# JUDGMENT OF THE COURT (Fifth Chamber)
18 June 1998 *

In Case C-266/96,

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

**Corsica Ferries France SA**

and

**Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl,**

**Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl,**

**Ministero dei Trasporti e della Navigazione,**

on the interpretation of Articles 3, 5, 30, 59, 85, 86 and 90(1) of the EC Treaty and of 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 (OJ 1986 L 378, p. 1),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet (Rapporteur), J. C. Moitinho de Almeida, J.-P. Puissochet and L. Sevón, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Corsica Ferries France SA, by G. Conte and G. Giacomini, of the Genoa Bar,

— Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl, by A. Tizzano, of the Naples Bar, and F. Munari, of the Genoa Bar,

— Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl, by S. M. Carbone and G. Sorda, of the Genoa Bar, and G. M. Roberti, of the Naples Bar,

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

— the Commission of the European Communities, by G. Marenco, Principal Legal Adviser, and L. Pignataro, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Corsica Ferries France SA, represented by G. Conte and G. Giacomini, Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl, represented by F. Munari, Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl, represented by S. M. Carbone, G. Sorda and G. M. Roberti, the Italian Government, represented by G. Aiello, Avvocato dello Stato, and the Commission, represented by L. Pignataro, at the hearing on 6 November 1997,

after hearing the Opinion of the Advocate General at the sitting on 22 January 1998,

gives the following

## Judgment

1 By order of 5 July 1996, received at the Court on 2 August 1996, the Tribunale di Genova (District Court, Genoa), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Articles 3, 5, 30, 59, 85, 86 and 90(1) of the EC Treaty and of 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 (OJ 1986 L 378, p. 1).

2 Those questions arose in proceedings between Corsica Ferries France SA (hereinafter 'Corsica Ferries') and Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl (the mooring group of the Port of Genoa, hereinafter 'the Genoa mooring group') and the Gruppo Ormeggiatori del Golfo di La Spezia Coop. arl (the mooring group of the Port of La Spezia, hereinafter 'the La Spezia mooring group') and the Ministero dei Trasporti e della Navigazione (Ministry of Transport and Shipping).

3 Corsica Ferries is a company incorporated under French law which, since 1 January 1994, has provided, in its capacity as a shipping company, a regular liner service by car ferry between Corsica and various Italian ports, including Genoa and La Spezia. For this purpose it uses ferries flying the Panamanian flag on time charter from Tourship Ltd, which is established in Jersey. Corsica Ferries and Tourship Ltd are both controlled by Tourship SA, a company incorporated under Luxembourg law and established in Luxembourg. Over the period from 1994 to 1996 Corsica Ferries paid to the Genoa and La Spezia mooring groups various sums in respect of mooring services (mooring and unmooring of vessels) to which port stops made by vessels operated by it had given rise.

4 Corsica Ferries always attached express reservations to its payments, indicating that the requirement to avail itself of the services of the mooring groups constituted an impediment to the free movement of goods and to freedom to provide services and that the sums it was being charged were calculated on a tariff which bore no relation to the actual services provided and had been adopted in breach of the competition rules of Community law.

5 On 2 July 1996, on the basis of Article 633 of the Italian Code of Civil Procedure, Corsica Ferries applied to the Tribunale di Genova for orders enjoining the Genoa mooring group to pay a sum of LIT 669 838 425, the La Spezia mooring group a sum of LIT 188 472 802, and, jointly and severally, the Ministry of Transport and Shipping a sum of LIT 858 311 227, each sum to be paid with interest. According to Corsica Ferries, such an order was justified because there was no legal cause for the payments it had made. It put forward two lines of argument in this connection.

6 First, the tariffs charged for mooring operations in the ports in point in the main proceedings bore no relation to the cost of the services actually provided to vessels by the mooring groups and, furthermore, varied from one port to another. This meant that there was an impediment both to the freedom to provide services, which is guaranteed in the maritime transport sector by Regulation No 4055/86, and to the free movement of goods guaranteed by Article 30 of the Treaty.

