JUDGMENT OF THE COURT
18 March 1997 *

In Case C-343/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale di Genova (Italy) for a preliminary ruling in the proceedings pending before that court between

Diego Calì & Figli Srl

and

Servizi Ecologici Porto di Genova SpA (SEPG)

on the interpretation of Article 86 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. L. Murray and L. Sevón, Presidents of Chambers, C. N. Kakouris, P. J. G. Kapteyn (Rapporteur), C. Gulmann, D. A. O. Edward, J.-P. Puissochet, H. Ragnemalm and M. Wathelet, Judges,

* Language of the case: Italian.

Advocate General: G. Cosmas,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Diego Calì & Figli Srl, by F. Bruno, of the Genoa Bar,

— Servizi Ecologici Porto di Genova SpA (SEPG), by V. Afferni, M. Bucello, E. Cavallari and G. Schiano di Pepe, of the Genoa Bar,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department at the Ministry of Foreign Affairs, acting as Agent, assisted by P. G. Ferri, Avvocato dello Stato,

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent,

— the French Government, by C. de Salins, Deputy Director of the Legal Affairs Directorate at the Ministry of Foreign Affairs, and R. Loosli-Surrans, Special Adviser at the same Ministry, acting as Agents,

— the United Kingdom Government, by S. Braviner of the Treasury Solicitor's Department, acting as Agent, and N. Paines, Barrister,

— the Commission of the European Communities, by G. Marenco, Legal Adviser, and F. Mascardi, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Diego Calì & Figli Srl, represented by F. Bruno; Servizi Ecologici Porto di Genova SpA (SEPG), represented by G. Schiano di Pepe; the Italian Government, represented by P. G. Ferri; the French Government, represented by C. de Salins and R. Loosli-Surrans; the United Kingdom Government, represented by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, and N. Paines; and the Commission, represented by G. Marenco, at the hearing on 15 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 10 December 1996,

gives the following

Judgment

1 By decision of 12 October 1995, which was received at the Court on 30 October 1995, the Tribunale di Genova referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions concerning the interpretation of Article 86 of the Treaty.

2 Those questions were raised in a dispute between Diego Calì & Figli Srl (hereinafter 'Calì') and Servizi Ecologici Porto di Genova SpA (hereinafter 'SEPG') regarding the payment to be made by Calì for preventive anti-pollution services performed by SEPG in the oil port of Genoa.

3 At the material time, the port of Genoa was managed by the Consorzio Autonomo del Porto (hereinafter 'CAP'), which was replaced in 1994 by the Autorità Portuale (Port Authority). The CAP was a public body upon which both the administrative and economic functions relating to the management of the port had been conferred by legislation.

4 By Order No 14 of 1 July 1986, the President of the CAP, in his capacity as delegate of the Government, approved the regulations governing the harbour police and security at the oil port of Genoa-Multedo.

5 By Order No 32 of 23 August 1991, the President of the CAP amended those regulations by creating a compulsory surveillance and rapid intervention service intended to protect maritime areas against any pollution caused by accidental discharges of hydrocarbons into the sea.

6 Article 1 of Order No 32 defines the service in the following terms:

'The service shall be responsible for the following functions and intervention procedures:

(a) constant surveillance of the waters on account of the presence of tankers laying alongside or berthed at quays in order to identify at once any risk of spills of hydrocarbons or other pollutants arising from criminal acts or negligence;

(b) in cases of pollution, whether from a ship or from dry land, occurring during loading or unloading operations or in any other circumstances:

(1) immediate reporting of the incident to the responsible authorities, together with the provision of any information which could be of use in evaluating the incident;

(2) taking all such action at the appropriate time, subject to those responsible for the pollution being liable for the costs thereby incurred, as is necessary and advisable for the purpose of containing the spill and associated risks and for removing and/or neutralizing the spilled substances and fully cleansing the waters in question.'

7 By Decree No 1186 of 30 August 1991, the President of the CAP entrusted that service, in the form of an exclusive concession, to SEPG.

8 By Decree No 1191 of 30 August 1991, the President of the CAP approved the tariffs which SEPG was authorized to apply, in respect of the service in question, to vessels using the installations of the oil terminal. Those tariffs were established in accordance with the tonnage of the vessels, the quantities transported and the duration of the intervention.

9 On several occasions between 1992 and 1994, Calì, which transports, for third parties, petrochemical products by sea in tankers, used the oil port of Genoa-Multedo for the purpose of loading and unloading products, including acetone.

10 The operations themselves were carried out not by Calì, but, on payment of a fee, by the harbour company Porto Petroli di Genova SpA. The vessels used were equipped with anti-pollution devices and systems.

11 SEPG invoiced Calì for a total amount of LIT 8 708 928 in respect of the anti-pollution surveillance services performed on Calì's behalf. The latter refused to pay on the ground that it had never requested nor had recourse to services of that type during the operations carried out in the oil port of Genoa.

12 On 22 December 1994 SEPG obtained an order from the Tribunale di Genova which required Calì to pay the disputed invoices.

