OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 9 February 1994 *

Mr President,
Members of the Court,

1. The Tribunale di Genova (District Court, Genoa, hereinafter referred to as 'the national court') has referred to the Court a number of questions for a preliminary ruling on the interpretation of Articles 5, 7, 30, 59, 85, 86 and 90 of the EEC Treaty. The questions arose in proceedings for a court order by which Corsica Ferries Italia S. r. l. (hereinafter referred to as 'Corsica Ferries') sought to recover from the Corporazione dei Piloti del Porto di Genova (Corporation of Pilots of the Port of Genoa, hereinafter referred to as 'the Corporation') the sums which it paid for piloting services, in its view contrary to Community law. The piloting services consist in a pilot's being present alongside the master of a vessel whilst the vessel enters the port and moors, in particular in order to indicate the course to be steered and to assist the master with the necessary manoeuvres.

In order to consider the questions it is necessary first to describe the legal and factual context — which is not completely transparent.

Legal and factual context

2. Corsica Ferries — whose company name was changed to 'Tour Ship Italia s. r. l.' at an extraordinary general meeting held on 4 December 1992 — is a limited liability company incorporated under Italian law whose registered office is at Cagliari and which provides domestic and international sea transport services using ferries. It appears from the written observations of Corsica Ferries that since 4 December 1992, 90% of its capital has been held by Tour Ship Group SA, a public limited company governed by Luxembourg law. [1]

According to its own statements, Corsica Ferries manages the fleet of the Tour Ship group as the shipping agent for the shipowner (as regards the identity of the shipowner, see section 22). Since 1989, it has been directly responsible, as a sea transport undertaking, for the operation of the scheduled service between the Port of Genoa and

* Original language: Dutch.

1 — It appears from the minutes of the extraordinary general meeting of shareholders held on 4 December 1992 (a copy of which is appended to Corsica Ferries' written observations) that it was only after it was resolved at that meeting to increase the company's capital that Tour Ship Group SA became a shareholder: until that date, 99% of the company's capital (LIT 20 000 000) had been held by a Liechtenstein company, Allgemeine Tourist Organisation Anstalt. The meeting resolved to increase the capital to LIT 199 000 000. Tour Ship Group immediately subscribed for LIT 179 000 000 of the shares, which it paid up forthwith.

various ports in Corsica (Bastia, Calvi, Ajaccio). It provides that scheduled service by means of two leased ferries, Corsica Regina and Corsica Victoria, which fly the Panamanian flag. [2] According to the statements made by Corsica Ferries' counsel at the hearing, those vessels belong to the company Tour Ship Panama. [3]

I would just make one additional comment about the structure of the Tour Ship group: Corsica Ferries' counsel stated at the hearing that the sole shareholder in the Luxembourg company Tour Ship Group is Mr F. Lota, a French national residing in Bastia (Corsica). Through the Luxembourg holding company, Mr Lota controls not only Corsica Ferries, but also Corsica Ferries France and Corsica Ferries Panama, which have recently been renamed Tour Ship France and Tour Ship Panama.

3. During the period from the end of 1989 to 31 July 1992, Corsica Ferries paid the Corporation a total of LIT 901 156 960 for its piloting services. It submits that it is the victim of tariff discrimination contrary to the rules on competition and free movement laid down by the EEC Treaty, and claims that the Corporation should reimburse it, for the period 1989 to 1992, the difference between the basic tariff which it was charged and the reduced tariff applicable to vessels flying the Italian flag which provide a scheduled service between national ports. That difference amounts to LIT 588 752 000.

4. The rules of Italian law governing piloting services are set out in Articles 86 to 100 of the Codice di Navigazione (Navigation Code, hereinafter referred to as 'the Code') and in Articles 98 to 137 of the Regolamento di Esecuzione (Navigazione Marittima) (Implementing Regulation (Maritime Navigation)).

Under Article 86 of the Code, a corporation of pilots, with legal personality, is to be set up by decree of the President of the Republic in ports and other places for the access or passage of vessels where there is a recognized need for a piloting service.

Although it is in principle optional, the establishment of a piloting service may, under Article 87 of the Code, be made compulsory by decree of the President of the Republic in ports where this is deemed to be necessary. Under that provision, piloting services have been made compulsory in virtually all Italian ports, including that of Genoa. A master of a vessel who infringes the obligation to use the services of a pilot exposes himself to criminal sanctions (Articles 1170 and 1171 of the Code).

2 — Corsica Ferries' counsel stated at the hearing that only those two vessels fly the Panamanian flag; Corsica Ferries' other vessels fly the Italian flag.

3 — According to the extract from Lloyd's Register of Shipping, which is appended to the Commission's written observations, those two vessels belong to Tourship Co. SA.

5. In practice, an agreement for the provision of services for valuable consideration arises between the Corporation and the master of the vessel — representing the shipowner — under which a pilot, who is a member of the Corporation, is to provide his services to the master.

Under Article 91 of the Code, piloting tariffs are to be approved by the Minister for the Merchant Navy after consulting interested trade associations. The tariffs are put into effect in each port by decree of the competent maritime authority.

By circular of 16 November 1990, the Ministry for the Merchant Navy informed all the harbourmasters' offices that the shipowners' associations and the Italian Federation of Port Pilots had agreed to adapt the tariffs for 1991 and 1992, and that, under Article 91 of the Code, the Ministry had approved those tariffs. The harbourmaster of the Port of Genoa rendered those tariffs applicable by decree.

6. It appears from the decrees of the harbourmaster [4] that, at the time of the facts at issue in the main proceedings, two separate tariffs were in force depending on whether or not the vessel had a cabotage licence for the Italian coast. [5] The tariff applicable to vessels with a cabotage licence was 30% lower than the tariffs which vessels without such a licence had to pay for the same piloting service. In addition, a reduction of 50% was granted to vessels carrying out regular scheduled services between Italian ports according to a fixed route and making at least one stopover a week at the Port of Genoa. Lastly, other reductions were granted to vessels of over 2 000 tonnes gross tonnage carrying out cabotage and using piloting services a specified number of times each month.

At the material time, only vessels flying the Italian flag were entitled to obtain a cabotage licence under Article 224 of the Code. On 1 January 1993, Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States [6] (see section 12 below) came into force. With an eye to that regulation, the Minister for the Merchant Navy, by circular of 18 December 1992, extended the tariff applicable to vessels with a cabotage licence to ships flying the flag of another Member State with effect from 1 January 1993.

4 — Decrees Nos 29/89, 50/90 and 28/91, a copy of which is appended to Corsica Ferries' written observations.

5 — See the definition of 'cabotage' in V. Power, *EC Shipping Law*, London, Lloyd's of London Press, 1992, p. 211, paragraph 7.6.2.1: 'cabotage is the carriage of passengers or goods by sea between ports in any one Member State, including the overseas territory of that State'.

6 — 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.

7. The Corporation considers that Community law has not been infringed and refuses to reimburse the amounts claimed by Corsica Ferries. The national court considered that 'a correct and accurate interpretation of the substance and scope' of the Treaty provisions on competition and the free movement of persons, goods and services was necessary in order to determine whether or not the application should be upheld, and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Articles 5 and 7 of the EEC Treaty compatible with the provisions of national legislation which lay down, in respect of vessels providing a regular scheduled service between ports of two Member States, by way of charges for the mandatory piloting service for navigational safety, reduced tariffs which are applicable only to vessels authorized to provide coastal services between domestic ports, where, in the present state of Community law, the provision of coastal services between domestic ports is reserved solely to vessels flying the Italian flag?