7 Secondly, those payments had been imposed in breach of the competition rules of the Treaty. Not only were the tariffs the result of an agreement between associations of undertakings, prohibited by Article 85 of the Treaty, but also the Genoa and La Spezia mooring groups were abusing their dominant position in a substantial part of the common market, in breach of Article 86 of the Treaty, by charging unfair tariff rates, by preventing shipping companies from using their own qualified staff to carry out mooring operations, and by setting tariffs that varied from one port to another for identical services provided to identical vessels.

8 In support of its application for an order that the Italian Republic be made jointly and severally liable for the payment of the sums which it claims are owed to it, Corsica Ferries claims that that State is liable because it did not intervene in order to bring to an end the breaches of Community law of which it considers itself a victim.

9 From the legislation applicable to the case, it appears that mooring services are governed by the Codice della Navigazione (Shipping Code, hereinafter 'the Code'), the Regolamento per la Navigazione Marittima (Regulation on Maritime Shipping, hereinafter 'the Regulation') and, for each port, by the provisions adopted by the competent local maritime authority.

10 Under Articles 62 and 63 of the Code, the Port Harbour Master regulates and supervises vessels' entry into and departure from the port as well as their movements, anchorage and mooring, orders berthing and unmooring manoeuvres, if need be orders, on his own initiative, the manoeuvres specified to be carried out at the vessel's own expense, and lastly orders the mooring ropes to be cut in an extreme emergency.

11 Pursuant to Article 116 of the Code, mooring operatives form part of the personnel assigned to port services. The rules specifically applicable to them are contained in Chapter VI (Articles 208 to 214) of the Regulation. Article 209 entrusts regulation of the mooring service to the Port Harbour Master, who is to ensure that it is properly run in accordance with the needs of the port and may, *inter alia*, set up a mooring group in ports where there is such a need. Lastly, Article 212 of the Regulation provides that, in each port, tariffs relating to mooring services are to be fixed by the Head of the Maritime District.

12 The specific legislation applicable in the Port of Genoa consists of Regulation No 759 of 1 June 1953, adopted by the President of the Consorzio Autonomo del Porto di Genova (Independent Consortium of the Port of Genoa), who set up the Genoa mooring group, and the Regulation on Shipping Services and Port Police adopted on 1 March 1972, Article 13 of which states:

'use of the services of mooring operatives for the mooring and unmooring of vessels is optional ...

Nevertheless, where a vessel does not request the services of mooring operatives, mooring operations must be carried out solely by the crew of the vessel.'

13 According to the national court, the second paragraph of that provision renders use of the services of the Genoa mooring group *de facto* compulsory.

14 The rules specifically applicable to the port of La Spezia are contained in Decree No 20 of 16 July 1968 of the Head of the Maritime District of La Spezia. Article 1 of that decree sets up a group of operators responsible for mooring operations. According to Article 2, that group

'shall carry out berthing and unmooring services for vessels and ensure safety in the port. The service in question is compulsory for vessels with a gross registered tonnage of more than 500 tonnes. Vessels with a lower tonnage may carry out the manoeuvre in question using its own crew provided they do not hinder traffic and do not compromise either the safety of the port or staff. It is strictly prohibited to use any other operative not belonging to the above group of operatives to provide mooring services.'

15 As regards the tariff rates for mooring operations, the account of these in the order for reference, given in the context of an *ex parte* summary procedure which consequently reproduces only the facts and legal arguments put forward by Corsica Ferries, differs from that given by the Genoa and La Spezia mooring groups, the Italian Government and the Commission. Notwithstanding the written question put by the Court to Corsica Ferries on that point, certain aspects have had to be left unresolved, since the parties have maintained divergent interpretations in certain respects.

16 According to the order for reference, there is no legislative text determining the criteria to which the head of each maritime district must conform in fixing the tariffs for mooring services. Those tariffs are sometimes fixed after agreements have been reached between undertakings in the sector and are made enforceable by an administrative measure.

