OPINION OF ADVOCATE GENERAL COSMAS
delivered on 10 December 1996 *

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I — Preliminary observations

1. The Tribunale di Genova has submitted to the Court of Justice, pursuant to Article 177 of the EC Treaty, a number of questions for a preliminary ruling concerning the compatibility with Community law of the monopoly established by the port authority in favour of a harbour company for the provision of anti-pollution surveillance and intervention services in the Port of Genoa.

2. This case calls for consideration of the extent to which the various services compulsorily provided by the ports in the Member States are compatible with Article 86 of the Treaty. The issue here bears certain similarities to the question raised in an earlier reference by the same court in the case of *Merci Convenzionali Porto di Genova* v *Siderurgica Gabrielli*, [1] concerning both the national legislative framework and the organization of activities in the Port of Genoa, on which the Court of Justice delivered judgment on 10 December 1991 (hereinafter 'the judgment in *Merci*').

3. It is important, in my view, because it affords the Court of Justice an opportunity to clarify to what extent protection of the environment is or is not a core public authority activity and, consequently, whether a body whose main task is preventing pollution is exercising an activity that constitutes a State responsibility.

II — Legislative framework

A — *Community provisions*

4. Article 86 of the Treaty prohibits, as incompatible with the common market, any abuse of a dominant position by an undertaking which may affect trade between Member States. It provides that:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

1 — Case C-179/90 [1991] ECR I-5889.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) ...

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

5. Article 90 of the Treaty provides that:

'1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. ...'

B — *The national legislation*

6. The Port of Genoa is managed by a public body, the Consorzio Autonomo del Porto (hereinafter 'the CAP'), [2] upon which responsibilities for the management of the port of both an administrative and economic nature have been conferred by law.

7. By Order No 14 of 1 July 1986, the President of the CAP approved regulations

2 — On 30 December 1994 the CAP was replaced by the Autorità Portuale (Port Authority), pursuant to Law No 84 of 28 January 1994 reforming harbour legislation.

governing port police and security at the Porto Petroli of Genoa-Multedo, that is to say the petroleum products terminal of the Port of Genoa (hereinafter 'the Porto Petroli').

8. Order No 32 of the President of the CAP, of 23 July 1991, amended the earlier regulations by creating a compulsory surveillance and rapid intervention service in order to protect the maritime area of the Porto Petroli against the threat of pollution caused by spills of hydrocarbons.

9. By Decree No 1186 of 30 August 1991, the President of the CAP entrusted that service, in the form of an exclusive concession, to Servizi Ecologici Porto di Genova SpA (hereinafter 'SEPG').

10. Under Article 1 of Order No 32 of the President of the CAP, the following responsibilities have been entrusted to SEPG:

(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 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 ;1substances and fully cleansing the waters in question.

11. By Decree No 1191 of 30 August 1991, the President of the CAP approved the tariffs to be charged by SEPG for the provision of the relevant services to vessels using the installations of the Porto Petroli. The tariffs are calculated on the basis of the vessel's tonnage and the quantities transported as well as the duration of the intervention when in fact required. Under that decree all vessels, regardless of their provenance or nationality, that use the Porto Petroli terminal installations to load or unload petroleum products and petrochemicals are required to pay for the pollution prevention/intervention service, according to the tariffs drawn up by SEPG.

12. However, the abovementioned decisions of the President of the CAP did not provide for the fees to be applied to the harbour company, Porto Petroli di Genova SpA, which the CAP had made responsible for carrying out the technical operations of loading and unloading petroleum, chemical and petrochemical products in the Porto Petroli.

III — Facts

13. On several occasions between 1992 and 1994 Diego Calì & Figli Srl (hereinafter 'Calì'), a company governed by Italian law which transports petrochemical products by sea in tankers on behalf of third parties, used berths West 2 and West 3 of the Porto Petroli [3] to unload acetone. [4]

14. There are no other terminals in the Ligurian Gulf in which chemicals and petrochemicals can be loaded and unloaded. [5]

15. The actual unloading operations were carried out not by Calì but by the harbour company, Porto Petroli di Genova SpA. Calì's vessels, however, were equipped with their own anti-pollution equipment and systems.

16. SEPG invoiced Calì for a total of LIT 8 708 928 for 'services provided'. Calì refused to pay, objecting that it had never approached SEPG to request any anti-pollution service in the Port of Genoa.

3 — The national court has explained that berths West 2 and West 3 are used solely for loading and unloading chemical and petrochemical products, whilst berths 1, 2, 3 and 4 of the Porto Petroli are used for loading and unloading petroleum products.

4 — As the Commission points out (in paragraph 9 of its written observations), according to the Community legislation in force, acetone is a hazardous chemical product because it is highly flammable but it is not a pollutant of the marine environment.

5 — As the Commission points out (in paragraph 7 of its written observations), the Porto Petroli at Genoa is Italy's principal port both because of its strategic position and the large quantities of goods transported, given its proximity to the major industrial regions of north-west Italy. According to the evidence produced, in 1993, the petroleum and chemical products handled accounted for more than 50% of the total of goods transported through the Gulf of Genoa, making up 23 830 000 tonnes of a total of 43 225 000 tonnes. Moreover, the volume of those products passing through the port of Genoa was appreciably greater than the total volume of products in the same sector that passed through the ports of La Spezia, Livorno and Savona. Finally, the Petroleum Port of Genoa is Italy's principal port for petroleum products accounting for 15% of the total volume of petroleum products handled in Italy as a whole. According to Calì, in 1995, more than 50% of the products transported through the Gulf of Genoa were petroleum, chemical and petrochemical products. To be precise: 27 417 550 tonnes of petroleum products and 1 387 tonnes of petroleum waste, and 745 553 tonnes of chemical products and 622 tonnes of chemical waste were carried.

17. On 22 December 1994, SEPG obtained an order from the Tribunale di Genova requiring Calì to pay the sum in question.

IV — The questions submitted by the national court

18. In the course of the proceedings brought by Calì contesting that order to pay, the Tribunale di Genova referred to the Court of Justice, by decision of 12 October 1995, three questions for a preliminary ruling:

'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 the 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?'

V — Replies to the questions submitted

A — *Admissibility of the questions submitted*

19. In its appeal against the order to pay, Calì argued that there were two possible approaches to resolving the dispute, the second of which required an interpretation of Article 86 of the Treaty.

20. Specifically, according to Calì, were the Tribunale to accept that the CAP's decisions had to be interpreted as applying solely to vessels loading and unloading petroleum products in the Porto Petroli but did not concern vessels engaged in similar operations for petrochemicals, there would be no need to refer to the Court of Justice for a preliminary ruling in order to resolve the dispute. Such a reference would, however, be necessary were the Tribunale to accept that the fees charged for the provision of services by SEPG to vessels using the installations of the Porto Petroli apply without distinction to all vessels that dock at that port or load or unload petroleum or petrochemical products.

21. The United Kingdom Government also points out that since the national court has not resolved this important issue of national law, there is no need for the matter to be

referred to the Court of Justice as the latter would then be ruling on a hypothetical question; the United Kingdom Government cites the judgment in *Meilicke* in this connection. [6]

22. The arguments put forward by Calì and the United Kingdom Government cannot, in my view, be accepted. In accordance with consistent case-law, it is for the national courts, which alone are able directly to establish the facts of a case, to decide, having regard to the particular features of each case, as to both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions referred to the decision to be taken in the case before them. [7] Moreover, the Court of Justice has made clear, on a number of occasions, that the discretion enjoyed by the national court, under Article 177 'includes a discretion to decide at what stage of the procedure it is appropriate to refer a question to the Court for a preliminary ruling'. [8]

23. In the light of the aforementioned case-law and given that the Court of Justice has before it 'the matters of fact or law necessary to give a useful answer to the questions submitted to it', [9] the questions submitted by the Tribunale di Genova cannot be held to be manifestly without relevance for the resolution of the dispute pending before that court. [10] Consequently, 'in so far as the quotation of the provision in question is not incorrect on the face of it' the Court of Justice should examine the questions referred. [11]

B — Substance

24. In submitting its questions to the Court of Justice, the national court is seeking a ruling as to whether in the case of SEPG there is an abuse of a dominant position within the common market or a substantial part thereof that may affect trade between Member States within the meaning of Article 86 of the Treaty.