(2) Is Article 30 of the EEC Treaty compatible with the provisions or practices of national legislation which require compulsory recourse to the Impresa di Pilotaggio (Piloting Service), even where the same operations can, without endangering navigational safety, be carried out in whole or in part, at a lower cost, with the men, equipment and technologies with which the vessel is provided?

(3) Is Article 59 of the EEC Treaty compatible, in the case of vessels providing a regular scheduled service between two Member States, with the provisions of national law which authorize reductions in the compulsory tariffs applied to the piloting service in domestic harbours to be made exclusively in respect of vessels flying the national flag?

(4) Does the approval on the part of the public authorities of a compulsory tariff, as a result of an agreement or consultation, or both, between the trade associations of the sector concerned, constitute "endorsement" of an agreement prohibited by Article 85(1) of the EEC Treaty, and, if so, can such endorsement be compatible with the provisions of Article 90(1) in conjunction with Articles 5 and 85 of the EEC Treaty?

(5) Is Article 90(1) in conjunction with Article 86 of the EEC Treaty compatible with national provisions which authorize a dominant undertaking which has been granted exclusive rights over a substantial part of the common market:

(a) to charge in respect of vessels providing a regular scheduled service between two Member States different rates for equivalent services, where the tariff system in force provides, with parity of service, for tariff reductions applicable in practice

only to vessels flying the national flag;

(b) to apply to vessels flying foreign flags, in the light of the foregoing, tariffs which provide for charges of an amount "three times" higher than those laid down for domestic vessels;

(c) not to reduce the costs of a compulsory service, such as that under consideration, where — whilst complying with the requirements of navigational safety at all times and in every respect — the vessels are capable of operating autonomously, at least in part?'

Admissibility of the national court's questions

8. The Corporation and the Italian Government contest the admissibility of the national court's questions. Since the main proceedings were not *inter partes* , the national court failed to find that Corsica Ferries' vessels at issue fly the Panamanian flag. They maintain that, as a result, the questions on intra-Community discrimination are irrelevant. Under Regulation No 3577/92, only Community shipowners carrying out transport using vessels registered in a Member State and flying the flag of a Member State can invoke the freedom to provide maritime transport services. Accordingly, both the Corporation and the Italian Government claim principally that the Court should declare inadmissible all the questions referred for a preliminary ruling by the national court. In the alternative, they propose that the Court should reformulate the first and second questions in the light of the circumstances of the case and declare all the other questions inadmissible. At the hearing, the French Government supported the latter view.

The Commission's point of view is more subtle. It points out that the Court has in the past often answered questions referred to it in proceedings such as the main proceedings. It argues that, in order to assess the relevance of the national court's questions, it is necessary to start out from the specific nature of the proceedings initiated in the national court: they are proceedings for a court order by which Corsica Ferries seeks to recover the difference between the tariffs which it was charged in 1989 to 1992 and the tariffs which were charged to vessels flying the Italian flag. The Commission therefore claims that only the questions relating to the amount of the tariffs for piloting services are relevant and not the questions relating to the mandatory nature of the piloting service and to the way in which the tariffs were fixed.

9. I largely endorse the Commission's view. My premiss is the basic philosophy underlying the preliminary rulings procedure created

by Article 177 of the EC Treaty:

' The procedure provided for in Article 177 of the Treaty is ... an instrument for cooperation between the Court of Justice and the national courts, whereby the Court of Justice provides the national courts with the criteria for the interpretation of Community law which they need in order to dispose of the disputes which they are called upon to resolve. ' [7]

In other words, the Court may provide criteria for the interpretation of Community law only in so far as they are of use in the main proceedings. In order to determine whether and to what extent the national court's questions need to be answered, account must therefore be taken of the nature of the main proceedings. As I have already indicated, the main proceedings are for a court order, namely a form of summary proceedings (procedimento sommario) under Article 633 et seq. of the Codice di Procedura Civile [Code of Civil Procedure] . A feature of those proceedings is that they may lead to the issue of a court order (decreto ingiuntivo) whereby the court grants the application without hearing the other party. The proceedings become inter-party proceedings only if the other party challenges the order. In view of those features, this procedure is available only to the claimant of a sum of money the amount of which is certain and which cannot be the subject of calculations or additions, except of a purely technical nature.

7 — Judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33.

10. The Court has always shown particular flexibility about the admissibility of preliminary questions raised in such proceedings for a court order. It has, on several occasions, dismissed objections of inadmissibility raised — generally by the Italian Government — on the ground of the specific nature of such proceedings. The Court rejected such an objection for the first time in the judgment in *Politi* v *Italy*. In answer to a question as to whether the conditions for the application of the second paragraph of Article 177 of the EC Treaty were fulfilled, the Court stated as follows:

' It is sufficient to note that the President of the Tribunale di Torino is performing a judicial function within the meaning of Article 177 and that he considered an interpretation of Community law to be necessary to enable him to reach a decision, there being therefore no need for the Court to consider the stage of the proceedings at which the questions were referred. ' [8]

In the judgment in the *Birra Dreher* case, the Court reiterated that view, while adding that

8 — Judgment in Case 43/71 *Politi* v *Italy* [1971] ECR 1039, paragraph 5. For subsequent confirmation, see the judgments in Case 162/73 *Birra Dreher* [1974] ECR 201, paragraph 3, in Case 70/77 *Simmenthal* [1978] ECR 1453, paragraph 9, and in Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 9, and recently the judgment of 13 December 1993 in Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni* [1993] ECR I-6621, paragraph 16. See the Opinion of Mr Advocate General Roemer in Case 33/70 *SACE* v *Italian Ministry for Finance* [1970] ECR 1213, at 1226: 'There can be no doubt as to the admissibility of the reference. In particular, it is of no importance that the proceedings in the main action are merely of a summary nature, in other words, simply for the granting of an order for payment'.

'Article 177 does not make the reference to the Court subject to whether the proceedings at the conclusion of which the national court has drawn up the reference for a preliminary ruling were or were not defended'. [9]

The Court confirmed those two judgments in *Simmenthal*, but qualified its view as follows:

' Nevertheless, although Article 177 does not make the reference to the Court subject to whether the proceedings during which the national court draws up the reference for a preliminary ruling were defended, it may where necessary prove to be in the interests of the proper administration of justice that a question should be referred for a preliminary ruling only after both sides have been heard.

However, it is for the national court alone to assess whether that is necessary. ' [10]

11. Consequently, it appears from that case-law that the national court is unquestionably a 'court or tribunal' within the meaning of Article 177 of the Treaty [11] and that — even though the Court states a preference for defended proceedings — the fact that the main proceedings are not defended has, in principle, no bearing on the admissibility of the questions referred to the Court. It nevertheless appears from the established case-law that, in view of the aim of Article 177 of the EC Treaty, the Court does not regard itself as having jurisdiction to give an answer where the questions referred to it are manifestly hypothetical, [12] where it is quite obvious that the interpretation of Community law sought by the national court has no relation to the actual nature of the case or to the facts of the main proceedings [13] and where the preliminary questions therefore do not involve an interpretation of Community law objectively required in order to settle the dispute in the main action [14] or where the national court has not provided the Court with sufficient factual or legal information for it to find that there is such an objective requirement. [15]

As far as the latter point is concerned, the findings made by the national court suggest

9 — Judgment in *Birra Dreher*, end of paragraph 3.

10 — Judgment in *Simmenthal*, paragraphs 10 and 11; this point of view has recently been confirmed in paragraph 16 of the judgment in *Ligur Carni*, cited in footnote 8.