17 According to the Genoa and La Spezia mooring groups, the Italian Government and the Commission, however, account must be taken of Law No 160/89 of 5 May 1989 (GURI No 139 of 16 June 1989), which provides, in Article 9(7), that the Minister for the Merchant Navy is to adopt the rules harmonising tariffs for port

services and operations at national level, after consultation with the trade unions most representative in the sector at national level, the other sides of the industry and the companies concerned. The tariff restructuring thus provided for was in particular regulated by Circular No 8/1994 of 19 September 1994 of the Minister for the Merchant Navy, who determines the criteria to which the port authorities must conform in fixing tariffs.

18 According to those same parties, the tariffs are thus calculated on the basis of a formula the purpose of which is to apportion the charges connected with performance of the mooring service between the various classes of port users. For the purpose of applying the tariffs, users are allotted to different categories on the basis of the gross tonnage of the vessel, and may claim reductions for certain categories of vessel, such as car-ferries, or reductions linked to the frequency of berthing. The level of the tariff, which is valid for two years, is calculated on the basis of projected overall turnover for each mooring group, which itself depends on the volume of traffic in the port. Before the decision of the port authority laying down the tariff for each port is adopted, those concerned, on both the supply and demand sides, may make known their point of view.

19 The tariffs for the ports of Genoa and La Spezia were published by decrees of 20 October and 27 September 1994 respectively.

20 According to the Tribunale di Genova, the Genoa and La Spezia mooring groups provide services to Corsica Ferries, which itself offers services falling under Regulation No 4055/86, and those groups constitute undertakings, for the purposes of Article 90(1) of the Treaty, with exclusive rights in a substantial part of the common market. Since it entertained doubts as to whether the nature of the exclusive rights, the compulsory nature of the service, the basis on which tariffs are drawn up and the amounts charged might constitute a barrier to intra-Community trade in goods and services and induce undertakings vested with those rights to abuse their dominant position to the detriment of trade between Member States as a result of the costs borne by the undertakings engaged in transport operations

between Member States, the national court decided, in consequence, to stay proceedings and refer to the Court for a preliminary ruling the following questions:

'(1) Must Article 30 of the Treaty be interpreted as precluding legislation and/or administrative practice in a Member State which debars shipping companies established in other Member States from berthing their vessels on entry to docks in the first-mentioned State, or unmooring those vessels on departure, unless they use the services provided by a local undertaking by virtue of its exclusive concession in respect of berthing and unmooring facilities, which entails paying to that undertaking dues which may not be commensurate with the actual cost of the services provided?

(2) Does Council Regulation (EEC) No 4055/86 of 22 December 1986 in conjunction with Article 59 of the Treaty preclude the imposition in a Member State of a requirement whereby berthing services are obligatory and shipping companies established in another Member State are charged tariffs which are fixed not by law but merely by administrative discretion in respect of the arrival or departure of their vessels in or from the first-mentioned Member State?

(3) Do Articles 3, 5, 90(1), 85 and 86 of the Treaty, in conjunction, preclude legislation and/or administrative practice in a Member State which confers on an undertaking established in that State an exclusive right to provide berthing services such as to enable those services to be made compulsory, dues to be charged which may not be commensurate with the actual cost of the services provided, tariffs to be applied which have been determined by agreement and/or administrative discretion, and tariff conditions to be imposed which vary from one port to another, even for like services?'

## Admissibility

21 Both the Italian Government and the Genoa and La Spezia mooring groups have questioned the admissibility of the questions referred on grounds relating, first, to the nature of the proceedings before the national court and, secondly, to the lack of relevance of the questions with regard to the case before that court.

22 First, as far as the nature of the proceedings before the national court is concerned, the Italian Government points out that they are summary, *ex parte* proceedings which may be brought by anyone who is seeking enforcement on the basis of written evidence for the purpose of obtaining a payment order without the other party being heard; any *inter partes* argument only takes place subsequently if the party who has been ordered to pay objects to that order. According to the Italian Government, the fact that the proceedings are not *inter partes* and it is impossible to obtain any evidence other than the written evidence produced by the applicant prevents the Court from having before it the information necessary to enable it to reply to questions which, as they concern competition, relate to complex legal and factual circumstances.