25. The first question that needs to be clarified plainly concerns whether SEPG actually constitutes an undertaking in terms of the Community rules on competition and, if it does, the Court is then being asked to determine the market within which it will consider whether SEPG holds a dominant position.

6 — Case C-83/91 *Meilicke* v *ADV/ORGA* [1992] ECR I-4871, paragraphs 29-32.

7 — See, for instance, Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 25. See also Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, paragraph 25 and Case C-127/92 *Enderby* v *Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, paragraph 10.

8 — See, in particular, Case C-348/89 *Mecanarte* v *Metalurgica da Lagoa* [1991] ECR I-3277, paragraph 48 and prior to that Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* v *Government of Ireland and Others* [1981] ECR 735, paragraph 5 et seq. and Case 338/85 *Pardini* v *Ministero del Commercio con l'Estero* [1988] ECR 2041, paragraph 8.

9 — *Meilicke*, cited in footnote 6 above, paragraph 32.

10 — See also Case 14/86 *Pretore di Salò* v *Persons Unknown* [1987] ECR 2545, paragraph 16.

11 — See Case 13/68 *Salgoil* v *Italy* [1968] ECR 453.

(1) *Does SEPG constitute an undertaking?*

26. The German Government and Calì consider that, in accordance with the judgments in *Merci* [12] and *Corsica Ferries*, [13] SEPG does constitute an undertaking that holds a dominant position in a substantial part of the common market.

27. Calì contends that the relationship between SEPG and the CAP, the public body that granted the concession, is of an administrative nature, whereas the relationship between SEPG and users of the Porto Petroli is based on a compulsory contract, not entered into freely by the contracting parties but imposed by the port authority, the CAP, which requires the contracting carrier to use the anti-pollution surveillance service provided by SEPG.

28. According to the Italian Government, it is clear from the aim and object of the service administered by SEPG in the form of an exclusive concession that this is an activity very different from the other harbour services to which the questions submitted to the Court of Justice in the *Merci* and *Corsica Ferries* cases related, as this activity consists in anti-pollution surveillance and is designed to guarantee port safety in order to protect the maritime environment (paragraph 3 of the Italian Government's observations).

29. SEPG maintains that by providing surveillance and anti-pollution services in the Porto Petroli, available to all vessels which dock there, it is ensuring what is described as 'passive' port safety and the safety of the neighbouring densely populated districts of Genoa as well as the adjacent tourist areas. The decision determining the compulsory fees charged in invoices issued to vessels docking in the port is open to challenge in the administrative courts. As regards the actual services provided to combat pollution should an accident occur, SEPG contends that these are not compulsory services since the polluter (if identified) may commission those same services from an undertaking of its choosing, at its own expense.

30. It is therefore necessary to establish whether, as regards its anti-pollution activity in the Porto Petroli, its principal activity, the exercise of which together with the issue of invoices has given rise to this case, SEPG is engaged in an economic activity and is, consequently, subject to the rules on competition, as maintained by the German Government, the Commission and Calì. The other possibility would be to consider this activity by SEPG to be bound up with the exercise of public authority powers, an argument put forward by the French Government and by SEPG itself in their observations; that, more-

12 — Cited in footnote 1 above.

13 — Case C-18/93 *Corsica Ferries Italia* v *Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783.

over, is a possibility that the Commission too does not omit to mention in its written observations.

31. I shall begin by considering the case-law of the Court of Justice on entities which constitute undertakings within the meaning of the Community rules on competition, and then go on to consider the crucial question of whether SEPG itself constitutes an undertaking.

(a) The case-law of the Court of Justice

32. The Court of Justice has had on several occasions to consider what entities are covered by the concept of undertaking and, consequently, subject to the Community rules on competition. It has ruled that 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. [14] In its case-law, therefore, the Court of Justice always gives the concept of undertaking a broad interpretation. It is therefore absolutely indispensable to establish whether the activity of a body or an administrative authority constitutes the exercise of official authority or the pursuit of an economic activity of an industrial or commercial nature which is 'capable of being carried on, at least in principle, by a private undertaking with a view to profit'. [15]

33. There are several examples in the case-law of the Court of Justice. In *Höfner and Elser* the Court of Justice held the German Bundesanstalt für Arbeit to be an undertaking because that public body is engaged in economic activity as an independent unit in the employment sector in a broad sense. [16]

34. The *Merci* [17] case concerned the market for the organization, on behalf of third parties, of the loading and unloading of ordinary freight in the Port of Genoa, by a specific dock-work undertaking and the carrying-out of that work by a specific dock-work company. It was common ground in that case that these were undertakings engaged in economic activity. The Court of Justice ruled that the undertakings in question had to be regarded as undertakings to which exclusive rights had been granted by the State within the meaning of Article 90(1) of the Treaty. It further held that such a

14 — See, more particularly, Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 21.

15 — See point 9 of the Opinion of Advocate General Tesauro in Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43.

16 — More specifically, in the judgment in *Höfner and Elser* (cited at footnote 14 above) concerning a public employment agency engaged in the business of employment procurement, the Court of Justice recognized that that body may be classified as an undertaking and established that, in the context of competition law 'employment procurement is an economic activity', going on to explain (paragraph 22) that 'the fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities.' The Court concluded (paragraph 23) that such an agency 'may be classified as an undertaking for the purpose of applying the Community competition rules'.

17 — Cited in footnote 1 above.

dock-work undertaking and/or company could not be regarded 'as being entrusted with the operation of services of general economic interest', within the meaning of Article 90(2) of the Treaty. [18]

35. In its *Corsica Ferries* [19] judgment concerning the market in compulsory piloting services in the Porto Petroli of Genoa, administered by the Corporation of Pilots of the Port of Genoa (*Corporazione Piloti del Porto di Genova*), the nature of which as an undertaking was not in dispute, the Court of Justice ruled, as in the *Merci* judgment, that the corporation in question 'has received from the public authorities the exclusive right to provide compulsory piloting services in the Port of Genoa', [20] within the meaning of Article 90(1) of the Treaty.

36. In the *SAT Fluggesellschaft* case, [21] the Court of Justice had to ascertain whether the activities of that body, which is responsible in particular for the common organization of air navigation services in the air space of the signatory States, constituted activities within the meaning of Articles 86 and 90 of the Treaty, and, after considering the nature of those activities, their purpose and the rules governing them, [22] the Court concluded that the body in question was not an undertaking within the meaning of those articles.

37. The Court of Justice ruled that: [23] 'Taken as a whole, Eurocontrol's activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers relating to the control and supervision of air space which are typically those of a public authority. They are not of an economic nature justifying the application of the Treaty rules of competition.' [24] The Court therefore held that the collection of route charges formed an integral part of Eurocontrol's activities as a whole, [25] but did not examine whether, exclusively in the

18 — Ibid., paragraph 28.

19 — Cited above at footnote 13.

20 — Ibid., paragraphs 39 and 42.

21 — Cited in footnote 15 above. The dispute in that case was brought before the Belgian courts by Eurocontrol and concerned the recovery of route charges owed by an airline (SAT Fluggesellschaft) for the flights it had made during a certain period of time.

22 — The responsibilities of Eurocontrol, which had the resources it needed for this, included in particular the collection (and, where necessary, enforced collection), on behalf of the contracting parties and third States that had acceded to the Convention (Convention concluded in Brussels on 13 December 1960, as subsequently amended), of the charges payable by users for the provision of air navigation services, as provided for under the Multilateral Agreement on Route Charges. The subject-matter of the agreement included in particular the establishment of a common system for determining and collecting route charges payable in respect of flights made in the air space of the contracting States.

23 — *SAT Fluggesellschaft* judgment, cited in footnote 15 above, paragraph 30.