11 — It is 'a court or tribunal which is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'; order in Case 138/80 *Borker* [1980] ECR 1975, paragraph 4; judgment in Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4. It also satisfies the requirement laid down in the recent judgment in *Corbiau* that it must be 'an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings' (judgment in Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15).

12 — The Court confirmed that it has no jurisdiction to deliver advisory opinions on general or hypothetical questions as long ago as its judgment in Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 18. In the judgment which it gave on 16 July 1992 in Case C-83/91 *Meilicke* [1992] ECR I-4871 the Court refused for the first time to answer any of the questions referred for a preliminary ruling.

13 — Judgment in Case 126/80 *Salonia* v *Poidomani and Others* [1981] ECR 1563, paragraph 6, and the judgment in Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 11; see also the judgments in Case C-186/90 *Durighello* [1991] ECR I-5773, paragraph 9, in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 18, and in Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 26. See also the order in Case C-286/88 *Falciola* [1990] ECR I-191, paragraph 8.

14 — Order in *Falciola*, cited in the preceding footnote, end of paragraph 9.

15 — See the judgment in Joined Cases C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 to 10 and the orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraphs 4 to 7, and in Case C-386/92 *Monin Automobiles* [1993] ECR I-2049, paragraphs 6 to 9.

that Corsica Ferries has produced sufficient documents to show that it did in fact pay the Corporation the amounts which it seeks to recover and that — provided that the arguments used to support the submission that the differences in tariffs at issue are incompatible with Community law prove to be well founded — it therefore has a money claim within the meaning of Article 633 of the Codice di Procedura Civile for an *amount* which is certain, namely the amount of the differences in tariffs. However, the other arguments put forward by Corsica Ferries — namely that the obligation to use piloting services is incompatible *per se* with Community law (dealt with in question 2) or that the manner in which the tariffs are fixed (question 4) or the circumstances in which remuneration may be charged for piloting services (question 5(c)) mean that the national provisions are incompatible with Community law — are not related to the amount of the claim. On the contrary, they are concerned with the *legal basis* for the claim and hence with *how it arose* . If the way in which that claim arose is not valid, payment is not due and the amount paid may be recovered in full. The Commission states in this connection that such a dispute cannot be the subject of proceedings for a court order under Article 633 of the Codice di Procedura Civile because it does not relate to a money claim. Without wishing to express a formal view on that issue, I consider that the national court has described the national legal context insufficiently to enable the Court to declare that it has jurisdiction to answer questions 2, 4 and 5(c).

12. The Court should therefore confine itself to answering questions 1, 3 and 5(a) and (b), that is to say, the questions relating to the status in Community law of the differences in tariffs that are at issue. If those questions are reformulated in order to extract the aspects of Community law requiring interpretation, [16] two main questions remain: (i) are the differentiated tariffs charged for piloting services consistent with the Community principle of freedom to provide services and (ii) is it compatible with Articles 90 and 86 of the EC Treaty for a national authority to enable an undertaking such as the Corporation to charge different tariffs for identical services?

Compatibility of differentiated tariffs with the Community principle of freedom to provide services

A — *Inapplicability of Articles 5, 6 and 59 of the EC Treaty. Applicability* ratione materiae *of Regulation (EEC) No 4055/86*

13. In its first and third questions, the national court asks the Court whether differentiated tariffs for piloting are compatible with three provisions of the EC Treaty, namely Article 5, Article 6 (Article 7 prior to the entry into force of the European Union Treaty) and Article 59.

16 — The Court reserves this right according to a consistent line of cases: see in particular the judgment in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 26, and the judgment in Case 204/87 *Bekaert* [1988] ECR 2029, paragraph 7.

I would observe forthwith that, in my view, Article 5 has no bearing on this case. It appears from the Court's case-law that that provision, which requires the Member States duly to fulfil their Community obligations, has no independent effect in a situation which, like the one in question, is governed — as will be shown — by a specific provision of Community law. [17]

Consequently, the question is whether Articles 6 and 59 of the EC Treaty are applicable. The Court has consistently held that the prohibition of discrimination laid down in Article 6 applies independently only to 'situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination'. [18] Since Article 59 of the EC Treaty lays down such a specific prohibition of discrimination, [19] it will now be necessary for me to consider whether it is applicable in a situation such as the one at issue.

14. In the context of a transport undertaking such as Corsica Ferries, it is clear that Article 59 of the EC Treaty is not independently applicable. According to Article 61(1) of the EC Treaty, 'Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport'. [20] In the celebrated judgment delivered on 22 May 1985 in *European Parliament* v *Council*, the Court inferred from that derogating provision that application of the principles governing freedom to provide services, as established in particular by Articles 59 and 60 of the Treaty, must be achieved, according to the Treaty, *by introducing a common transport policy*. [21] It was on account of that obligation that the Court found against the Council in that judgment under Article 175 of the EC Treaty for failing to ensure freedom to provide services in the sphere of international transport. Accordingly, Articles 59 and 60 are not of direct application in the transport sector [22] — although this does not prevent them (as will be seen in paragraph 23 below) from serving as a reference point when it is a question of the Council's implementing freedom to supply services in that sector.

15. Admittedly, the Commission points out that Corsica Ferries may also be regarded as a *person for whom services are intended* within the meaning of Article 60 of the Treaty. Piloting services are services provided for remuneration which are not, strictly speaking, transport services (nothing and nobody is transported and assistance is merely given to the carrier). From that point

17 — See the judgment in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraph 19.

18 — Judgments in Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 13, in Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, paragraph 12, and in Case C-179/90 *Merci* [1991] ECR I-5889, paragraph 11.

19 — See the recent judgment in Case C-20/92 *Hubbard* [1993] ECR I-3777, paragraph 10.

20 — The provisions on transport are set out in Title IV of Part Two of the EEC Treaty, 'Foundations of the Community'; since the entry into force of the European Union Treaty, they appear in Title IV of Part Three of the EC Treaty, 'Community policies'.

21 — Judgment in Case 13/83 *European Parliament* v *Council* [1985] ECR 1513, paragraph 62.

22 — Judgment in *European Parliament* v *Council*, paragraph 63; see also the judgment in Case 4/88 *Lambregts* [1989] ECR 2583, paragraph 14.

of view, the Commission argues that it might be considered, following the judgments in *Luisi and Carbone* [23] and *Cowan* [24], that Corsica Ferries, as a victim of discriminatory tariffs, can rely on Article 59 of the Treaty. However, I doubt that the judgments in *Luisi and Carbone* and *Cowan* may unquestionably serve as precedents in this case: both those cases concerned natural persons who were carrying out no economic activity within the meaning of the EC Treaty and came within the scope of Community law only because they went to another Member State as tourists or patients, that is to say, as *persons for whom intra-Community services were intended*. The situation is completely different in the case of an undertaking like Corsica Ferries which *offers* domestic and international services and is hindered in providing its cross-frontier services by the fact that higher piloting tariffs are applied to its foreign services than are applied to vessels flying the Italian flag carrying out scheduled services between Italian ports. Consequently, the differentiated tariffs must be considered from the point of view of the hindrance which they pose to Corsica Ferries as a provider of intra-Community services, rather than from the point of view of the restrictions to which they give rise for Corsica Ferries as a recipient of piloting services, which, for it, are merely ancillary services. As I have already stated, this does not, however, prevent the principles of freedom to provide services set out in Article 59 et seq. of the EC Treaty from also being applicable, but in the context of the measures adopted by the Council pursuant to Article 84(2) of the EC Treaty.