23 In that respect, it should be borne in mind that the Court has already held that the President of an Italian district court, adjudicating on an application in *ex parte* summary proceedings for which provision is made in the Italian Code of Civil Procedure, performs a judicial function within the meaning of Article 177 of the Treaty and that that article does not make the reference to the Court subject to there having been an *inter partes* hearing in the proceedings in the course of which the national court refers the questions for a preliminary ruling (Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 12, and the case-law cited therein).

24 It must, however, be added that in the context of such applications, it is equally necessary that the national court give the Court a detailed and complete account of the factual and legal context.

25 In this case the description of the factual and legal context does indeed appear inadequate in some respects, thus preventing the Court from replying to certain of the questions raised with the precision desired. Nevertheless, the information in the file enables the Court to give a ruling although it will leave open certain aspects of the questions raised.

26 As regards the relevance of the questions raised, the Genoa and La Spezia mooring groups have claimed that the application before the national court seeks to obtain reimbursement of all the sums paid to them by Corsica Ferries. Since they would in any event be entitled to obtain some remuneration since mooring services were in fact provided, the application by Corsica Ferries does not therefore fulfil one of the requirements laid down by Article 633 of the Italian Code of Civil Procedure, namely that there should be a debt that is certain. They conclude that the reply to the questions referred will have no effect on the decision to be given on the dispute.

27 In that regard, it must be borne in mind that, as the Court has consistently held, it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action (see Case C-62/93 *BP Supergas* v *Greek State* [1995] ECR I-1883, paragraph 10, and Case C-143/94 *Furlanis* v *Anas and Itinera* [1995] ECR I-3633, paragraph 12). That is not, however, the case here.

28 The reference for a preliminary ruling is, accordingly, admissible.

## Question 1

29 By its first question the national court asks, essentially, whether Article 30 of the Treaty precludes legislation of a Member State which requires shipping companies which are established in other Member States and whose vessels make port stops in the first-mentioned State to use the services of mooring groups holding exclusive concessions, for a charge higher than the actual cost of the service provided. The national court asks whether, although not directly concerning goods, the legislation at issue in the main proceedings is contrary to Article 30 of the Treaty, inasmuch as its effect is to render transport more costly and therefore to impede imports of goods from other Member States.

30 It should be noted that, in the case in the main proceedings, the legislation applies without distinction to any vessel, Italian or otherwise, making a port stop in one of the ports in question. The requirement it lays down is that, for a charge, local mooring services holding an exclusive concession for berthing and unmooring are to be used. As far as any effects of that requirement on the free movement of goods are concerned, it must be observed that, on the one hand, essentially what is involved in this case is the provision of a maritime transport service concerning persons as well as goods. On the other hand, even if only the transport of goods were involved, the file on the case shows that, for a vessel, the price of mooring services represents less than 5% of port costs which, in total, represent 12 to 14% of the cost of transport, making up from 5 to 10% of the cost of transported products. The use of mooring services represents an additional cost for transported products of approximately 0.05%.

31 Consequently, legislation such as that at issue in the main proceedings makes no distinction according to the origin of the goods transported, its purpose is not to regulate trade in goods with other Member States and the restrictive effects which it might have on the free movement of goods are too uncertain and indirect for the

obligation which it imposes to be regarded as being capable of hindering trade between Member States (Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 24, and Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraph 41).

32 The answer to the first question must therefore be that Article 30 of the EC Treaty does not preclude legislation of a Member State, such as that at issue in this case, which requires shipping companies which are established in other Member States and whose vessels make port stops in the first-mentioned Member State to have recourse to the services of local mooring groups holding exclusive concessions, for a charge higher than the actual cost of the service provided.

**Question 3**

33 By its third question, which it is appropriate to examine before the second question in order to make the best possible use of the information concerning the factual and legal context given in the file, the national court asks, essentially, whether Articles 3, 5, 85, 86 and 90 of the Treaty preclude legislation in a Member State which confers on undertakings established in that State an exclusive right to provide mooring services, requires those services to be used for a charge higher than the actual cost of the services provided, and provides for tariffs that vary from one port to another for equivalent services.