13 In the course of the proceedings contesting that order, the Tribunale di Genova stayed proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'1. Can a "dominant position within the common market or in a substantial part of it" be said to exist where a limited company, set up by a national port authority, is given responsibility for and does actually carry out, pursuant to an administrative concession from that authority, the task of providing, with exclusive rights within a harbour sector specializing in loading and unloading petroleum products, an "anti-pollution surveillance" service, and where that company collects the relevant fee, which is set unilaterally by the port authority on the basis of the vessel's tonnage and the quantity of the product loaded or unloaded, from users of that service, that is to say vessels which dock at the wharves to carry out those operations?

2. Having regard to the situation set out in Question 1 and if there is a dominant position within the common market or a substantial part of it, is there an abuse of the aforesaid "dominant position" within the meaning of Article 86

of the Treaty, in particular of subparagraphs (a), (c) and (d), and are there related practices, when an undertaking holding the exclusive concession for a service (even though on the basis of a decision of the authority granting the concession) charges fees:

— which are compulsory and independent of the provision of an efficient surveillance and/or intervention service, merely because a vessel berths in a mooring in the Porto Petroli and loads/unloads goods, whether petroleum products or chemicals and petrochemicals, according to the contractual terms imposed;

— the amount of which depends solely on the tonnage of the vessel, the amount of the product and also, in the event of any actual intervention, the duration thereof, but not on the product's nature, quality or capacity to pollute;

— which, since they are imposed exclusively on the vessel (which is merely passively loaded and unloaded), affect a subject other than those whose responsibility it is to carry out the necessary technical operations (in this case Porto Petroli di Genova SpA and the laders/receivers of the product), resulting in an inevitable discrepancy between the responsibility for any pollution and the bearing of the cost of the anti-pollution service;

— which, given the nature of the product and/or its existence, represent an unnecessary service for vessels equipped with their own anti-pollution devices and systems adapted to the type of product to be loaded or unloaded;

— which impose on the vessel a charge, and an associated extra cost, in addition to those provided for by the landing contract between the carrier and the company operating the wharves, and have no practical connection with the subject-matter of the contract.

3. If, in the situations set out in Questions 1 and 2, there are one or more practices amounting to abuse of a dominant position by an undertaking for the purposes of Article 86 of the Treaty, does this lead to a potential adverse effect on trade between Member States of the Union?'

14 In order to answer the first question, concerning the existence of a dominant position, it must be established whether an activity of the kind carried on by SEPG in this case falls within the scope of Article 86 of the Treaty.

15 Such activities are carried on under an exclusive concession granted to SEPG by a public body.

16 As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7).

17 In that connection, it is of no importance that the State is acting directly through a body forming part of the State administration or by way of a body on which it has conferred special or exclusive rights (Case 118/85 *Commission* v *Italy*, cited above, paragraph 8).

18 In order to make the distinction between the two situations referred to in paragraph 16 above, it is necessary to consider the nature of the activities carried on by the public undertaking or body on which the State has conferred special or exclusive rights (Case 118/85 *Commission* v *Italy*, cited above, paragraph 7).

19 On this point, it is clear from the order for reference and the wording of the first question that the main proceedings concern the payment to be made by Calì for anti-pollution surveillance exercised by SEPG in relation to the loading and unloading of acetone products transported by Calì in the oil port of Genoa.

20 Furthermore, it is common ground that the dispute in the main proceedings does not concern the invoicing of any action by SEPG necessitated by pollution actually produced during loading or unloading operations.

21 Article 1 of Order No 32 of the President of CAP referred to above expressly distinguishes, moreover, between surveillance intended to prevent pollution and intervention in a case where pollution has occurred and it provides (Article 1(b)(2)) that those responsible for the pollution are to bear the costs arising from any action deemed necessary or advisable.

22 The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas.

23 Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature

justifying the application of the Treaty rules on competition (Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43, paragraph 30).

24 The levying of a charge by SEPG for preventive anti-pollution surveillance is an integral part of its surveillance activity in the maritime area of the port and cannot affect the legal status of that activity (Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol,* cited above, paragraph 28). Moreover, as stated in paragraph 8 of this judgment, the tariffs applied by SEPG have been approved by the public authorities.

25 In the light of the foregoing considerations, the answer to Question 1 must be that Article 86 of the EC Treaty is to be interpreted as not being applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, even where port users must pay dues to finance that activity.

26 In view of the answer to Question 1, there is no need to answer Questions 2 and 3.

Costs

27 The costs incurred by the Italian, German, French and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale di Genova (Italy), by decision of 12 October 1995, hereby rules:

Article 86 of the EC Treaty must be interpreted as not being applicable to anti-pollution surveillance with which a body governed by private law has been entrusted by the public authorities in an oil port of a Member State, even where port users must pay dues to finance that activity.

Rodríguez Iglesias		Mancini	Murray
Sevón	Kakouris	Kapteyn	Gulmann
Edward	Puissochet	Ragnemalm	Wathelet

Delivered in open court in Luxembourg on 18 March 1997.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President