16. According to the interpretation of Article 61(1) of the EC Treaty which the Court gave in *European Parliament* v *Council*, the Council was under a duty to ensure freedom to provide services in the transport sector. As regards the *sea transport* sector, a specific legal basis exists, namely the first subparagraph of Article 84(2) of the EC Treaty, which provides that the Council may, acting by a qualified majority — rather than by a unanimous vote as was the case before the Single European Act —, decide 'whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport'. Since late 1986, the Council has adopted various regulations on that basis designed to liberalize this sector. Two of those regulations set out to achieve freedom to provide services. [25]

The first of those regulations — the only one which was applicable at the material time — was Council Regulation (EEC) 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. [26] That regulation entered into force

23 — Judgment in Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

24 — Judgment in Case 186/87 *Cowan* [1989] ECR 195.

25 — The Council also adopted the following regulations on this basis with a view to liberalizing maritime transport: Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4) (adopted on the basis of, *inter alia* , Article 87 of the EC Treaty), Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport (OJ 1986 L 378, p. 14) and Council Regulation (EEC) No 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades (OJ 1986 L 378, p. 21).

26 — OJ 1986 L 378, p. 1. That regulation was amended following German reunification by Council Regulation (EEC) No 3573/90 of 4 December 1990 (OJ 1990 L 353, p. 16).

on 1 January 1987. [27] Article 1 of the regulation confirms the principle of freedom to provide services in the following terms:

'1. 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.

2. The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

3. The provisions of Articles 55 to 58 and 62 of the Treaty shall apply to the matters covered by this Regulation.

4. For the purposes of this Regulation, the following shall be considered "maritime transport services between Member States and between Member States and third countries" where they are normally provided for remuneration:

(a) *intra-Community shipping services:*

the carriage of passengers or goods by sea between the ports of a Member State and any port or off-shore installation of another Member State;

The second regulation which is worth mentioning here (although it was not adopted until after the material facts occurred) is Council Regulation (EEC) No 3577/92 (cited in section 6 above). That regulation applies the principle of freedom to provide services to maritime transport within Member States, namely maritime cabotage. Article 1(1) reads as follows:

'As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of a Member State, provided that these ships

27 — Under Article 12 of the regulation. Article 2 of the regulation contains specific transitional deadlines for unilateral national restrictions on the carriage of certain goods wholly or partly reserved for vessels flying the national flag.

comply with all conditions for carrying out cabotage in that Member State, including ships registered in Euros, once that Register is approved by the Council. '

17. Since this case is concerned with an undertaking providing scheduled services between the Port of Genoa in Italy and ports in Corsica in France, intra-Community shipping services within the meaning of Article 1(4)(a) of Regulation No 4055/86 are manifestly involved (and not cabotage services within the meaning of Regulation No 3577/92, which was not yet applicable at the time of the facts of the main proceedings). As a result, Regulation No 4055/86 is applicable both *ratione materiae* and, as will subsequently be seen, *ratione personae*.

That enables me to give a definitive answer forthwith to the question as to whether Article 6 of the EC Treaty is applicable in this case. The answer is in the negative, since, like Article 59 of the EC Treaty (see section 23 below), Article 1(1) of Regulation No 4055/86 contains a specific expression of the prohibition of discrimination laid down in Article 6 of the EC Treaty. In the absence of such a specific provision, Article 6 would have been applicable. In the judgment delivered in 1974 in *Commission* v *France*, the Court inferred from the special exemption provided by Article 61(1) of the EC Treaty that, in the field of transport, 'the general rules of the Treaty must be applied insofar as they are not excluded', [28] general rules which, according to that judgment, are also applicable to sea and air transport. Under Article 84(2) of the EC Treaty, sea and air transport is excluded solely from the rules of the title of the Treaty on the common transport policy. [29] There is no doubt that the prohibition laid down in Article 6 of the EC Treaty forms part of those general rules.

B — *Applicability* ratione personae *of Regulation No 4055/86*

18. Before tackling the question as to whether Article 1 of Regulation No 4055/86 prohibits discriminatory treatment of a provider of services such as Corsica Ferries, I shall first examine whether Corsica Ferries falls within the scope *ratione personae* of the regulation. As I have already mentioned (in section 8), the Corporation and the Italian Government maintain that, as an undertaking whose vessels fly the Panamanian flag — that is to say, a flag of a third country —, Corsica Ferries cannot rely on the principle of freedom to provide services.

19. I cannot accept that proposition. Unlike Article 1(1) of Regulation No 3577/92, Arti-

28 — Judgment in Case 167/73 *Commission* v *France* [1974] ECR 359, paragraphs 28 and 32.

29 — Paragraph 32 of the judgment cited in the preceding footnote.

cle 1(1) of Regulation No 4055/86 does not provide that 'Community shipowners who have their ships registered in ... a Member State' must be involved. In order for that provision to apply *ratione personae*, it is sufficient for 'nationals of Member States who are established in a Member State other than that of the person for whom the services are intended' to be involved. Nationals or companies who satisfy that requirement may rely on the principle of freedom to provide services even if they sail under the flag of a third country. [30]

As the Commission has observed, the third indent of Article 2 of Regulation No 4055/86 provides an additional argument in favour of that solution. That provision lays down a specific timetable (expiring on 1 January 1993) by which the Member States have to abolish unilateral national restrictions in existence before 1 July 1986 on the carriage of certain goods 'between Member States and between Member States and third countries *in other vessels*' (my emphasis), that is to say, vessels which — unlike the vessels referred to in the first two indents — do not fly the flag of a Member State. It appears from that *specific* derogation that the carriage of goods and persons in vessels not flying the flag of a Member State does fall *in general* within the scope of the rules on freedom to provide services set out in Article 1 of the regulation.

The fact that Corsica Regina and Corsica Victoria are not registered in a Member State would only have any effect if it were to appear that Corsica Ferries did not fall within the first but within the *second paragraph* of Article 1 of Regulation No 4055/86 (which is set out in section 12 *supra*). Under that provision, freedom to provide services applies only to nationals of Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, *if their vessels are registered in that Member State in accordance with its legislation.*

20. In my view, there is not the slightest reason for regarding Corsica Ferries as a shipping company established outside the Community. It is certainly a company established in the Community, with the result that Article 1(1) is applicable to it. In order to determine what is meant by the expression 'establishment in the Community', reference should be made to the case-law on Article 52 of the EC Treaty in which the Court held that

30 — The question of the effect of Community law on national rules relating to the nationality of vessels has nothing whatsoever to do with that question. In the judgment of 4 October 1991 in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 15, the Court held that 'as Community law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member States must comply with the rules of Community law'. For the significance of Community law as regards the nationality of ships, see in general R. R. Churchill, 'European Community Law and the Nationality of Ships and Crews', *European Transport Law*, 1992, pp. 591 to 615.

