costs between the transport activities in respect of which the public service obligations have been maintained and those in which they are terminated.

The mere prospect for a transport undertaking of discontinuing certain activities following termination of public service obligations is insufficient to justify allocating the whole of the total costs to the activities it has been compelled to maintain, as this could take place only where those activities are in fact discontinued.

In Case 36/73

Reference to the Court under Article 177 of the EEC Treaty by the Section for Administrative Litigation of the Raad van State (Netherlands Council of State) for a preliminary ruling in the action pending before that court between

NV NEDERLANDSE SPOORWEGEN (Netherlands Railway Company) of Utrecht,

appellant,

and

NETHERLANDS MINISTER OF TRANSPORT AND WATERWAYS,

respondent,

on the interpretation of Articles 2, 4, 5 and 10 of Regulation No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road, and inland waterway,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, P. Pescatore (Rapporteur), R. Monaco, J. Mertens de Wilmars, H. Kutscher, C. Ó Dálaigh and A. J. Mackenzie Stuart, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

By decision of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (OJ p. 1500), the Council of the EEC specifically decided, on the question of State intervention, that the public service obligations which Member States impose on transport undertakings should be maintained only insofar as is essential in order to ensure the provision of adequate transport services and subject to payment of fair compensation for the financial burdens thereby devolving upon such undertakings.

By Regulation No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, p. 1), of the Council specifically provided that the competent authorities of the Member States should be able, on application from transport undertakings concerned, to terminate certain obligations inherent in the concept of public service and involving specified economic disadvantages for the undertakings on which they were imposed; where a public service obligation is maintained, in whole or in part, the national authorities are under an obligation to grant compensation to the undertaking concerned on the basis of common procedures laid down in the Regulation.

By letter of 16 June 1970 the Netherlands Railway Company applied to the Secretary of State for Transport and Waterways under Article 2 of Regulation No 1191/69 to be discharged from all its public service obligations, viz. the obligation to operate, the obligation to carry and tariff obligations, in respect of all passenger traffic on railways which it was licensed to operate.

On 30 December 1971, after a sustained exchange of correspondence, the Minister of Transport and Waterways issued a decree (No V-1/071130) communicating his decision, in order to ensure the provision of adequate transport services, to maintain, over the whole of the Netherlands railway system, the obligations of the Netherlands Railway Company to operate and to carry in relation to passenger traffic, and to fix at 230 760 931 florins, for the year 1972, the compensation due to the company for the financial burdens resulting from maintenance of its public service obligations.

In a letter of 29 June 1970, the Netherlands Railway Company applied to the Secretary of State for Transport and Waterways to be relieved of all its public service obligations, viz. the obligation to operate, the obligation to carry, and tariff obligations, in respect of all railway goods traffic it was licensed to carry. On 24 June 1970, the company had specifically applied to be discharged from the obligations to operate and to carry in relation to bulk-loaded railway goods traffic.

On 30 December 1971, the Minister of Transport and Waterways issued a decree (No V-1/071128) communicating his decision to terminate, with effect from 1 January 1972, the company's obligations to operate and to carry in respect of bulk-loaded railway goods traffic over the whole network.

On the same date, 30 December 1971, the Minister of Transport and Waterways sent a letter (No V-1/071127) to the Netherlands Railway Company communicating certain decisions on the subject of mail traffic and express freight services; in the letter, the Minister indicated that 'generally speaking, there can be no question of a tariff obligation within the meaning of Regulation No 1191/69'.

On 28 January 1972, in three separate applications, the Netherlands Railway Company appealed to the Section for Administrative Litigation of the Raad van State against the decision contained in the decrees and in the Minister's letter of 30 December 1971.