34 The rules on competition laid down in the Treaty apply to the transport sector (Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 12, and Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* [1994] ECR I-2517, paragraph 12).

35 Articles 85 and 86 of the Treaty are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations adopted by Member States. However, it is settled law that Articles 85 and 86, read in conjunction with Article 5 of the Treaty, require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (*Centro Servizi Spediport*, cited above, paragraph 20, and the case-law cited therein).

*Articles 86 and 90 of the Treaty*

36 The national court asks whether there is an abuse, on the part of the Genoa and La Spezia mooring groups, of their dominant position on a substantial part of the common market by virtue of the exclusive rights conferred upon them by the Italian public authorities.

37 There are three aspects to the abuse alleged in this case. It is said to reside in the grant of exclusive rights to local mooring groups, preventing shipping companies from using their own staff to carry out mooring operations, in the excessive nature of the price of the service, which bears no relation to the actual cost of the service provided, and in the fixing of tariffs that vary from port to port for equivalent services.

38 As regards the definition of the market in question, it appears from the order for reference that it consists in the performance on behalf of third persons of mooring services relating to container freight in the ports of Genoa and La Spezia. Having regard *inter alia* to the volume of traffic in those ports and their importance in

intra-Community trade, those markets may be regarded as constituting a substantial part of the common market (Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 15, and Case C-163/96 *Raso and Others* [1998] ECR I-533, paragraph 26).

39 As far as the existence of exclusive rights is concerned, it is settled law that an undertaking having a statutory monopoly in a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (Case C-41/90 *Höfner and Elser* v *Macrotron* [1991] ECR I-1979, paragraph 28; Case C-260/89 *ERT* v *DRP* [1991] ECR I-2925, paragraph 31; *Merci Convenzionali Porto di Genova*, cited above, paragraph 14; and *Raso and Others*, cited above, paragraph 25).

40 Next, it should be pointed out that although merely creating a dominant position by granting exclusive rights within the meaning of Article 90(1) of the Treaty is not in itself incompatible with Article 86, a Member State is in breach of the prohibitions contained in those two provisions if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant position or if such rights are liable to create a situation in which that undertaking is led to commit such abuses (Case C-41/90 *Höfner and Elser* v *Macrotron*, cited above, paragraph 29; Case C-260/89 *ERT* v *DRP*, cited above, paragraph 37; *Merci Convenzionali Porto di Genova*, cited above, paragraph 17; Case C-323/93 *Centre d'Insémination de la Crespelle* [1994] ECR I-5077, paragraph 18; *Raso and Others*, cited above, paragraph 27).

41 It follows that a Member State may, without infringing Article 86 of the Treaty, grant exclusive rights for the supply of mooring services in its ports to local mooring groups provided those groups do not abuse their dominant position or are not led necessarily to commit such an abuse.

42 In order to rebut the existence of such abuse, the Genoa and La Spezia mooring groups rely on Article 90(2) of the Treaty, which provides that undertakings entrusted with the operation of services of general economic interest are to be subject to the competition rules contained in the Treaty only in so far as their application does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. Article 90(2) of the Treaty further provides that, in order for it to apply, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

43 They maintain that the tariffs applied are indispensable if a universal mooring service is to be maintained. On the one hand, the tariffs include a component corresponding to the additional cost of providing a universal mooring service. On the other hand, the differences in the tariffs from one port to another, which, according to the file, result from account being taken, when the tariffs are calculated, of corrective factors reflecting the influence of local circumstances — which would tend to indicate that the services provided are not equivalent — are justified by the characteristics of the service and the need to ensure universal coverage.

44 It must therefore be considered whether the derogation from the rules of the Treaty provided for in Article 90(2) of the Treaty may fall to be applied. To that end, it must be determined whether the mooring service can be regarded as a service of general economic interest within the meaning of that provision and, if so, first, whether performance of that particular task can be assured only through services for which the charge is higher than their actual cost and for which the tariff varies from one port to another, and, secondly, whether the development of trade is not affected to such an extent as would be contrary to the interests of the Community (see, to that effect, Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 32).