'the concept of establishment within the meaning of Article 52 et seq. of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period'. [31]

Naturally, account must be taken in this connection of the fact that Corsica Ferries is a company and therefore — since among other things Article 1(3) of Regulation No 4055/86 refers to Article 58 of the EC Treaty (see section 16 above) — it must have its registered office, central administration or principal place of business within the Community in order to be able to qualify for the benefit of freedom to supply services. In this context, it should also be borne in mind that the General Programme for the abolition of restrictions on freedom to provide services — a programme which, as the Court has repeatedly stated, provides useful guidance with a view to the implementation of the provisions of the Treaty on freedom to provide services [32] — provides a definition of the companies and firms which benefit by the abolition of restrictions on freedom to provide services:

' companies and firms formed under the law of a Member State and having their seat prescribed by their statutes, their centre of administration or their main establishment situated within the Community, provided that where only that seat prescribed is situated within the Community their activity shows a real and continuous link with the economy of a Member State; such link shall not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital '. [33]

21. It is clear from the application of those criteria to Corsica Ferries that it is in fact a shipping company established in the Community: as has already been mentioned (in section 2), it is a company incorporated under Italian law whose registered office is in Cagliari and whose activities, in particular the activities at issue (operation of regular scheduled services between the Port of Genoa and ports in Corsica), unquestionably show a real and continuous link with the economy of a Member State. [34]

It also seems clear to me that, not only is Corsica Ferries a 'national of a Member State' within the meaning of Article 1(1) of Regulation No 4055/86, but it also fulfils the requirement of being 'established in a Member State other than that of the person for

31 — Judgment in Case C-246/89 *Commission* v *United Kingdom*, cited in the preceding footnote, at paragraph 21; see also the judgment in Case C-221/89 *Factortame and Others* ('*Factortame II*') [1991] ECR I-3905, paragraph 20.

32 — See in particular the judgment in Case 63/86 *Commission* v *Italy* [1988] ECR 29, paragraph 14.

33 — Title I of the General Programme for the elimination of restrictions on freedom to provide services, OJ English Special Edition, Second Series IX, p. 3.

34 — I would reach the same conclusion if, in addition to the strictly legal criteria, the Tour Ship group were to be regarded as an economic entity: the bulk of the group's activities are located in the Community (France and Italy) and the person who actually controls the group — Mr Lota — is French and resides in Corsica. The fact that before 4 December 1992, it was a Liechtenstein Anstalt — also, as may be assumed, under the Mr Lota's control — which owned 90% of Corsica Ferries is not a determining factor in this connection.

whom the services are intended'. Since the scheduled services which it carries out ply between Corsica and the Port of Genoa, a major proportion of the persons for whom the services are intended unquestionably consists of persons established in another Member State (in particular, France).

Be that as it may, that question has no bearing on the interpretation of Community law requested of the Court, since Article 1(1) of Regulation No 4055/86 refers solely to 'nationals of the Member States'. It might have some relevance to the interpretation of the expression 'shipping company' within the meaning of the *second paragraph* of Article 1, but, as I have just mentioned, that provision is not applicable in this case. [35]

C — *Interpretation of Article 1(1) of Regulation No 4055/86*

22. I would add a brief word about who, in the final analysis, is the *shipowner* in the main proceedings. There was a complete lack of clarity about this at the hearing. Counsel for Corsica Ferries argued that it depends on the definition given to the term 'shipowner': if the criterion employed is the ownership of the vessel, the shipowner is Tour Ship Panama; if the criterion taken is who bears the risk connected with the operation of the undertaking, the shipowner is Corsica Ferries itself; if the criterion is who carries out real control, the shipowner is Mr Lota.

23. I shall now turn to the scope of Article 1(1) of Regulation No 4055/86. Since, as the title of the regulation indicates, that provision is designed to apply to intra-Community shipping transport the principle of freedom to provide services — a fundamental principle of the EC Treaty [36] and its wording is manifestly based on the first paragraph of Article 59 of the EC Treaty, it seems fitting to interpret the provision as consistently as possible with the Court's case-law on the first paragraph of Article 59. The Court has already come out in favour of such an approach which is consistent with the Treaty in the judgment in *European Parliament* v *Commission*, which I cited earlier.

35 — I would point out that there is an amended proposal for a Council Regulation on a common definition of a Community shipowner, which was submitted by the Commission on 27 February 1991 (OJ 1991 C 73, p. 25). It is stated in the conclusions of the European Council held in Edinburgh on 11 and 12 December 1992 that the Commission intended to revise that proposal in the light of the principle of subsidiarity: See *EC Bulletin*, 12-1992, p. 18. In a resolution of 16 September 1993, the Parliament called upon the Commission to maintain its proposal for a regulation and upon the Council to adopt it without delay (OJ 1993 C 268, p. 170).

36 — The Court has long held that this principle is fundamental: see in particular the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 27.

This is borne out by the following paragraph of that judgment:

' However, the Parliament, the Commission and the Netherlands Government have rightly contended that the obligations imposed on the Council by Article 75(1)(a) and (b) include the introduction of freedom to provide services in relation to transport, and that the scope of that obligation is clearly defined by the Treaty. Pursuant to Articles 59 and 60 the requirements of freedom to provide services include, as the Court held in its judgment of 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305), the removal of any discrimination against the person providing services based on his nationality or the fact that he is established in a Member State other than that where the services are to be provided. ' [37]

This is the reason why Article 1 of Regulation No 4055/86 has to be interpreted consistently with the way in which the Court has interpreted Article 59 of the EC Treaty. It appears from the above quotation that this means — as the Court has consistently held — that any discrimination against a person providing services on account of his nationality or on account of the fact that he is established in a Member State other than the one in which the service is provided is prohibited. [38] What is more, not only overt discrimination is prohibited, but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result. [39]

24. Should it be considered in this case that the conditions for obtaining reduced tariffs for piloting services — namely that the vessel using the services has to have a cabotage licence and carry out regular services between Italian ports (see section 6) — constitute discrimination contrary to Community law? The Commission considers that this is in fact the case. At the material time, cabotage licences were granted under Article 224 of the Code only to ships flying the Italian flag. Since, generally speaking, vessels flying the Italian flag belong to Italian nationals or companies, whilst nationals or companies of other Member States do not generally operate with vessels flying the Italian flag, the Commission considers that the aforementioned conditions constitute covert

37 — Judgment in *European Parliament* v *Council*, cited in footnote 21, at paragraph 64. See also the judgments in Joined Cases 209 to 213/84 *Asjes* [1986] ECR 1425, paragraph 37, and in Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 11.

38 — See among recent judgments, the judgments in Case 154/89 *Commission* v *France* [1991] ECR I-659, paragraph 12, in Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, paragraph 15, and in Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 16, (the 'tourist guide' judgments); the judgment in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 19; the 'Mediawet' judgments, Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 14, and Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 10; and the judgments in Case C-106/91 *Ramrath* [1992] ECR I-3352, paragraph 27, and in Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 13.

39 — Judgment in Joined Cases 62/81 and 63/81 *Seco* [1982] ECR 223, paragraph 8; more recently, see in particular the judgment in Case C-360/89 *Commission* v *Italy* [1992] ECR I-3401, paragraph 11.

discrimination based on nationality, which, as the Court has consistently held, is also prohibited.

Although, in my view, the Commission's reasoning is correct, the conclusion that prohibited discrimination is involved in this case can also be reached directly on the basis of the Court's judgment of 13 December 1989 in *Corsica Ferries France*. What was at issue in this case was a French decree levying a charge, borne by the shipowner, on all passengers which, in the case of ships plying between Corsica and mainland France, was levied only when the ship left the Corsican port, whereas ships plying between Corsica and another State were liable to the charge both on arrival at and departure from a Corsican port.

The Court held that

' 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 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 '. [40]

25. Accordingly, it follows from the judgment in *Corsica Ferries France* that it is sufficient in order for there to be an infringement of the principle of freedom to provide services for a Member State to apply to the *exportation* of services, such as intra-Community shipping services, discriminatory treatment by comparison with the treatment given to similar *domestic* services (see also section 28 below). [41] Such discrimination is also involved in this case. It is therefore also prohibited by Article 1(1) of Regulation No 4055/86, which, as I stated earlier, has to be interpreted consistently with Article 59. The fact that, as the Corporation maintains, the differences in the tariffs charged for piloting services had only a limited effect on supplies of services by undertakings such as Corsica France — which, moreover, does not go without saying, having regard to the magnitude of the amounts sought to be recovered — does not affect their incompatibility with Community law: as the Court also held in *Corsica Ferries France*,

' the articles of the EEC Treaty concerning the free movement of goods, persons, services and capital are fundamental Commu-

40 — Judgment in *Corsica Ferries France*, cited in footnote 37, at paragraph 7.