With the authority of a Royal Decree dated 26 January 1973, the Section decided, on 28 February 1973, to refer to the Court of Justice under the third paragraph of Article 177 of the EEC Treaty for a preliminary ruling on the following questions:

1. Is the view of the Minister of Transport and Waterways, adopted in these proceedings and underlying the disputed decisions, that the appellant has no tariff obligations within the meaning of Regulation (EEC) No 1191/69 of the Council of the European Communities of 26 June 1969, based on an incorrect interpretation of Article 2 and especially Article 2 (5) of this Regulation?
2. Does a correct interpretation of Articles 4 and 5 of the Regulation involve that economic disadvantages within the meaning of the Regulation exist only where these disadvantages extend over a long period, say over more than one year?
3. Insofar as compensation is calculated on the basis that equal account must be taken of passenger and goods traffic in a situation where the obligations to operate and to carry are maintained in relation to passenger services operated by the appellant but terminated in relation to goods, is the decision of the Minister for Transport and Waterways of 30 December 1971, No V-1071130 consistent with Article 10 of the Regulation, correctly interpreted?

The application from the Section for Administrative Litigation of the Raad van State was registered at the Court of Justice on 2 March 1973.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 7 June 1973 by the Netherlands Railway Company, appellant in the main action; on 13 June 1973 by the Commission of the European Communities; and, on the same date, by the Netherlands Minister of Transport and Waterways, respondent in the main action. Further observations were submitted on 8 October 1973 by the Commission, on 12 October by the appellant in the main action, and on 22 October by the respondent in the main action.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without preparatory inquiry.

The oral observations of the parties in the main action and of the Commission were made at the hearing on 9 October 1973.

The Advocate-General delivered his opinion at the hearing on 7 November 1973.

In proceedings before the Court, the Netherlands Railway Company was represented by B. H. ter Kuile, of the Bar at The Hague and the Commission by its Legal Adviser, M. R. Baeyens.

II — Observations submitted to the Court

The written and oral observations submitted to the Court can be summarized as follows:

A — On the first question

The *Netherlands Railway Company,* appellant in the main action, maintains that, in order to settle the main action, it is essential to know whether the obligations imposed on the company by Articles 28 *et seq.* of the Netherlands Law of 9 April 1875 concerning the railways are to be regarded as a tariff obligation within the meaning of Article 2 (5) of Regulation No 1191/69; if so, the question arises whether, under Article 6 (5) of the Regulation, the Netherlands Railway Company has not been discharged from this tariff obligation since 1 January 1972, because the Minister of Transport failed to take a decision within the time limit laid down in Article 6 (3) of the Regulation.

In this connexion, it must be borne in mind that Article 2 (5) of Regulation No 1191/69 makes specific provision for two kinds of tariff obligation: the first consists of the obligation to apply rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking; the second is concerned with the rates fixed or approved by any public authority which result from the imposition of, or refusal to modify, various special tariff provisions, in particular those covering certain categories of passenger, certain categories of goods or certain routes. These two forms of tariff obligation were imposed on the Netherlands Railway Company by Article 28 *et seq.* of the Railways Law.

As passenger transport by rail is governed by the obligation to operate and to carry, maintained in force for the whole Netherlands railway system by the Minister of Transport's decree of 30 December 1971, tariff policy in this field is largely determined by the competent government authorities; in this context they are not motivated solely by considerations of commercial viability but also by considerations of a political, social and economic nature. Without doubt, therefore, the Netherlands Railway Company is, in regard to passenger traffic, subject to a tariff obligation within the meaning of Regulation No 1191/69.

In any case, the obligations assumed by the company under Article 28 *et seq.* of the Railways Law must be regarded as a tariff obligation within the meaning of Article 2 (5) of the Regulation simply because the Minister of Transport can refuse to approve tariff changes dictated by the commercial interests of the company; this applies both to passenger and to goods traffic.

The *Netherlands Minister of Transport and Waterways,* respondent in the main action, takes the view that a tariff obligation arises within the meaning of the first paragraph of Article 2 (5) of Regulation No 1191/69 as soon as the following conditions have all been fulfilled

— the transport undertaking must be under an obligation to apply rates
— these rates must be fixed or approved by public authority
— they must be contrary to the commercial interests of the undertaking
— they must result from the imposition of, or refusal to modify, special tariff provisions.