24 — Moreover, although the Court of Justice has not defined the concept of official authority, the interpretation provided by Advocate General Mayras in Case 2/74 *Reyners* v *Belgian State* [1974] ECR 631, 665, remains the *locus classicus* and is worded as follows: 'Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens. Connexion with the exercise of this authority can therefore arise only from the State itself, either directly or by delegation to certain persons who may even be unconnected with the public administration.' See also points 22 and 23 of the Opinion of Advocate General Jacobs in *Höfner and Elser* (cited in footnote 14 above).

25 — Paragraph 28; see also paragraph 30.

context of its activity of collecting route charges which gave rise to the main action, Eurocontrol did or did not constitute an undertaking entrusted with a revenue-producing monopoly, within the meaning of Article 90(2) of the Treaty. [26]

38. It should be underlined that in the abovementioned case (*SAT Fluggesellschaft*) the Court of Justice followed the opinion of Advocate General Tesauro, who pointed out that: 'the performance of duties involving the exercise of public authority by a body may prevent the range of activities carried on by it from being subject to the rules of competition only where those duties form an inseparable part of the activity in question', concluding from that that 'in the case in point the services provided (radar control, meteorological information, warning services) form an indissociable whole'. The Advocate General went on to say that 'air control constitutes a natural monopoly in the air space where it is carried out, and in that respect, competition between two bodies not only is not desirable but would not even be possible in practice'. [27] He also pointed out that [28] the pursuit of an activity that involves the exercise of official powers is incompatible with the classification of an entity as an undertaking, with the result that a body acting as a public authority is not subject to the Treaty rules on competition. The Advocate General concluded that 'it is a public service to which any idea of commercial exploitation with a view to profit is alien: which may not be incompatible, where appropriate and given equal efficiency, with economic management of the activity in question'.

39. Moreover, in the judgment in *Poucet* [29] the Court of Justice ruled that sickness insurance funds or the bodies which act on their behalf in administering the social security system provided by the State, are not engaged in economic activity but have an 'exclusively social function' because that activity is subject to control by the State, [30] 'is based on the principle of national solidarity and is entirely non-profit-making'. In addition, 'the benefits paid are statutory benefits bearing no relation to the amount of the contributions'. [31] The Court stressed that 'the social security schemes, as described, are based on a system of compulsory contribution, which is indispensable for application of the principle of solidarity and the financial equilibrium of those schemes'. [32] It further ruled that in the discharge of their duties, the funds 'apply the law and thus cannot influence the amount of the contributions, the use

26 — See also on this point the earlier judgment in Case 29/76 *LTU* v *Eurocontrol* [1976] ECR 1541, paragraphs 4 and 5.

27 — Point 13 of the Opinion in *SAT Fluggesellschaft* (cited in footnote 15 above).

28 — Ibid., point 9.

29 — Joined Cases C-159/91 and C-160/91 *Poucet and Pitre* v *AGF and Cancava* [1993] ECR I-637 (hereinafter 'the judgment in *Poucet*').

30 — Ibid., paragraph 14. An almost identical approach was taken by Advocate General Jacobs in point 64 of his Opinion in Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705, concerning the legal definition of an occupational pension fund as an undertaking, but the Court of Justice did not in the end give a ruling on that question.

31 — Judgment in *Poucet*, cited in footnote 29 above, paragraph 18; see also paragraph 8. In its judgment in Case C-244/94 *Fédération Française des Sociétés d'Assurance and Others* v *Ministère de l'Agriculture et de la Pêche* [1995] ECR I-4013, the Court of Justice considered that the concept of undertaking within the meaning of Articles 85 and 86 of the Treaty encompassed an organization responsible for managing a supplementary old-age insurance scheme operating according to the principle of capitalization, since the insurance contributions were invested on the financial market and then paid back in the form of an annuity for life and not capital. It was considered (paragraph 12) that, even though it was non-profit-making and it managed a system established by law as an optional scheme, operating in keeping with the rules laid down by the authorities and presenting some aspects of solidarity (paragraphs 19 and 20), while the benefits it provided depended solely on the amount of the contributions, a body of that nature did constitute an undertaking within the meaning of Articles 85 and 86 of the Treaty.

32 — Judgment in *Poucet*, cited in footnote 29 above, paragraph 13.

of assets and the fixing of the level of benefits'. [33]

40. It is worth pointing out that where the Court of Justice has to establish whether or not an activity is an economic activity, it looks at the nature of the activity, irrespective of the body that carries it out. The Court has thus recognized that [34] 'the State may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services on the market' [35] and that in order to classify such an activity as an activity carried out by a public undertaking it is of no importance that the body in question does not have a legal personality distinct from that of the State. But the Court has made clear that 'in order to make such a distinction, it is therefore necessary, in each case, to consider the activities exercised by the State and to determine the category to which those activities belong'. [36]

41. It is clear from the case-law of the Court of Justice, and more especially the judgments in *SAT Fluggesellschaft* and *Poucet*, that certain bodies that are the instruments of a policy in the (general) public interest and enjoy prerogatives of the public authority, that is to say bodies that exercise an activity typical of a public authority or have an exclusively social function, do not constitute undertakings and are not therefore subject to the Community rules on competition.

42. In reaching those conclusions, the Court of Justice has focused on the nature of the activity exercised, that is to say whether or not it is of an economic nature and whether it could, in principle, be performed by a private profit-making undertaking. It has also considered the aim of the activity and the rules to which it is subject. [37] In addition, the Court has looked at a number, or bundle, of indicators that on their own are not sufficient to rule out that an activity is of an economic nature and establish that it falls outside the scope of competition law. Basically, the Court has assessed the extent to which the entity whose activities are under review operates in compliance with the rules laid down by the administrative authorities and whether, more particularly, it has the power to influence the level of the consideration demanded in return for the services provided to users, and the extent to which it is profit-making.

33 — Ibid., paragraph 15.

34 — See Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, in which the Court of Justice ruled that Italy's Amministrazione Autonoma dei Monopoli di Stato (Autonomous State Monopolies Board) constituted a public undertaking that did not have legal personality distinct from that of the State but carried on economic activities by offering goods and services on the market in the manufactured tobacco sector.

35 — For instance, in Case 107/84 *Commission* v *Germany* [1985] ECR 2655, paragraphs 14 and 15 in particular, the Court of Justice ruled that only part of the postal activities carried out by a body governed by public law may be regarded as the activities of a public authority in the strict sense.

36 — Case 118/85, cited in footnote 34 above, paragraph 7. See also Case C-92/91 *Taillandier* [1993] ECR I-5383, paragraph 14. Furthermore, in Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 20, the Court of Justice took the view that the rules laid down by British Telecom, in the exercise of the rule-making powers conferred on it by statute, should be considered to form an integral part of its business activity.

37 — See the judgments in *SAT Fluggesellschaft*, cited in footnote 15 above, paragraph 30 and *Poucet*, cited in footnote 29 above, paragraph 18.

(b) Are the activities of SEPG of an economic nature?

43. A distinction has, in principle, to be made here. I take the view that the collection of fees by SEPG, which gave rise to the main action, forms an integral part of its activities for the protection of the port's maritime environment and, for that reason, I shall consider the extent to which it constitutes an undertaking, in terms of the Community rules on competition, on the basis of those activities as a whole. [38]

44. On the question of whether or not the activity of SEPG is of an economic nature, both the national court in its order for reference, SEPG itself and the Italian and French Governments consider that the fundamental aim of SEPG's anti-pollution activity is not only to guarantee the safety of users of the Porto Petroli, of the densely populated districts adjacent to the port and, more generally, of those districts of Genoa close to the port where tourism is a growth industry, but also to protect the port environment and, in the final analysis, ensure that public assets are properly preserved.

45. In my view, the antipollution surveillance carried out by SEPG at the Porto Petroli cannot be considered to be of an economic nature, and, consequently, that company cannot be held to be an undertaking within the meaning of the Community rules on competition.