41 — This view is also taken by G. Marenco, 'The Notion of Restriction on the Freedom of Establishment and Provision of Services in the Case-Law of the Court', in *Yearbook of European Law*, Volume 11, Oxford, Clarendon Press, 1992, (111), p. 144.

nity provisions and any restriction, *even minor*, of that freedom is prohibited '. [42]

Lastly, it is clear that Article 1(1) of Regulation No 4055/86 has direct effect. [43] Corsica Ferries is entitled in any event to rely on that direct effect as regards the differences in tariffs charged for piloting services, which, in this case, were approved by ministerial circular and can therefore be deemed to emanate from the public authorities. Moreover, it seems desirable to me that, following the example of the case-law on the Treaty provisions on services, [44] the principle set out in the aforesaid provision should also apply to a trade association such as the Corporation, which was set up by decree of the President of the Republic and has a degree of collective power to make regulations.

26. The Corporation and the Italian Government have sought to persuade the Court that the differences in tariffs could be *objectively justified*. In their contention, the piloting services were necessary to ensure the safety of vessels moving in and around the port. The Italian Government further stressed at the hearing that the application of differentiated tariffs was a choice of national transport policy which was completely compatible with the principles of Community law. The preferential tariff applied to vessels engaged in cabotage sought, it was maintained, to make this form of transport competitive with road transport, which is overcrowded and a big source of pollution. In that respect, the differentiated tariffs also constituted an environment policy choice, since cabotage caused much less pollution than road transport. Lastly, the Italian Government stated that until the end of December 1992, that is to say, before Regulation No 3577/92 entered into force, it was perfectly lawful to place maritime transport at an advantage in this way, since there was not yet a common transport policy with regard to cabotage.

27. Although I can agree that piloting services do have a function to perform with a view to ordering movements in and around the port and in that respect are concerned with public security in the broad sense — a ground of justification expressly recognized in Article 56 of the EC Treaty, which is applicable in this case as a result of Article 1(3) of Regulation No 4055/86 (see section 12 above) —, I cannot see why a difference in the tariffs charged for those services is necessary in order to ensure shipping safety. [45]

42 — Judgment in *Corsica Ferries France*, paragraph 8 (my emphasis). See also, as regards freedom of establishment, the judgment in Case 270/83 *Commission* v *France* [1986] ECR 273, end of paragraph 21, and, as regards free movement of goods, the judgment in Case C-126/91 *Yves Rocher* [1993] ECR I-2361, paragraph 21 (in which an exception was made for purely hypothetical barriers).

43 — As its final sentence states, the regulation of which this provision forms part is binding in its entirety and directly applicable in all Member States in accordance with the second paragraph of Article 189 of the EEC Treaty.

44 — See, as regards Article 59 of the EC Treaty, the judgments in Case 36/74 *Walrave* [1974] ECR 1405, paragraph 17, and in Case 13/76 *Dona* [1976] ECR 1333, paragraph 17.

45 — It appears from the judgment in Case 16/78 *Choquet* [1978] ECR 2293, paragraph 8, that the requirements for the safety of highway traffic may in any event constitute a ground of general interest justifying non-discriminatory restrictions on freedom to provide services.

The same reservation essentially applies to the national transport and environment policy choices prayed in aid. Whilst it is true that reasons relating to transport infrastructure and environment protection certainly qualify as grounds for non-discriminatory restrictions on intra-Community services, [46] it seems to me that the application of differentiated tariffs is by no means *necessary* in order to achieve the policy objectives promoted, even regardless of the fact that it is not certain that the differentiated tariffs at issue, which have discriminatory effects, are capable of being justified on the grounds of policy aims which can be relied on only in order to support non-discriminatory restrictions. [47] In order to make maritime transport within Italy competitive with transport over land, it would have been sufficient — and even appropriate — to make piloting tariffs cheaper for all vessels; it was not necessary to that end to apply differentiated tariffs depending on whether or not the vessels were flying the Italian flag. It is clear, moreover, from the circular of 18 December 1992 (see section 6 above), which extended the tariffs applicable to vessels licensed for cabotage operations to vessels flying the flag of another Member State, that a different solution was possible. Consequently, the differential tariffs in force until that time were not necessary in order to achieve the aims pursued and hence do not comply with the principle of proportionality.

Lastly, as regards the argument based on Regulation No 3577/92, it is true that it was only through the adoption of that regulation that the Council finally implemented the principle of freedom to provide services in the field of maritime transport within Member States. However, that simply means that, until that regulation entered into force, Community law allowed the Member States to apply restrictions with regard to the provision of services *in the field of cabotage*. [48] In contrast, as far as the provision of services in the field of intra-Community shipping transport — as is at issue in the main proceedings — was concerned, the Member States were under a duty to abolish restrictions as from 1 January 1987, that is to say, as from the entry into force of Regulation No 4055/86.

28. The only point remaining to be examined is whether, as a company incorporated under Italian law whose principal place of

46 — It appears from the Court's case-law on the free movement of goods that environment protection in particular may be invoked as a ground of general interest in order to justify restrictions on intra-Community trade: see the judgments in Case 240/83 *ADBHU* [1985] ECR 531, paragraph 13, in Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraphs 8 and 9, and in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, paragraph 32.

47 — The Court has consistently held that national rules which are not applicable to services without distinction as regards their origin are compatible with Community law only if they can be brought within the scope of an express derogation, such as Article 56 of the EC Treaty: for recent confirmation, see, *inter alia*, the recent judgment in *Collectieve Antennevoorziening Gouda*, cited in footnote 38, at paragraph 11; see also the judgments in Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraph 11, and in *Distribuidores Cinematográficos*, also cited in footnote 38, at paragraph 16.

48 — For the possibility of Member States' applying restrictions on freedom to provide services in the field of *intra-Community maritime transport* prior to the entry into force of Regulation No 4055/86, see the judgment in *Corsica Ferries France*, cited in footnote 37, at paragraph 14.

business is located in Italy, Corsica Ferries can actually rely on Article 1(1) of Regulation No 4055/86 as against the *Italian* authorities. To my mind, the proper starting point should be the following considerations set out by the Court in the 'tourist guide' judgments:

' 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. ' [49]

29. It is clear from what I have already said that here all the relevant elements are not confined within a single Member State: the mere fact that Corsica Ferries provides regular scheduled services between the Port of Genoa and ports in Corsica is a relevant intra-Community element (see section 17 above). However, it is true that the case-law which I have just cited applies Article 59 of the EC Treaty to services which are provided in a *Member State in which they are received* irrespective of the place in which the recipient of the service is established, whereas the question arising in the present case is instead whether the principle of freedom to provide services can also be relied on against the *Member State from which the provider originates*, Italy, in this case, in view of the fact that Corsica Ferries is a company incorporated under Italian law.