This definition, which is not affected by the second paragraph of Article 2 (5), obviously does not cover all the types of tariff obligation which could be imposed on transport undertakings; the Council expressly stated this in an interpretative declaration recorded in the minutes of its meeting of 26 June 1969.

In order to create a tariff obligation within the meaning of the Regulation, all the conditions set out in the first paragraph of Article 2 (5) must be satisfied simultaneously; the Regulation defines only one tariff obligation.

The fact that, under Article 28 of the Netherlands Railways Law, the tariffs for goods and passenger traffic must be

approved by the Minister of Transport creates an obligation to carry within the meaning of Article 2 (4) of the Regulation, but not a tariff obligation. Any idea that a tariff obligation is created whenever an undertaking has to apply tariffs approved by public authority would be incompatible with Article 2 (5) of the Regulation; that provision specifically requires that the rates shall be contrary to the commercial interests of the undertaking and form part of special tariff provisions.

For there to be an obligation to carry, it is enough that the transport undertaking is obliged to accept and handle traffic at specified rates and that this obligation is contrary to its commercial interests; it matters little who fixed the rates. In the case of a tariff obligation, on the other hand, the undertaking is forced to apply rates fixed or approved by public authority; while the question whether the rates are fixed by the carrier, subject to approval by public authority, or fixed by the authority itself at the instigation or otherwise of the undertaking, has no connexion with the obligation to carry within the meaning of the Regulation, the methods by which the rates are fixed and the identity of the authority responsible for fixing them have a considerable bearing on the question whether there exists a tariff obligation within the meaning of the Regulation.

Finally, it should be noted that those who drafted Regulation No 1191/69 drew a clear distinction between the tariff obligation and the obligation to carry, and that there is a tariff obligation within the meaning of the Regulation whenever the conditions set out in the first paragraph of Article 2 (5) are satisfied and insofar as the second paragraph of that Article is inapplicable.

The *Commission of the European Communities* contends that Article 28 of the Netherlands Railways Law, which provides for passenger and goods transport rates to be submitted for approval by the Minister of Transport and Waterways, does not create a tariff obligation within the meaning of Article 2 (5) of the Regulation No 1191/69. Before there can be a tariff obligation, the first paragraph of Article 2 (5) requires two conditions to be fully satisfied: the rates fixed or approved by public authority must, first, be contrary to the commercial interests of the undertaking and, second, constitute 'special tariff provisions'. The second paragraph of that Article specifies that obligations arising from 'measures taken with respect to transport rates and conditions in general with a view to the organization of the transport market or of part thereof' do not constitute a tariff obligation, and the approval referred to in Article 28 of the Netherlands Law must, in principle, be regarded as a 'measure of organization of the transport market'.

B — On the second question

The *Netherlands Railway Company* states that, in the main action, it is essential to establish to what extent its public service obligations in respect of certain kinds of goods traffic, in particular express deliveries and mail traffic, are maintained, terminated or discharged. This gives rise to the question whether Regulation No 1191/69 covers only public service obligations involving long-term economic disadvantages or whether it also applies to economic disadvantages experienced within the period of only one year; in the latter case, as the Minister had not given his decision before 1 January 1972 on the application for termination of all public service obligations, these ceased to exist from that date and the company is absolved from any obligation towards users.

As regards the question referred, it is necessary to bear in mind that, according to the preamble to Regulation No 1191/69, the annual accounting system has a bearing on the right of transport undertakings to compensation for the maintenance of one or more public

service obligations; Article 13 (1) of the Regulation provides for the amount of compensation to be fixed in advance for a period of at least one year. Under the second paragraph of Article 5 (1), economic disadvantages within the meaning of the Regulation can extend over a longer period than one year; under Article 13 (1), compensation for these disadvantages can also be fixed for a period longer than a year. Since compensation can be fixed either for a period of a year or for a longer period, there is no reason for refusing to consider a disadvantage arising for only one year as an economic disadvantage within the meaning of the Regulation, and in principle creating an entitlement to compensation (for a year).