46. In point of fact, if the nature and purpose of the activities of SEPG — as defined in Article 1 of Order No 32 of the President of the CAP, and consisting in antipollution surveillance, that is to say in protecting the environment of the port and adjacent areas — are analysed, they have clearly to be classified differently, according to what they are designed to achieve. Firstly, the maritime zone of the Porto Petroli, that is to say a public asset, is being protected in the interest of the State and of citizens. Secondly, users of the Porto Petroli are being protected against the risk of accidents and, thirdly, protection is being provided for the areas surrounding the Porto Petroli, the inhabitants of those areas and undertakings established there which have a direct interest in the

38 — As regards the area of SEPG's activities involving operations to neutralize the effects of pollution of the Porto Petroli in the event of an environmental accident, particularly spillages of petroleum, chemical or petrochemical products, I consider it right that the polluted waters should be decontaminated by an operator which has specialist staff and the proper equipment. It has then a predominantly economic character and is based on the principle that, where identifiable, 'the polluter pays'.

prevention of environmental accidents caused by tankers docking at the port.

47. The anti-pollution surveillance carried out by SEPG at the Porto Petroli meets the fundamental need to ensure the safety of both users of the Porto Petroli and the inhabitants of the surrounding area. As well as being geared to protection of the environment, an aspect that I shall consider below, that activity is directly linked, if not equivalent, to the function of policing the maritime area of the port, and that, in my view, is a function that may be exercised by a public authority, regardless of the legal form adopted for its organization and administration. Consequently, a legal body assigned the above responsibilities may not be deemed to be an undertaking within the meaning of Article 86, and it is therefore unnecessary to consider whether it constitutes an undertaking entrusted with the operation of services of general economic interest, within the meaning of Article 90(2) of the Treaty. [39]

48. Furthermore, it seems to me that the performance of the abovementioned tasks, that is to say SEPG's anti-pollution activities, ought specifically to be recognized by the Court as constituting an essential function of the State. In other words, an activity that consists in anti-pollution surveillance of the maritime environment, that is to say in protecting the environment, cannot constitute the activity of an undertaking but falls into the category of a core State activity.

49. In the light of the above analysis, I consider that in so far as it involves anti-pollution surveillance of the Porto Petroli, the activity of SEPG cannot conceivably be carried out within a competitive system, since that would jeopardize, if not destroy, the effectiveness of the system of safeguards as regards both the port environment and the safety of port users and inhabitants of the surrounding areas. It is therefore a public service unrelated to commercial profit-making activity. Furthermore, that this service is provided for the benefit of the whole of the community is also apparent from the fact that the surveillance has to be exercised regardless whether the fees owed by any particular vessel have been paid.

50. A further element leading me to conclude that SEPG's activity is not of an economic nature is the fact that it is run according to operating criteria that are not appropriate to a private undertaking, given that, on the basis of Decree No 1191 of the President of the CAP, the CAP unilaterally fixes the fees SEPG is to charge for providing its services to vessels which use the

39 — It is certainly undeniable that the provision of those services has incidental advantages, including advantages from an economic point of view. As the Italian Government points out, the mere fact of establishing the service has meant that shipowners have been able to obtain better terms and lower rates from the insurance companies.

terminals of the Porto Petroli. That means that SEPG is unable to take decisions independently of the CAP, that it acts on behalf of the CAP, has no real power to influence the process of setting the charges and is able only to determine the amount owed on each occasion [40] and collect it.

51. Finally, it seems to me necessary to underline that, if the service in return for which fees are paid is held not to be of an economic nature, the activity involved in collecting the fees must be regarded as having the same nature.

52. SEPG claims that it is not necessary for there to be a contractual relationship between SEPG itself and Calì before it can require Calì to pay the sum invoiced and that the latter's obligation to pay derives ultimately from the taxation powers of the CAP. SEPG further claims that the sums invoiced on the basis of those charges for the anti-pollution surveillance services provided by SEPG to every vessel using the facilities of the Porto Petroli and which SEPG is responsible for collecting have to be considered to be purely fiscal in character.

53. Furthermore, as the Italian Government representative stated at the hearing, that feature of the anti-pollution service means that this cannot be considered to be a market because the element of supply and demand is lacking; this is a service provided in the Porto Petroli generally, regardless of the specific services provided to tankers docking at the port, and it involves guaranteeing the cleanliness of the maritime environment and preventing the risk of pollution. It was in fact pointed out that should an accident occur, SEPG would be liable not in regard to the vessels but solely in regard to the Genoa port authorities. According to the Italian Government, that factor distinguishes this dispute from compulsory pilotage in the port where the pilot is liable in regard to the vessel for any accident he himself causes by negligence.

54. I would point out that, in this case, the sums collected by SEPG for anti-pollution surveillance of the Porto Petroli have to be deemed to be a charge payable by an individual for the benefit he has received as a

40 — In the *SAT Fluggesellschaft* case (cited in footnote 15 above), the Court of Justice pointed out, on the one hand, that the international organization 'acts in that capacity on behalf of the Contracting States without really having any influence over the amount of the route charges' (paragraph 29) and, on the other, that 'the charges are collected on behalf of the Contracting States to which they are paid over, after deduction of a proportion of the revenue corresponding to an "administrative rate" intended to cover collection costs' (paragraph 23). In the *Poucet* case (cited in footnote 29 above), the Court of Justice further pointed out that the social security bodies cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits (paragraph 15).

result of a specific administrative activity carried on chiefly in the interest of the community. [41]

(c) Prevention of pollution as a public authority activity

55. Awareness of the dangers that now threaten the environment and the serious environmental disasters that occur from time to time [42] throughout the world have sensitized and mobilized not only individuals but also private and public bodies as well as governments everywhere, prompting the adoption of measures for the effective protection of the environment. Clearly, then, the prevention of pollution is crucially important, as it serves the general interest not only of the current generation but of future generations also. [43] It can therefore be said that the aim of protecting the environment is fundamentally valid as a preventive measure. [44]

56. Analysis of the Treaty and secondary Community law seems to me to indicate that protection of the environment, particularly where based on prevention, constitutes a public authority activity [45] that cannot be understood as anything other than a core State activity. [46]

57. Article 2 of the Treaty lays down specifically that the Community has the task, among its other objectives, of promoting 'growth respecting the environment'. In accordance with Article 3(k) of the Treaty, for the Community to fulfil its task, its activities are to include 'a policy in the sphere of the environment'. Respect for the

41 — See also the similar line of argument contained in point 14 of the Opinion of Advocate General Tesauro in the *SAT Fluggesellschaft* case (cited in footnote 15 above).

42 — We have only to call to mind the environmental disasters caused from time to time by the spillage of petroleum products, such as occurred off the coasts of Brittany and Scotland, for example, nuclear accidents (as in the case of Chernobyl) or the escape of hazardous chemicals into the atmosphere (dioxins in Seveso).

43 — That was stressed in the 1992 Rio Declaration (principle 3) and, in 1987, in the report of the World Commission on Environment and Development, better known as the Brundtland Report.

44 — See Mikhail Dekleris [Vice-President of the Simvoulio tis Epikratias (Greek Council of State)]: 'O Dodekádeltos tou perivállontos — Ególpio viosímou anaptíxeos' ('Bulletin on the Environment — A Vademecum for Viable Development'), in the series *Nómos kai Físi — Vivliothíki Perivállontikoú Dikaíou* (Law and Environment — Library of Environmental Law), editor: A. N. Sakkoula, Athens-Komotini, 1996 (397 pp.) The author argues that the whole complex of texts relating to the environment under international, Community and national law point to 'the principle of a Public Environmental Order', as he describes it, and that, according to that principle, planning, regulating and monitoring the balance between man-made and ecosystems is basically a State responsibility that has to be assured by the State (pages 67 and 119); 'the market clearly has a complementary role'; and the environment has to be protected 'in accordance with scientific criteria' (p. 119); the author concludes that this principle is binding on everyone (p. 67).

45 — The same conclusion emerges if we analyse international legislation in this field and, in particular the 1972 Stockholm Declaration on the Environment (principles 17 and 18) and the 1992 Rio Declaration (principles 4, 7 and 11) as well as Agenda 21 of 1992 which restated the principles of the Rio Declaration (see the guidelines contained in Chapter 8 on the organic merging of the environment and development in the decision-taking process); see also M. Dekleris, op. cit., p. 122 et seq.