I nevertheless take the view that this question should be answered in the affirmative, since the services provided in this case are, *by reason of their nature*, intended for both recipients from another Member State and for nationals, more specifically for both French recipients (and travellers from other Member States) and Italian recipients. A brief comparison with the case-law on the free movement of persons should suffice to elucidate my view: the Court has confirmed, *inter alia*, that Community nationals (or companies and firms within the meaning of Article 58 of the EC Treaty) may rely on the Treaty provisions in question (namely Article 48 or 52) against their Member State of origin where that Member State applies measures which make it more difficult for them to establish themselves or work in another Member State (or even in their own Member State). This may be the case, for example, where it prohibits them from leaving their

49 — Judgments, cited in footnote 38, in Case C-154/89 *Commission* v *France*, at paragraphs 9 and 10, in Case C-180/89 *Commission* v *Italy*, at paragraphs 8 and 9, and in Case C-198/89 *Commission* v *Greece*, at paragraphs 9 and 10. The last paragraph cited has been expressly confirmed by the Court in paragraph 12 of the judgment in *Hubbard*, cited in footnote 19.

own country, [50] where it refuses to recognize professional qualifications acquired by its nationals in another Member State [51] or where it puts restrictions on the use of a university degree obtained in another Member State [52] or, more generally, where it treats them less favourably when they wish to work in more than one Member State, for instance by subjecting them to more burdensome treatment in the field of social security. [53]

To my mind, the same principle should apply in the sphere of freedom to provide services, as is confirmed by the judgment in *Corsica Ferries France* , cited in section 24 above: [54] where a Member State of origin restricts the supply of services by one of its nationals or by companies incorporated under its law, such restrictions are, in principle, incompatible with the Community principle of freedom to provide services and the providers of services concerned may rely on that principle against their own Member State where, as in this case, the services provided are, by reason of their nature, also intended for recipients from other Member States.

Compatibility with Articles 86 and 90 of the EC Treaty of a measure of a national authority authorizing an undertaking such as the Corporation to apply differentiated tariffs

30. In question 5(a) and (b), the national court seeks to establish whether it is compatible with the *first paragraph of* Article 90 in conjunction with Article 86 of the EC Treaty for a national authority to authorize an undertaking such as the Corporation to charge, for like services, different tariffs depending on whether the vessels concerned are flying the national flag or the flag of another State. In its question, the national court starts out from the premiss that the Corporation should be regarded as 'a dominant undertaking which has been granted exclusive rights over a substantial part of the common market'.

In order to answer this question properly, I must first consider whether the Corporation should in fact be regarded as an undertaking which has been granted special or exclusive rights within the meaning of Article 90(1) of the EC Treaty. I shall then examine whether the charging of differentiated tariffs constitutes an abuse of a dominant position in a substantial part of the common market.

50 — Judgment in Case 81/87 *Daily Mail* [1988] ECR 5483, paragraph 16.

51 — Judgment in Case 115/78 *Knoors* [1979] ECR 399, paragraph 24.

52 — Judgment in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32.

53 — Judgments in Case 143/87 *Stanton* [1988] ECR 3877, paragraphs 13 and 14, and in Joined Cases 154/87 and 155/87 *Wolf and Others* [1988] ECR 3897, paragraphs 13 and 14.

54 — This case was concerned with a company incorporated under French law which relied on Article 59 of the EC Treaty against the French authorities on the ground that the intra-Community services which it provided were subject to discriminatory treatment in comparison with similar domestic services.

A — *Is the Corporation an undertaking to which special or exclusive rights have been granted within the meaning of Article 90(1) of the EC Treaty?*

31. I take the view that the starting point for considering whether the Corporation is an undertaking within the meaning of Article 90(1) of the EC Treaty (the national court's question is not concerned with Article 90(2)) should be the judgment in *Merci*. [55] The dispute in the *Merci* case was also concerned with the Port of Genoa. It related to operations for the loading, unloading, transhipment and movement of goods in the dock in respect of which Article 110 of the Code conferred an exclusive right on the dock corporations. The Court held as follows:

' a dock-work undertaking enjoying the exclusive right to organize dock work for third parties, as well as a dock-work company having the exclusive right to perform dock work must be regarded as undertakings to which exclusive rights have been granted by the State within the meaning of Article 90(1) of the Treaty '. [56]

The Corporation (as I mentioned in section 4 above) was established by decree of the President of the Republic under Article 86 of the Code. It is not contested that the Corporation has an exclusive right to provide piloting services in the Port of Genoa. It also appears to me to be indisputable that, despite its special legal form as a trade association and the fact that it is recognized by decree of the President of the Republic, the Corporation is an undertaking for the purposes of the application of the Community provisions on competition, as the Corporation itself acknowledges in its written observations: it is in all respects an entity engaged in an economic activity through its members and, as the Court held in the judgment in *Höfner and Elser*, [57] its legal status and the way in which it is financed have no relevance in this connection. It must therefore be considered that an undertaking such as the Corporation is an undertaking to which a Member State has granted exclusive rights within the meaning of Article 90(1) of the EC Treaty.

B — Does the charging of differentiated tariffs constitute an abuse of a dominant position within the meaning of Article 86 of the EC Treaty?

32. The fact that the Corporation is an undertaking to which exclusive rights have been granted within the meaning of Article 90(1) of the EC Treaty has important

55 — The judgment in *Merci* , cited in paragraph 18, also contains, in paragraphs 25 to 28, sufficient indications as to the applicability of Article 90(2) which may be applied to the present case by analogy.

56 — Judgment in *Merci* , paragraph 9.

57 — Judgment in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; this case-law has recently been confirmed in the judgment in Joined Cases C-159/91 and C-160/91 *Poucet* [1993] ECR I-637, paragraph 17.

consequences for the applicability of Article 86 of the EC Treaty. As has been confirmed in particular by the judgment in *Merci* and, even more recently, by the judgment in *Corbeau*, the Court has consistently held that

' an undertaking having a statutory authority over a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty '. [58]

The question arising is therefore whether the Corporation has a dominant position in 'a substantial part of the [common] market'. In the judgment in *Merci*, the Court held as follows with regard to dock-work undertakings with a legal monopoly over the loading, unloading and transhipment of goods in Genoa docks:

' As regards the definition of the market in question, it may be seen from the order for reference that it is that of the organization on behalf of third persons of dock work relating to ordinary freight in the Port of Genoa and the performance of such work. Regard being had in particular to the volume of traffic in that port and its importance in relation to maritime import and export operations as a whole in the Member State concerned, that market may be regarded as constituting a substantial part of the common market '. [59]

The parties intervening in these proceedings are at odds as to whether or not the market in piloting services in question constitutes a substantial part of the common market. The Italian Government argues that it does not, on the ground that the piloting services constitute only a negligible part of commercial activity in the sea transport sector. In my view, that argument will not stand up. The market in question is the market in piloting services in the Port of Genoa. The main argument deployed by the Court in the judgment in *Merci* in order to find that a substantial part of the common market was involved can be applied in this case too: in view of the quantities transhipped in the Port of Genoa, the importance of that port from the point of view of aggregate import and export activities in Italy and the fact that the piloting service has been made compulsory for all ships, it must be concluded that the Corporation has a dominant position in a substantial part of the common market.

58 — Judgment in *Merci*, paragraph 14; judgment in Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 9. See also the judgments in *Höfner and Elser* , cited in footnote 57, at paragraph 28, in *ERT*, cited in footnote 38, at paragraph 31, and in Case C-18/88 *RTT* [1991] ECR I-5941, paragraph 17.

59 — Judgment in *Merci*, paragraph 15.