45 It is evident from the file on the case in the main proceedings that mooring operations are of general economic interest, such interest having special characteristics, in relation to those of other economic activities, which is capable of bringing them

within the scope of Article 90(2) of the Treaty. Mooring groups are obliged to provide at any time and to any user a universal mooring service, for reasons of safety in port waters. At all events, the Italian Republic could properly have considered that it was necessary, on grounds of public security, to confer on local groups of operators the exclusive right to provide a universal mooring service.

46 In those circumstances it is not incompatible with Articles 86 and 90(1) of the Treaty to include in the price of the service a component designed to cover the cost of maintaining the universal mooring service, inasmuch as it corresponds to the supplementary cost occasioned by the special characteristics of that service, and to lay down for that service different tariffs on the basis of the particular characteristics of each port.

47 Consequently, since the mooring groups have in fact been entrusted by the Member State with managing a service of general economic interest within the meaning of Article 90(2) of the Treaty, and the other conditions for applying the derogation from application of the Treaty rules which is laid down in that provision are satisfied, legislation such as that at issue does not constitute an infringement of Article 86 of the Treaty, read in conjunction with Article 90(1).

*Article 85 of the Treaty*

48 The national court also asks whether the process whereby the tariffs for the mooring services are fixed is compatible with Article 85 of the Treaty.

49 The Court has already held that Articles 5 and 85 are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforces their effects, or where it deprives its own rules of the character of legislation by delegating to private economic operators the responsibility for taking decisions affecting the economic sphere (*Centro Servizi Spediporto*, cited above, paragraph 21, and the case-law cited therein).

50 In that connection it must be pointed out, first, that the file on the case in the main proceedings does not reveal the existence of an agreement, decision or concerted practice within the meaning of Article 85 of the Treaty.

51 Although the mooring groups do constitute undertakings for the purposes of that provision, any agreement there may be between those groups at national level does not result in fixing a common price for all ports, since the tariff is calculated on the basis of a mathematical formula to which are applied various corrective factors linked to the characteristics of each port. Moreover, even if it were shown that the ports compete with each other in a single geographical market, which is presumed to be the case in the order for reference, it remains difficult to discern the restrictive effects of any agreement, inasmuch as exclusive rights are granted in each of the ports concerned and there is therefore no potential competitor to the local mooring group. Consequently, it is not evident from the file on the case in the main proceedings that there is an agreement between undertakings the purpose or effect of which is to restrict competition.

52 Nor, on the other hand, is it evident from the file that the Italian authorities have delegated their powers with respect to the fixing of tariffs to the Genoa and La Spezia mooring groups. In each of the ports concerned the tariffs for mooring services have been fixed by the local maritime authority, pursuant to Article 212 of the Regulation, on the basis of a general formula determined at national level by the public authorities after consultation, not only with the mooring groups concerned, but also with the representatives of users and shipping agents in the ports

of Genoa and La Spezia. The participation of the mooring groups in the administrative procedure for drawing up the tariffs cannot be regarded as an agreement, decision or concerted practice between economic operators which the public authorities have required or favoured or the effects of which they have reinforced.

53 Accordingly, Article 85 of the Treaty does not preclude legislation such as that at issue in the main proceedings.

54 In the light of the foregoing considerations, the answer to be given to the third question must be that the combined provisions of Articles 5, 85, 86 and 90(1) of the Treaty do not preclude legislation of a Member State, such as that at issue in this case,

— which confers on undertakings established in that State an exclusive right to provide a mooring service,

— which requires the service to be used at a price which, in addition to the actual cost of the service provided, includes a supplement to cover maintenance of a universal mooring service, and

— which provides for tariffs that vary from one port to another in order to take into account each port's particular characteristics.