46 — That, clearly, does not imply that if this objective is to be consistently pursued, all interested parties and citizens will not have to be made aware of and contribute to it.

environment and the establishment of a policy on the environment seem to me inconceivable unless the appropriate vigilance is exercised by the competent authorities, specifically by taking action to prevent incidents damaging to the environment.

58. The growing interest in protecting the environment is also apparent from the fact that the whole of Title XVI of the Treaty (Article 130r to Article 130t) is devoted to the environment.

59. The basic provision on the protection of the environment is Article 130r of the EC Treaty which reads as follows:

'...

2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the *precautionary principle and on the principles that preventive action should be taken*, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies.

...' [47] (emphasis added).

Under Article 130t, the protective measures adopted by the Council pursuant to Article 130s 'shall not prevent any Member State from maintaining or introducing more stringent protective measures', but they must be compatible with the Treaty and notified to the Commission. [48]

60. In my view, various provisions of secondary Community law as well as the case-law of the Court of Justice allow us to maintain that protection of the environment and, more particularly, supervision and control of the extent to which legislation and practices designed to prevent accidents are actually being applied, constitute the exercise of public powers, that is to say of public authorities, given that 'the best environment policy

47 — Article 130r (1) and (4) provide:
'1.Community policy on the environment shall contribute to pursuit of the following objectives:
— preserving, protecting and improving the quality of the environment;
— protecting human health;
— prudent and rational utilization of natural resources;
— promoting measures at international level to deal with regional or worldwide environmental problems.
...
4. Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organizations ...
...'

48 — Article 24(1) of the Greek Constitution provides a good example of this, laying down that 'the protection of the natural and cultural environment is the responsibility of the State. To safeguard that environment, the State must take the appropriate preventive measures and measures of enforcement ...'.

consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects'. [49]

61. Accordingly, as regards Council Directive 84/631/EEC, [50] the Court held, [51] in relation to the transfrontier shipment of hazardous waste, that 'the relevant national authorities are entitled to raise objections and are therefore able to prohibit a particular shipment of dangerous waste ... in order to deal with the problems concerning, first, protection of the environment and of health and, secondly, public policy and security'. [52] Protection of the environment and of health as well as public policy and security are thus held to be factors justifying specific activities on the part of the national authorities. Consequently, we can consider that they have to be held to be activities falling within the responsibility of the public authorities. [53]

62. A further argument supporting the view that the prevention of environmental disasters is a public authority activity emerges if we consider, for instance, the provisions of Council Directive 93/75/EEC. [54] To be more specific, according to the third recital in its preamble, the directive has set in place arrangements for providing the public authorities with information to enable them to adopt the necessary precautions with regard to vessels carrying dangerous or polluting goods bound for or leaving Community ports. It is clear from the provisions of Directive 93/75 as a whole that preventing the risk of pollution and the risk of serious accidents resulting from the transport by sea of dangerous or polluting goods is linked to the more general endeavour to exercise supervision and guarantee safety in order to avert and limit the damage that a disaster

49 — That statement is the first of the general principles of a Community policy on the environment approved by the Council meeting of Environment Ministers in Bonn on 31 October 1972. See annex (Title II) to the Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment (OJ 1973 C 112, p. 1).

50 — Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste (OJ 1984 L 326, p. 31), as amended by Council Directive 86/279/EEC of 12 June 1986 (OJ 1986 L 181, p. 13). The directive set in place a comprehensive system, mainly concerned with the transfrontier shipment of hazardous waste for disposal in precisely specified installations, and is based on the requirement that the holder of the waste provide detailed advance notification.

51 — Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 32.

52 — See Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1) which replaced Directive 84/631. As the Court of Justice has pointed out (see Case C-209/94 P *Buralux* and *Others* v *Council* [1996] ECR I-615, paragraph 5), that regulation 'establishes a uniform and comprehensive system for the transfer of all types of waste, whether hazardous or otherwise, not only between Member States but also between the Community and non-member countries'. It lays down (Article 30) the obligation to adopt the necessary measures and, more especially, a system of checks to be carried out by the competent authorities of the Member States to guarantee that the waste is transported as provided for under the regulation.

53 — Article 5 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43) provides that 'Member States shall take the necessary measures to ensure that toxic and dangerous waste is disposed of without endangering human health and without harming the environment ...' Moreover, Article 15 establishes a system of control and supervision by the competent authorities.

54 — Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods (OJ 1993 L 247, p. 19). That directive implements the Solas and Marpol international conventions as well as IMO Resolution A 648 (16).

would cause to the maritime environment inside and outside ports. In other words, supervision and control intended to gauge compliance with legislation that is designed to prevent accidents of that nature constitute public authority activities exercised in order to meet an essential public interest. [55]

63. Furthermore, the case-law of the Court clearly indicates that protection of the environment is recognized by the Court itself as an objective 'in the general interest' [56] justifying the restrictions on freedom of trade and freedom of competition. [57]

64. Finally, various other Community texts [58] bear out the view that exercising supervision to prevent pollution is an activity of the public authorities which cannot be considered to be of an economic nature.

(2) Has SEPG infringed Articles 86 and 90(2) of the Treaty?

65. Under Italian law, SEPG has the exclusive right to exercise surveillance (and under-

55 — It is significant that, as also confirmed by the Court of Justice, Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous ;1substances (OJ 1980 L 20, p. 43), 'seeks to protect the Community's groundwater in an effective manner by laying down specific and detailed provisions requiring the Member States to adopt a series of prohibitions, authorization schemes and monitoring procedures in order to prevent or limit discharges of certain ;1substances', listed in the two annexes (see Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 7).

56 — Case 240/83 *Procureur de la République* v *ADBHU* [1985] ECR 531, paragraph 15.

57 — Case 278/85 *Commission* v *Denmark* [1987] ECR 4069, paragraph 16. In its judgment in Joined Cases 372/85 to 374/85 *Ministère Public* v *Traen and Others* [1987] ECR 2141, paragraph 22, concerning criminal proceedings brought against three operators of private waste disposal undertakings and a driver of a vehicle carrying solid waste for having disposed of waste in various places without first obtaining the permission of the competent authority, as provided for by Council Directive 75/442/EEC of 15 July 1975 on waste, the Court of Justice ruled that the power vested in the Member States regarding organization of the supervision provided for in the directive 'subject to the usual limitations upon the exercise of a discretionary power ... is qualified only by the requirement that the objectives of that directive, namely the protection of human health and of the environment, must be complied with'. It can again be argued on the basis of that extract that protection of the environment constitutes an objective in the general interest, the pursuit of which, in my view, constitutes an activity analogous to the exercise of public powers. The *Traen* judgment is of interest because, as in the case of SEPG, the authority responsible for supervising solid waste disposal was the director of the sewage company, a company set up by the public authorities.

58 — For example, following the European Council meeting held in Dublin in June 1990, the participants declared it to be the intention of the Heads of State and Government that action by the Community and its Member States will be developed on a coordinated basis and on the principles of sustainable development and *preventive and precautionary action*. Sustainable development means development that meets current needs without prejudicing the ability of future generations to meet their needs. See also the Resolution of the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development (OJ 1993 C 138, p. 1). Meeting in Luxembourg on 20 June 1996, the Council of Energy Ministers adopted a 'common position' on the principles and conditions for the gradual creation of a single market in electricity. What is significant is that, in accordance with that 'common position' which was forwarded to the European Parliament as the next stage in the procedure, the directive to be adopted, provides, among other things, (see 'Résumé of the "common position" of the Council (drawn up by the Council Secretariat)' in *EUROPE/ Documents*, No 1993, 10 July 1996) that: 'Member States may impose *public service obligations* on undertakings operating in the electricity sector relating to security of supply, regularity, quality and price of supplies and to *environmental protection*'. In other words, protection of the environment is acknowledged to be a public service obligation and, therefore, a public authority responsibility. Finally, I would refer by way of illustration to the fifth 'European Community programme of policy and action in relation to the environment and sustainable development' entitled 'Towards Sustainability', drawn up by the Commission (OJ 1993 C 138, p. 5). Significantly, Chapter 3, entitled 'The actors', confirms that the action programmes on the environment in place until then were largely based on legislation and controls involving government and manufacturing industry. It is, however, stressed that the concept of shared responsibility requires a much more broadly-based and active involvement of all economic players including public authorities, public and private enterprise in all its forms and, above all, the general public, both as citizens and consumers. The role of local and regional authorities is highlighted in areas such as, for instance, the control of industrial pollution.

take rapid intervention) to protect the maritime environment in the event of pollution resulting from the spillage of petroleum products. It therefore enjoys an exclusive right within the meaning of Article 90(1) of the Treaty.