33. In contrast, I am not at all convinced by the arguments of the Corporation itself, which essentially asks the Court to revise the assessment which it made in the judgment in *Merci*. The Corporation relies on two new factors in this regard. The first is the fact that, since the judgment in *Merci* was delivered, a specific Italian law on competition has entered into force which enables inquiries to be initiated into monopolistic situations such as the one at issue in the main proceedings. In order to respond to this point, I shall merely refer to that which the Court has consistently held since the judgment in *Wilhelm*, namely:

' Community law and national law on competition consider restrictive practices from different points of view. Whereas Articles 85 and 86 regard them in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of the considerations peculiar to it and considers restrictive practices only in that context '. [60]

The fact that the new Italian legislation on competition is strongly based on the Community provisions on competition does not alter the difference of perspective mentioned in the passage quoted.

The second 'new factor' relied upon by the Corporation, namely the establishment of the internal market, is more remarkable still. It argues that the integration of the market achieved thereby makes the function of competition law as an instrument for integrating the national markets largely redundant. In accordance with the principle of subsidiarity enshrined in the new Article 3b of the EC Treaty (added by the European Union Treaty), Community competition law should henceforth concentrate on cases of real importance for the internal market and cases of lesser importance should be left to the national authorities. I shall not pay more attention to that argument than it deserves. It is sufficient to observe that the achievement of an important programme of *legislation* such as that relating to the internal market does not prove that an advanced degree of *economic* integration of the national markets has been achieved, and that according to Article M of the European Union Treaty the principle of subsidiarity enshrined in Article 3b of the EC Treaty cannot detract from the '*acquis communautaire* ', including the interpretation which the Court has developed of the conditions for the application of Article 86 of the EC Treaty.

34. The Italian Government argues that the differences in tariffs do not constitute an *abuse of a dominant position* within the meaning of Article 86 of the EC Treaty. It maintains that the differences are justified on

60 — Judgment in Joined Cases 253/78 and 1 to 3/79 *Giry and Guerlain* [1980] ECR 2327, paragraph 15. See the judgment in Case 14/68 *Wilhelm* [1969] ECR 1, paragraph 3, delivered as long ago as 13 February 1969. As regards the relationship between the Community provisions on competition and national rules on the supervision of a particular economic sector, see the judgment in Case 45/85 *Verband der Versicherer* v *Commission* [1987] ECR 405, paragraph 23.

the ground that intra-Community shipping transport is not in competition with the domestic shipping transport activity of cabotage. That argument is not convincing. What is important is that there is no connection between those differences in tariffs and the nature of the piloting service offered, which is precisely the same in both cases (whether, in the first case, vessels with a cabotage licence or vessels making regular trips between Italian ports are involved or, in the second case, other vessels). For my part, I consider that what is involved here is clearly an instance of the form of abuse of a dominant position which is covered by indent (c) of the second paragraph of Article 86 of the EC Treaty, namely

' applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage '. [61]

It appears implicitly from the Community case-law, in particular the judgments in *United Brands* [62] and in *Merci*, [63] that the Court does not interpret that phrase restrictively, with the result that it is not necessary, in order to apply it, that the trading partners of the undertaking responsible for the abuse should suffer a competitive disadvantage *against each other or against the undertaking in the dominant position.*

It also appears clear to me that the differences in tariffs at issue *may affect trade between Member States*, as is required for the application of Article 86 of the EC Treaty. Since the Port of Genoa is an international port, charging higher piloting tariffs to vessels not flying the Italian flag — and presumably the majority of vessels belonging to shipowners from other Member States fall into this category — may unquestionably have an adverse effect on intra-Community trade. [64] Moreover, the Court has consistently held that

' Article 86 does not require it to be proved that the abusive conduct has in fact apprecia-

61 — In this respect, a parallel may be drawn with the situation at issue in the case of *United Brands* (judgment in Case 27/76 *United Brands* [1978] ECR 207): there the Court held that the discriminatory pricing policy practised by UBC, which invoiced distributor/ripeners at prices which differed from one Member State to another for identical quantities and types of bananas constituted an abuse of a dominant position on the ground that '[t] hese discriminatory practices, which varied according to the circumstances of the Member States, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of bananas while still green and by reducing the deliveries of the quantities ordered' (paragraph 232) and that 'a rigid partitioning of national markets was thus created at price levels which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been competition had thereby been distorted' (paragraph 233). The same reasoning can be applied *mutatis mutandis* in the present case: the differentiated tariffs charged by the Corporation constitute an obstacle to freedom to provide intra-Community shipping transport services and place persons providing such services at a disadvantageous competitive position.

62 — Cited in the preceding footnote.

63 — See paragraphs 18 and 19 of that judgment.

64 — Cf. paragraph 20 of the judgment in *Merci*, where, in order to answer the question whether the rules at issue were liable to affect trade between the Member States, the Court referred to what it held in paragraph 15 of that judgment (quoted above in the body of my Opinion).

bly affected trade between Member States but that it *is capable* of having that effect'. [65]

35. Article 90(1) of the EC Treaty prohibits Member States from enacting or maintaining in force, in the case of undertakings to which they have granted exclusive rights, measures 'contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94'. [66] The Court has stated that that provision prohibits Member States from, *inter alia*, adopting or maintaining in force any measure which could deprive Articles 85 and 86 of the EC Treaty of their effectiveness. [67] Where, in accordance with Article 91 of the Code (see section 4 above), the Italian Minister for the Merchant Navy approves by law discriminatory piloting tariffs which are the result of an abuse of a dominant position, in my view his action simply falls within the prohibition set out in Article 90(1), certainly when that provision is read in conjunction with the second paragraph of Article 5 of the EC Treaty, which requires Member States to abstain from any measure which could jeopardize the attainment of the objectives of the EC Treaty. [68]

Conclusion

36. In view of the foregoing, I propose that the Court should answer the national court's questions as follows:

(1) it is not necessary to answer questions 2, 4 and 5(c);

65 — Judgment in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 104 *in fine* (my emphasis); see also the judgments in Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraph 20, and in *Höfner and Elser*, cited in footnote 57, at paragraph 32. See also the judgments of the Court of First Instance in T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraph 76, and in Case T-70/89 *BBC* v *Commission* [1991] ECR II-535, paragraph 64. The Court of Justice gave an even broader interpretation in the judgment in Case 247/86 *Alsatel* [1988] ECR 5987, paragraph 11, that is to say, that Article 86 of the EC Treaty covers all practices 'which may influence, directly or indirectly, actually or potentially, patterns of trade between the Member States and thereby hinder the economic interpenetration intended by the Treaty'.

66 — In the Dutch language version, the authors of the European Union Treaty omitted to alter the reference to Article 7, which has been renumbered Article 6.

67 — Judgment in *ERT*, cited in footnote 38, at paragraph 35. See also the earlier judgment in Case 13/77 *INNO* [1977] ECR 2115, paragraphs 31 and 32.

68 — Compare the judgment in Case 66/86 *Ahmed Saeed* [1989] ECR 803, paragraph 3 of the operative part, in which the Court ruled that Articles 5 and 90 of the Treaty precluded the approval by national authorities of tariffs resulting from tariff agreements contrary to Article 85(1) of the EC Treaty.

(2) it is contrary to the Community principle of freedom to provide services, which, in the case of maritime transport between the Member States, is laid down in Article 1(1) of Regulation No 4055/86, to charge, for identical piloting services, a different tariff depending on whether an undertaking providing transport services between two Member States is involved or an undertaking providing such services between ports located in the national territory;

(3) it is contrary to Article 90(1) and Article 86 of the EC Treaty for a national authority to authorize an undertaking to which exclusive rights have been granted over a substantial part of the common market to apply the aforementioned discriminatory tariffs.