## Question 2

55 By its second question, the national court asks, essentially, whether the combined provisions of Regulation No 4055/86 and Article 59 of the Treaty preclude legisla-

tion of a Member State from requiring shipping companies established in other Member States, when their vessels make a port stop in the first-mentioned Member State, to use, for a charge, the services of local mooring groups holding exclusive concessions.

56 According to settled case-law, Article 59 of the Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to nationals providing services and to those of other Member States, when that restriction is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 16).

57 As the Advocate General pointed out at paragraph 35 of his Opinion, the impugned legislation would not appear to contain any overt or covert discrimination contrary to Article 59 of the Treaty and Article 9 of Regulation No 4055/86.

58 On the one hand, in the Port of Genoa the obligation to use the mooring services provided by the Genoa mooring group applies to all shipping companies without distinction. On the other hand, in the port of La Spezia, all operators of vessels whose gross tonnage exceeds 500 must have recourse to the services of the La Spezia mooring group. A company such as Corsica Ferries, which operates

car-ferries, is therefore subject to the same obligation to use the mooring services as Italian transport companies using vessels of equivalent size.

59 As a preliminary point it should be noted that, as far as any impediment to the freedom to provide mooring services is concerned, reference need merely be made to the Court's reasoning, earlier in this judgment, regarding the application of the derogation from the rules of the Treaty which is provided for in Article 90(2) of the Treaty, to conclude that such an impediment, if it exists, is not contrary to Article 59 of the Treaty since the conditions for application of Article 90(2) are satisfied.

60 With regard to the possible existence of a restriction on freedom to provide maritime transport services, it must be observed that the mooring service constitutes a technical nautical service which is essential to the maintenance of safety in port waters and has the characteristics of a public service (universality, continuity, satisfaction of public-interest requirements, regulation and supervision by the public authorities). Accordingly, provided that the price supplement in relation to the actual cost of the service does indeed correspond to the additional cost occasioned by the need to maintain a universal mooring service, the requirement to have recourse to a local mooring service, even if it were capable of constituting a hindrance or impediment to freedom to provide maritime transport services, could be justified, under Article 56 of the EC Treaty, by the considerations of public security relied on by the mooring groups, on the basis of which the national legislation on mooring was adopted.

61 Consequently, the answer to the second question must be that the provisions of Regulation No 4055/86 and Article 59 of the EC Treaty do not preclude legislation of a Member State, such as that at issue in this case, which requires shipping companies established in another Member State, when their vessels make port stops in the first Member State, to have recourse to the services which local mooring groups holding exclusive concessions suppy for a charge. Such legislation, even if it constituted an impediment to freedom to provide maritime transport services,

would, in fact, be justified by considerations of public security within the meaning of Article 56 of the EC Treaty.

## Costs

62 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Tribunale di Genova by order of 5 July 1996, hereby rules:

**1) Article 30 of the EC Treaty does not preclude legislation of a Member State, such as that at issue in this case, which requires shipping companies which are established in other Member States and whose vessels make port stops in the first-mentioned Member State to have recourse to the services of local mooring groups holding exclusive concessions, for a charge higher than the actual cost of the service provided.**

**2) The combined provisions of Articles 5, 85, 86 and 90(1) of the EC Treaty do not preclude legislation of a Member State, such as that at issue in this case,**

**— which confers on undertakings established in that State an exclusive right to provide a mooring service,**

**— which requires the service to be used at a price which, in addition to the actual cost of the service provided, includes a supplement to cover maintenance of a universal mooring service, and**

**— which provides for tariffs that vary from one port to another in order to take into account each port's particular characteristics.**

**3) The provisions of 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 and Article 59 of the EC Treaty do not preclude legislation of a Member State, such as that at issue in this case, which requires shipping companies established in another Member State, when their vessels make port stops in the first Member State, to have recourse to the services which local mooring groups holding exclusive concessions supply for a charge. Such legislation, even if it constituted an impediment to freedom to provide maritime transport services, would, in fact, be justified by considerations of public security within the meaning of Article 56 of the EC Treaty.**

Gulmann Wathelet Moitinho de Almeida

Puissochet Sevón

Delivered in open court in Luxembourg on 18 June 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber