] The fact that goods — fish — may result from the transaction is immaterial, as many services can be provided as inputs in the process of producing goods.

30 — *Almelo*, loc. cit.; Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraphs 14 to 20.

31 — Joined Cases C-92/92 and C-326/92 [1993] ECR I-5145, paragraph 27.

32 — See, for example, Case C-70/95 *Sodemare and Others* v *Regione Lombardia* [1997] ECR I-3395, paragraphs 36 to 40.

23. I would therefore propose that the Court answer the first question referred by the national court in the negative. As a result, the second to sixth questions do not require to be answered. It is necessary, therefore, for the purposes of the seventh question, to assess whether the Treaty provisions on services apply in the circumstances of the present case.

24. It is not in dispute that both the applicant and the defendant are established in Finland. The Court has consistently held that the provisions of the Treaty on freedom to provide services cannot apply to activities whose relevant elements are confined within a single Member State. [33] Although the arguments of the parties in the present case have addressed the possibility that the 1996 Law affects the ability of landowners to provide to non-Finnish tourists the service of permitting angling on their waters as well as ancillary accommodation and other services, the present case does not concern a transaction with such a cross-border character. Thus, the proceedings display no link with any of the situations envisaged by the Community-law rules on the free provision of services. That finding cannot be invalidated by the theoretical possibility of a dispute similar to the present arising in circumstances where a non-Finnish angler fished in the applicant's waters on the basis of a licence granted under the 1996 Law. [34]

25. Furthermore, there seems to be no reason, in this context, to reconsider the Court's consistent approach to standing to invoke the services provisions of the Treaty in the light of its ruling in *Pistre and Others*, which revised the traditional approach to standing on the part of certain domestic producers to invoke the Treaty rules on free movement of goods in respect of national rules which created a difference in treatment as between domestic and imported goods, to the detriment of the latter. [35] Without it being necessary to determine whether the indistinctly applicable provisions of the 1996 Law at issue in the present case are capable of constituting restrictions on the freedom to provide services, it is clear that no such difference in treatment arises in the present case.

33 — *Procureur du Roi* v *Debauve*, loc. cit., paragraph 9; Joined Cases C-29/94 to C-35/94 *Aubertin and Others* [1995] ECR I-301, loc. cit., paragraph 9; *USSL No 47 di Biella* v *INAIL*, loc. cit., paragraph 19.

34 — See *Höfner and Elser*, loc. cit., paragraph 39.

35 — Joined Cases C-321/94 to C-324/94 [1997] ECR I-2343, paragraph 45.

V — Conclusion

26. In the light of the foregoing, I propose that the Court respond as follows to the questions referred by the Pargas Tingsrätten:

(1) Fishing rights and spinning licences are not goods within the meaning of the EC Treaty;

(2) The provisions of the EC Treaty governing the freedom to provide services do not apply to a situation which is confined in all respects within a single Member State.