In providing that economic disadvantages making themselves felt over a period of time greater than a year must be assessed on the basis of a statement of the annual economic disadvantages, the second paragraph of Article 5 (1) does not, any more than the Regulation as a whole, in any way exclude the possibility that the economic disadvantages may extend over a period of only one year and create a corresponding right to compensation. The Regulation was in no way intended to take the right to compensation away from an undertaking which, because of the imposition or maintenance of one or more public service obligations suffers, or has suffered, economic disadvantages within the meaning of the first and second paragraphs of Article 5 (1) for one year only. Although there is no obligation to do so, compensation can be paid on an annual basis; the same must apply to the economic disadvantages which give rise to it.

Incidentally, the idea of 'long-term economic disadvantages' is very vague: would a period of two years be enough to justify a compensation payment or would the period have to be at least three or four years?

The *Minister of Transport* points out that, whilst a public service obligation imposed by authority is of such a nature as to prevent an undertaking from discontinuing operations which are against its commercial interests, a deficit registered during a single financial year would in any event not necessarily justify putting an immediate end to the operation responsible. Inasmuch as it appeared possible to run the business profitably by extending the economic assessment over several years, discontinuance of the operation would actually be against the interests of the undertaking; it would be particularly desirable to keep the operation going if the present value of foreseeable initial losses is less than the present value of profits realizable during subsequent years. Regulation No 1191/69 is not intended to enable a transport undertaking to have the benefit of compensation for economic disadvantages of a purely temporary character.

Maintenance of a public service obligation for a year can nevertheless give rise to compensation. This happens when the commercial interests of an undertaking require an operation to be immediately discontinued whereas the competent authority insists on its being maintained for a further year. In such a situation, the economic disadvantages can clearly not be determined on the basis of all the costs which would have to be taken into account in assessing a long-term economic disadvantage; more particularly, the calculation of costs could not take account of the interest and depreciation factors and in this way make allowance for replacement of durable means of production, except in the rare case where replacement cannot be avoided, even for a period of one year.

The *Commission* emphasizes that, under the second paragraph of Article 5 (1) of Regulation No 1191/69, the economic disadvantages attendant upon an obligation to operate or to carry shall be determined 'on the basis of a statement, actualized if necessary, of the annual economic disadvantages . . .'. The statement normally shows the revenue and

costs of a service over several years and takes account of the useful life of plant and stock necessary for the operation concerned. It is necessary to actualize the statement in circumstances where there is no need to have regard to developments over several years, as would be the case when the undertaking had ascertained that the public service obligation would not be maintained for more than a year. Article 5 (1) of Regulation No 1191/69 in no way excludes the possibility that economic disadvantages can be shown by the transport undertaking concerned to exist as the result of public service obligations over a period of only one year.

C — On the third question

The *Netherlands Railway Company* points out that maintenance of its public service obligations in relation to passenger traffic and, meanwhile, their termination in relation to goods traffic make it necessary for the Court of Justice to rule on the question whether the compensation due to the Company must be calculated on the basis that passenger traffic must be regarded as the production unit primarily responsible for costs (the so-called 'differential method of calculation') or on the basis that equal account must be taken of passenger and goods traffic.

In calculating the compensation to be paid, account must be taken, on one hand, of the 'specific costs' of passenger traffic and goods traffic and, on the other, of 'common costs' related to both passenger and goods traffic. In cases where passenger and goods services are operated on the same network or part thereof, specific costs means the costs allocated exclusively to one of these types of traffic and which would disappear only if it were wholly discontinued; specific costs are chargeable to the type of transport for whose benefit they are incurred. Common costs are those which the undertaking is bound to incur in any case, regardless of these specific costs, as long as one of the two kinds of rail service continues to be operated.

Determining the compensation due under Section IV of Regulation No 1191/69 raises the question whether the common cost should be allocated to the two types of traffic or only one of them.