66. The Court has consistently recognized that the 'the conduct of an undertaking referred to in Article 90(1) of the Treaty must be assessed with regard to the provisions of Articles 85, 86 and 90(2)'. [59] Thus, should the Court hold that SEPG does constitute an undertaking under Community competition law, then, once SEPG's conduct has been reviewed in the light of Article 86, it would seem to me necessary to consider whether SEPG may be held to be an undertaking entrusted with providing a service of general economic interest in accordance with Article 90(2), and to analyse the implications of that definition.

(a) Reply to the first question: determination of the relevant market and whether SEPG occupies a dominant position

67. The United Kingdom Government claims that in the light of the judgment in *Merci*, SEPG, which enjoys an exclusive right and is responsible for exercising supervision to prevent pollution, has a dominant position in a substantial part of the common market. It further claims that the services provided by SEPG do not appear to represent a separate service additional to use of the port, as in the *Merci* case, but form an integral part of the running of the port. It points out that the element of 'surveillance' involved actually comprises surveillance exercised in the port for the rapid detection of instances of pollution. Any intervention in the event of pollution is not so much a service provided for the benefit of the polluting vessel but constitutes an integral part of the way in which the port is managed for the benefit of all users and in the interest of the proper functioning of the port installations generally.

68. In the view of both the United Kingdom Government and the Commission, the dominant position is held not by SEPG but by the port authority, the CAP, as a whole, which makes the port facilities available to users. The fees collected by SEPG are part of the whole range of charges levied for use of the Porto Petroli.

69. The Commission does not dispute that the anti-pollution surveillance exercised where petroleum products are being loaded and unloaded constitutes a service in the public interest of an economic nature. However, considering that SEPG formed part of the CAP at the time of the events in question, the Commission argues that the CAP and SEPG constitute a single economic

59 — See, for example, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 28 and Case C-393/92 *Municipality of Almelo and Others* v *Energiebedrijf Ijsselmij* [1994] ECR I-1477, paragraph 33.

entity, so that any measure taken by SEPG may be directly imputed to the CAP. Referring to the judgment in *Merci*, [60] it considers that the Court of Justice has on a number of occasions held that the CAP possesses all of the traits necessary to be deemed an undertaking within the meaning of Article 86 of the Treaty.

70. The Commission further claims that in order to answer the question whether there is a dominant position and whether the invoices issued by SEPG represent an unwarranted additional service, unconnected with the subject-matter of the contract and such as to constitute the abuse of a dominant market position, the making available to users in the Porto Petroli of Genoa of installations and equipment for loading and unloading petroleum, petrochemical and chemical products has to be regarded as being the activity of an undertaking. That, according to the Commission, is because Calì asked to use the equipment and that service goes hand-in-hand with the obligation to use the surveillance and intervention service in the event of pollution that SEPG provides.

71. That line of argument from the United Kingdom Government and the Commission cannot be accepted. I consider that it is solely the nature of the activities of SEPG, and not whether or not it forms a single economic entity with the CAP, that is the crucial element that will enable us to determine whether or not the activities of SEPG make it an undertaking whose conduct will have to be examined in the light of Articles 86 and 90 of the Treaty. [61] That, moreover, is the question referred to the Court of Justice by the national court, and, in order to provide a helpful solution, I do not consider it necessary to analyse whether the CAP constitutes an undertaking within the meaning of Article 86 and, more specifically, an undertaking entrusted with operating a service of general economic interest.

72. In addition to the above considerations, it is worth pointing out that it is clear from the judgment in *Merci* [62] that the Court is referring not to the CAP but specifically to 'an undertaking' of a Member State 'such as the Port of Genoa company'. [63] That is to say that the Court did not in fact establish whether the CAP constituted an undertaking under Article 86 but whether two specific entities constituted an undertaking. [64] To be precise, the Court found, with reference to the market in the organization, on behalf of third parties, of dock work with regard to ordinary freight in the Port of Genoa [65] and

60 — In point of fact the Commission is citing paragraph 13 of the judgment in *Merci*, cited in footnote 1 above, and point 16 of the Opinion of Advocate General Van Gerven in that same case.

61 — See paragraph 19 et seq. of the judgment in Case C-364/92 *SAT Fluggesellschaft*, cited in footnote 15 above.

62 — Paragraph 13, cited in footnote 1 above.

63 — Furthermore, it is apparent from point 16 of the Opinion of Advocate General Van Gerven, cited in footnote 60 above, that the question of establishing whether undertakings existed concerned two port entities (Merci and Compagnia) and not the CAP as a whole.

64 — The fact that it is pointed out, in paragraph 27 of the judgment in *Merci*, that 'it does not appear either from the documents supplied by the national court or from the observations submitted to the Court of Justice that dock work is of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities' does not, in my view, absolutely preclude certain activities carried out in a port having those same characteristics; at any rate, the Court did not rule that the CAP constituted an undertaking within the meaning of Community competition law.

65 — i. e. Merci Convenzionali Porto di Genova.

the actual performance of such dock work by a specific dock-work company, [66] that that dock-work undertaking and/or company had a dominant position but could not be held to be 'entrusted with the operation of services of general economic interest' within the meaning of Article 90(2) of the Treaty, [67] without ascertaining the extent to which the CAP as a whole constituted an undertaking. [68]

73. Furthermore, in its judgment in *Corsica Ferries*, [69] in which the Court had to establish whether there was an abuse of a dominant position in the case of an undertaking that had been accorded an exclusive right to provide compulsory piloting services in the Port of Genoa, the Court defined the relevant market as the market 'in piloting services in the Port of Genoa'. [70] Here again, in other words, it did not seek to establish whether the CAP constituted an undertaking holding a dominant position in a specific market (namely the market in port activities as a whole).

74. According to SEPG, although in the judgment in *Merci* the Court held that the Port of Genoa constituted a substantial part of the common market, that view cannot be applied to the Porto Petroli in this case because of its size (it is a part of the Port of Genoa), the kind of products that it handles (petroleum products and petrochemicals) and the alternative solutions offered under the port system.

75. That argument by SEPG cannot be accepted as formulated. It seems to me that the case-law is unambiguous in this case. In the judgment in *Merci*, the Court stated: '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.' [71]

76. The market at issue in this case is the market in the provision of anti-pollution services in a part of the Port of Genoa in which it is possible, because of the special facilities it contains, to carry out operations involving the loading and unloading of petroleum products, chemicals and petrochemicals. The statistics — produced by the representatives of Calì and the Commission at the hearing — on the volume of goods (petroleum products, chemicals and petrochemicals) that are handled in the Porto Petroli of Genoa and account for a substantial percentage of the total volume of goods handled in the port as a whole, show that the Porto Petroli serves the whole of Liguria. The strategic position of the Porto Petroli is evident, given its proximity to important industrial areas of

66 — i. e. Compagnia Unica Lavoratori Merci Varie del Porto di Genova.

67 — Judgment cited in footnote 1 above, paragraph 28.

68 — Which would not, moreover, have been appropriate because, under the national legislation, the CAP has been entrusted with both economic and administrative activities.

69 — Cited in footnote 13 above.

70 — Paragraph 41.

71 — Cited in footnote 1 above, paragraph 15.

north-west Italy. On the basis of the judgment in *Merci*, [72] the market in which SEPG operates (the provision of anti-pollution and intervention services in the Porto Petroli of Genoa) has to be held to constitute a substantial part of the common market.

77. Since, as is clear from the order for reference and the Italian legislation at issue, SEPG has the monopoly on anti-pollution activities (and also intervention measures if pollution occurs) in a substantial part of the common market, that fact alone confirms the dominant position of the undertaking in question, in accordance with consistent case-law. [73]

78. For those reasons, it is my view that the solution adopted in the judgment in *Merci* may be applied to this case also, that is to say we may consider that, as regards this element of its activity in which it takes the form of an undertaking holding a monopoly, SEPG does have a dominant position in a substantial part of the common market, bearing in mind, however, that 'the simple fact of creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not as such incompatible with Article 86', as has been consistently held by the Court of Justice. [74]

(b) Reply to the second question: abuse of a dominant position

79. Since the question has been raised before the national court of whether or not SEPG is an undertaking abusing the dominant position it holds in the Porto Petroli, with the risk of distorting competition in trade between the Member States — a question which arose as a result of Cali's failure to pay invoices issued in respect of the use by its tankers of the wharves of the Porto Petroli — I take the view that the problem need be considered only in terms of SEPG's activities in the area of anti-pollution surveillance. It is not therefore necessary to consider what would happen in the event of an accident that caused pollution in the Porto Petroli, an issue that has not been raised before the national court. Were it to do so, the Court would be providing an answer that would not help decide the case that is pending; [75] it would simply be providing an advisory opinion on a hypothetical question, on which the national court does not have to decide. [76] Moreover, the Court has consistently declared that it 'has no jurisdiction to rule on questions submitted by a national court if they bear no relation to the facts or the subject-matter of the main action and are

72 — Judgment cited in footnote 1 above, paragraph 15. See also *Corsica Ferries* (cited in footnote 13 above), paragraph 41.

73 — See, for example, *Merci* (paragraph 14), *Höfner* (paragraph 28) and *Corsica Ferries* (paragraph 40) and Case C-260/89 *ERT* (cited in footnote 59 above), paragraph 31.

74 — *Merci* (cited in footnote 1 above), paragraph 16. See also paragraph 42 of *Corsica Ferries* (cited in footnote 13 above).

75 — See Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 21; Case C-231/89 *Gmurzynska-Bscher* v *Oberfinanzdirektion Köln* [1990] ECR I-4003, paragraph 20; Case C-346/93 *Kleinwort Benson* v *City of Glasgow District Council* [1995] ECR I-615, paragraph 24 and Case C-415/93 *Union Royale Belges des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 60.

76 — See Case 244/80 *Foglia* v *Novella* (paragraphs 18 and 20) and Case 149/82 *Robards* v *Insurance Officer* [1983] ECR 171, paragraph 19. See also Joined Cases C-422/93, C-423/93 and C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29.

therefore not strictly needed in order to decide the dispute in that action'. [77]

80. Having made that preliminary distinction, I shall consider to what extent the CAP's approval of the fees charged by SEPG creates the conditions that enable SEPG to abuse its dominant position within the meaning of subparagraphs (a), (c) and (d) of the second paragraph of Article 86 of the Treaty.

(i) Infringement of subparagraph (a) of the second paragraph of Article 86

81. According to Calì, the invoicing system applied by the CAP, regardless of the fact that SEPG did not ultimately provide any actual services to port users, which takes no account of whether the products carried are hazardous in nature but only of the vessel's tonnage and the quantities of the product, constitutes an unfair trading condition within the meaning of subparagraph (a) of the second paragraph of Article 86. Calì in fact argues that, at the expense of users of the Porto Petroli, charges are imposed for unsolicited services at a disproportionate level.

82. According to SEPG, its fees do not constitute an unfair trading condition, in so far as the carrier is able to include the cost in the freight charge. Given the type of activity that it carries on, the criteria applied to determine the sum payable, based on the vessel's tonnage and the quantities of the product, cannot be regarded as constituting an unfair trading condition since, it is maintained, they were fixed on the basis of a specific and detailed study by experts in the field and following negotiations with the users of the Porto Petroli. Furthermore, in any event, given the low level of the charges, they cannot be considered disproportionate.

83. In view of the nature of the services provided by SEPG [78] to all users of the Porto Petroli without distinction, I consider that the criteria that determine the amount of the charges, namely the vessel's tonnage and the quantities of the product rather than the nature, quality and capacity to pollute of the goods themselves, cannot be held to be an unfair trading condition. In my view, these criteria are acceptable because they are objective. The same conclusion is reached when considering the level of the charges,

77 — See, for example, Case C-96/94 *Centro Servizi Spediporto* v *Spedizioni Marittima del Golfo* [1995] ECR I-2883, paragraph 45 and *Corsica Ferries* (cited in footnote 13 above), paragraph 14.

78 — The loading and unloading of petroleum, chemical and petrochemical products involves a risk to the environment that justifies the existence of the anti-pollution surveillance service in question.

which is quite low, [79] so that it seems to me difficult to envisage any infringement of subparagraph (a) of the second paragraph of Article 86.

84. However, subparagraph (a) of the second paragraph of Article 86 could be held to have been infringed in so far as SEPG, which holds a dominant position and has been granted exclusive rights under the national rules, is thereby requiring payment for services that Calì has not specifically requested. [80] The question is whether that 'abuse' of a dominant position is justified in the light of Article 90(2), which I shall consider below (under (3)).

(ii) Infringement of subparagraph (c) of the second paragraph of Article 86

85. According to the national court, the fact that SEPG compulsorily charges fees which, because they are imposed only on vessels in the port, affect a subject other than those whose responsibility it is to carry out the necessary technical operations, [81] inevitably results in a discrepancy between the responsibility for any pollution and the bearing of the cost of the anti-pollution service. Basically, the national court is therefore raising the question of whether there is an abuse of a dominant position because dissimilar conditions are being applied to equivalent services, within the meaning of subparagraph (c) of the second paragraph of Article 86 of the Treaty.

86. That argument cannot be accepted. I do not think that dissimilar conditions can be considered to be being applied to similar transactions, in this case as between Porto Petroli di Genova SpA, which carries out the loading and unloading, and the laders-receivers of the product on the one hand and the tankers on the other, because it is not possible to collect the sums payable other than from vessels that use the port installations and could, for one reason or another, trigger an environmental accident; and those sums are ultimately being collected from the operator on whose behalf the transport and related port operations are carried out.

(iii) Infringement of subparagraph (d) of the second paragraph of Article 86

87. According to Calì, the anti-pollution surveillance service provided by SEPG is an

79 — The order for reference indicates that Calì received an order to pay a total of LIT 8 708 928 in respect of the provision of services by SEPG. The Commission points out that that sum covers 18 invoices issued to Calì for the use of docks in the Porto Petroli between 31 January 1992 and 31 January 1994.

80 — In the judgment in *Merci*, cited in footnote 1, the Court of Justice recognized (paragraph 19) that there had been an abuse because the undertakings holding a dominant position, which had been granted exclusive rights in accordance with the procedures laid down in the national rules in question, were, as a result, induced either to demand payment for services which had not been requested or to charge disproportionate prices.

81 — In this case Porto Petroli di Genova SpA and the laders/receivers of the product.

additional service that is unnecessary in relation to the contract for use of the port between the carrier and the Porto Petroli. It therefore represents, according to Calì, an unnecessary and unjustified additional charge which the carrier has to bear and is therefore incompatible with subparagraph (d) of the second paragraph of Article 86 of the Treaty.

88. According to the Commission, the CAP is in breach of subparagraph (d) of the second paragraph of Article 86, via its subsidiary SEPG, because it imposes on all vessels berthing at the Porto Petroli, without distinction, a service which, because of the nature of the product transported (in the case of non-polluting goods) is neither useful nor justified.

89. That argument clearly underestimates the importance of prevention when it comes to safeguarding the port environment and averting pollution in the interest of port users; it could, at least at first sight, be held to be founded only if the nature of the services provided to users of the Porto Petroli is totally left out of account. However, I find it difficult to accept that the charge for the anti-pollution surveillance service represents an unnecessary and unjustified additional cost to be borne by the carrier, even if the individual vessel carries anti-pollution equipment appropriate to the nature of the goods carried. Once again the question is whether that 'abuse' of its dominant position by SEPG is justified in the light of Article 90(2), an issue which I shall consider below (under (3)).

(c) Reply to the third question: the effect on intra-Community trade

90. According to Calì, the fees charged by SEPG result in an unjustified additional cost to the carrier which is then reflected in the prices of the products imported and exported. The monopoly enjoyed by SEPG is therefore alleged to distort competition to the detriment of other Italian undertakings and undertakings from the other Member States seeking to supply similar services in the Porto Petroli.

91. Given that the Port of Genoa is of major importance for international trade and in the light of the consistent case-law of the Court of Justice, [82] according to which Article 86 does not require it to be demonstrated that the abusive conduct has actually substantially affected trade between the Member States but requires it to be established that

82 — See, for example, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 104; Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraph 20 and *Höfner and Elser* (cited in footnote 14 above), paragraph 32.

that conduct is capable of having such an effect, it could, in my view, be claimed in this case that SEPG's conduct, constituting an abuse of a dominant position within the meaning of Article 86, is capable of distorting trade between the Member States.

(3) *Is SEPG an undertaking entrusted with the operation of a service of general economic interest?*

92. As the representative of the Italian Republic emphasized in the written observations and at the hearing, SEPG is entrusted with a service for the benefit of the public. This implies that SEPG may be held to be an undertaking entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) and that the rules on competition are not therefore applicable in this case.

93. According to the United Kingdom Government, in contrast with the approach taken in the judgment in *Merci*, the port authority, which forms a single entity with SEPG, has to be considered to be providing a service of general economic interest within the meaning of Article 90(2) of the Treaty.

94. The Commission, however, maintains that, in accordance with the judgment in *Merci*, the port activities, which include the activities of SEPG, do not exhibit special characteristics as compared with other economic activities that would justify the application in this case of the derogation under Article 90(2).

95. In accordance with Article 90(2) of the Treaty, 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'. Given that that definition (undertaking entrusted with the operation of services of general economic interest) introduces a derogation from the Community rules on competition, the Court of Justice interprets it narrowly. [83] It is within that framework that I shall consider the extent to which the rules on competition apply to SEPG.

96. Certainly, undertakings entrusted with the operation of services of general economic

83 — See, in particular, Case 127/73 *BRT* v *SABAM and Fonior* [1974] ECR 313, paragraph 20.

interest [84] are engaged in 'activities of direct benefit to the public'. [85] In this case it seems to me that in so far as it is deemed an undertaking in terms of Community competition law, SEPG has, in any event, to be placed in that category because of the nature of the activities it exercises.

97. Consequently, I believe it has to be accepted in this case that it is clear from the documents forwarded by the national court and the written observations presented to the Court that, if they are held to be of an economic nature, SEPG's activities are of general economic interest. The constant surveillance of the port installations, designed to prevent pollution and ensure that they are maintained in a condition that enables tankers to dock and load or unload unhindered, without risk to users of the Porto Petroli or residents or economic operators in the surrounding areas, should, in my view, be held to constitute the operation of a service of general economic interest. [86]

98. According to the case-law of the Court of Justice, the question of the application of Article 90(2) of the Treaty arises only where the operation of the service of general economic interest concerned has been entrusted to a specific undertaking 'by an act of the public authority'. [87] In this case, the decisions of the President of the CAP which entrusted to SEPG, exclusively, the concession to provide anti-pollution surveillance services in the Port of Genoa constitute 'an act of the public authority', in the above-mentioned sense, entrusting to a specific undertaking the operation of a service of general economic interest or specifically defining the obligations incumbent on that undertaking in the exercise of its operations.

99. There then arises the question whether the restrictions of competition are necessary to enable SEPG to carry out the special task with which it has been entrusted.

100. The Court has accepted the possibility of restricting competition from other economic operators, [88] but only 'in so far as is necessary in order to enable the undertaking entrusted with such a task of general interest

84 — The Court of Justice has on a number of occasions examined activities of general economic interest: that of maintaining the navigability of an important waterway, for instance (Case 10/71 *Ministère Public of Luxembourg* v *Muller and Others* [1971] ECR 723); the provision of services in the telecommunications sector (Case 155/73 *Sacchi* [1974] ECR 409); the operation of air routes that are not commercially viable (Case 66/86 *Ahmed Saeed Flugreisen and Silverline Reiseburo* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803; and postal services (Case C-320/91 *Corbeau* [1993] ECR I-2533).

85 — As stated by Advocate General Van Gerven in point 27 of his Opinion in the *Merci* case (cited in footnote 1 above). See also point 137 of the Opinion of Advocate General Darmon in Case C-393/92 *Almelo* (cited in footnote 59 above).

86 — See the similar approach taken by the Court of Justice in the judgment in *Merci* (cited in footnote 1 above), paragraph 27.

87 — See Case 127/73 *BRT* (cited in footnote 83 above), paragraph 20; Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021, paragraph 7; and Case 66/86 *Ahmed Saeed Flugreisen* (cited in footnote 84 above), paragraph 55.

88 — See the judgment in *Almelo* (cited in footnote 59 above), paragraph 49, which concerned an undertaking entrusted, in the form of a non-exclusive concession under public law, with the task of supplying electricity in part of the national territory only.

to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.' The Court acknowledges [89] that it is for the national court to consider whether the restriction on competition is necessary in order to enable the undertaking entrusted with that task of general economic interest to perform it. [90]

101. In the light of documents supplied and the written observations submitted, I consider that application of the rules on competition contained in the Treaty could obstruct SEPG in the performance of its task. Setting aside the fact that it is not, in reality, possible to envisage anti-pollution surveillance activities being entrusted to several bodies that are in competition with each other and not, therefore, very effective, were private undertakings to be authorized to compete with the holder of the exclusive rights in the sectors of their choice corresponding to those rights, they could concentrate on the economically profitable operations concerning, for instance, surveillance of the loading and unloading operations of certain companies only, and offer more advantageous tariffs than those applied by the holder of the exclusive right, since, unlike the latter, they would not be bound for economic reasons to offset losses in the unprofitable sectors against profits in the more profitable sectors. [91] A solution of that nature would have the effect of undervaluing the need for constant and effective protection of the environment, respect for which has to be guaranteed by the Community and the Member States.

102. To summarize, only were the Court of Justice to find SEPG to be an undertaking under the Community rules on competition, would I have to conclude, given the nature of the tasks entrusted to it (anti-pollution surveillance), that it is an undertaking entrusted with a task of general economic interest within the meaning of Article 90(2) of the Treaty. Consequently, it is for the national court to assess, on the basis of the information provided by SEPG, the company in question, what requirements of public interest it has to meet which oblige it to act in a manner incompatible with Articles 86 and 90 of the Treaty. [92]

89 — See, in particular, *Almelo* (cited in footnote 59 above), paragraph 50, and *Corbeau* (cited in footnote 84 above), paragraphs 16 and 19.

90 — See, in particular, *Almelo* (paragraph 50) and *Corbeau* (paragraph 20). See also *Ahmed Saeed Flugreisen* (cited in footnote 84 above), paragraphs 55 to 57.

91 — On a similar issue, see *Corbeau* (cited in footnote 84 above), paragraph 18.

92 — Clearly, if the national court concludes that the supplementary conditions of Article 90(2) are in fact fulfilled, then, particularly on the point of establishing whether the task assigned by a Member State and its performance involve a form of trade development incompatible with the Community interest, that court can, if it sees fit, contact the Commission for an answer to that question and obtain the legal and economic information on which to base its ruling. That clearly accords with the findings of the Court of Justice on the application of Articles 85 and 86 in, for example, Case C-234/89 *Delimitis* v *Henniger Brau* [1991] ECR I-935, paragraph 53, and in the earlier order in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, paragraph 18. See also point 28 of the Opinion of Advocate General Van Gerven in *Merci* (cited in footnote 1 above).

VI — Conclusion

103. In the light of the foregoing, I propose that the Court should give the following answer to the questions referred by the Tribunale di Genova:

A harbour company entrusted with providing an anti-pollution protection/surveillance service in a port's marine environment, such as the company described in the order for reference, does not constitute an undertaking within the meaning of Articles 86 and 90 of the Treaty.