In this connection regard must be paid to the fact that passenger transport is the Netherlands Railway Company's main sphere of activity, whereas goods traffic is a secondary, allied by-product. In the field of passenger transport, the Netherlands authorities have maintained the company's responsibility for public service obligations over the whole of the network; on the other hand, these obligations have been terminated as regards transport of goods. A case, like the present, in which passenger transport is provided in order to maintain public service obligations, while termination of such obligations enables the goods service to be abandoned, calls for application of the differential method of calculating the cost of goods transport; for this type of traffic, therefore, only specific costs are taken into account. Passenger transport must be taken as the production unit mainly responsible for the costs during the period under consideration; the so-called common costs must of necessity be committed for the benefit of passenger traffic and are therefore allocable to this type of transport. A decision to terminate goods traffic would have no effect on common costs because these costs would in any case be incurred so long as the passenger service had to be maintained.

Under the method of calculation laid down in the first paragraph of Article 10 (1) of Regulation No 1191/69, compensation for the economic disadvantages of continuing to carry out the public service obligations imposed on the Netherlands Railway Company in relation to passenger transport must represent the difference between the reduction in the specific costs of passenger transport and the common

costs, on the one hand, and, on the other, the reduction in revenue from passenger traffic which would result if the obligation to operate and to carry during the period in question were terminated.

The same would apply if the economic disadvantages were calculated on the basis of the formula laid down in the second paragraph of Article 10 (1) of the Regulation, as the specific passenger traffic costs and the common costs must be deemed to be costs allocable to that part of the undertaking's activities which is affected by the public service obligation.

The integrated method of calculation under which costs are shared between both types of transport applies only when public service obligations are imposed or maintained in respect of both. On the other hand, when public service obligations are maintained only for one type of transport and terminated as regards the other, the common costs are allocable in their entirety to the type of transport which, because of the public service obligations imposed on it, will in any event be maintained throughout the relevant period; in the present case, passenger traffic therefore represents the production unit to which the bulk of the costs must be charged.

In commercial operation, the differential method of calculation is applied generally; it does not result in an incomplete estimate of costs, as common costs are included in the costs of the principal sphere of activity for whose exclusive benefit the capital concerned has been invested. It does not distort competition to the detriment of other modes of transport; inclusion in the costs of goods transport of the specific costs thereof means that account is taken of the costs of the infrastructure peculiar to this traffic; incidentally, there is in fact, distortion at the present time to the detriment of railway transport because water and road transport bear none or only an inadequate portion of the costs of the infrastructure.

From this it follows that the answer to the third question is that the Minister of Transport's decision is incompatible with Article 10 of Regulation No 1191/69, correctly interpreted, because, while providing for the maintenance of the obligation to operate and to carry in relation to passenger traffic and at the same time for termination of these obligations as regards goods traffic, the decision is based on the concept of according the same importance to goods and passenger traffic in calculating compensation.

The *Minister of Transport* believes that the level of compensation for financial burdens arising from an obligation to operate and to carry can be worked out on the basis of two methods. The 'equivalent' method involves allocation of the mixed costs, associated with various products, among the latter, on the basis of their contribution to production. In turn, the method whereby costs are allocated in the main to a given unit of production (the method known as 'differential' calculation) is based on the concept that one of the two products must in any event be produced and that the other must be regarded as of only secondary importance, covering its own costs; this method of calculation is only justified in the case of an operation which is incidental to existing production, the industrial infrastructure being ignored. It can be applied only when an application for termination of the public service obligation has been rejected and the obligation covers a relatively weak section of the overall operation, such as in the case of a secondary product. This is manifestly not the position in the case of transport of goods by rail.

Section IV of Regulation No 1191/69 on common compensation procedures must be considered in conjunction with Section II on common principles for the termination or maintenance of public service obligations; in particular, the two methods of compensation described in Article 10 (1) have a direct connexion

with the alternatives set out in the first and third paragraphs of Article 5 (1).

It follows from the wording of the third paragraph of Article 5 (1) that where transport of a more than incidental character is involved, the Regulation requires apportionment of the total costs in order to determine the economic disadvantages attendant upon maintaining the public service obligation, and the compensation for it. This is the situation covered by the second paragraph of Article 10 (1), under which the amount of compensation has to be equal to the difference between the costs allocable to that part of the undertaking's activities affected by the public service obligation and the corresponding revenue. It is true that, under the Regulation, the question how the common costs should be allocated is left open.

The Railway Company's argument is based on a false assumption; in reality, the goods service is maintained and, in those circumstances, it is impossible to allocate the whole of the infrastructure costs to passenger transport alone. Otherwise, the carriage of goods by rail could be effected at excessively low rates and the competitive position in relation to other forms of transport would be distorted.

According to the *Commission* the main action is concerned with obligations to operate and to carry affecting one or more categories of the passenger or goods traffic in a network, within the meaning of the third paragraph of Article 5 (1) of Regulation No 1191/69. The financial burdens are therefore assessed in accordance with the third, fourth and fifth paragraphs of Article 5 (1); the level of compensation is determined by applying the second paragraph of Article 10 (1).

Although the obligations to operate and to carry have been terminated as regards goods traffic, the remaining financial burdens cannot be wholly allocated to passenger traffic alone; compensation could be legitimately calculated on this basis only if goods traffic had in fact been discontinued.

Grounds of judgment

1 By decision of 28 February 1973, which followed a Royal Decree of 26 January 1973 and was lodged at the Registry on 2 March 1973, the Section for Administrative Litigation of the Raad van State, acting under Article 177 of the EEC Treaty, referred various questions of interpretation relating to Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ L 156, 1969, p. 1).

2 It is clear from the decision referring them that these questions were raised in the course of proceedings concerning the decisions taken by the Minister of Transport following applications made by the Netherlands Railway Company, appellant in the main action, in which, in regard to both passenger traffic and the various forms of goods traffic, the company asked to be relieved of the whole of the public service obligations as defined in the Regulation.

On the first question

3 The first question asks whether the view adopted by the Minister of Transport that the appellant has no tariff obligation within the meaning of Regulation No 1191/69 is based on an incorrect interpretation of Article 2, and especially Article 2 (5), of that Regulation.

4 An answer to this question appears to be necessary to enable the national court to determine the respective legal rights of the parties in the administrative procedure instituted under Section II and, particularly, Articles 4 and 6 of Regulation No 1191/69.

5 In this connexion, the appellant in the main action regards itself as bound by a 'tariff obligation' within the meaning of Regulation No 1191/69 on account of Article 28 of the Netherlands Railways Law, which provides in general terms that tariffs for passenger and goods transport shall be submitted for approval by the Minister of Transport.

6 In the applications which gave rise to the disputed decisions, the appellant in the main action asked to be relieved of the said obligation.

7 As the Minister for Transport has not ruled on the application, the appellant regards itself as having been relieved of the obligation involved because the competent authorities failed, within the prescribed time limits, to take a decision as required by Article 6 (5) of the Regulation.

8 The Minister of Transport, on the other hand, believes that the provisions of Article 28 of the Railways Law do not constitute a 'tariff obligation' within the meaning of Regulation No 1191/69 and that therefore there was no need for him to rule on the application submitted by the appellant insofar as it purported to relate to a tariff obligation.

9 From the foregoing it is clear that the question of interpretation raised by the national court is whether the general obligation imposed by law on transport undertakings to submit their tariffs for approval by public authority comes within the meaning of the words 'tariff obligation' in Article 2 (5) of Regulation No 1191/69.

10 Article 2 (5) of the Regulation defines a tariff obligation as being 'any obligation imposed upon transport undertakings to apply, in particular for certain categories of passenger, for certain categories of goods, or on certain routes, rates fixed or approved by any public authority which are contrary to the commercial interests of the undertaking and which result from the imposition of, or refusal to modify, special tariff provisions'

11 Under this provision, the distinguishing features of a tariff obligation are not only that rates are fixed or approved by public authority but also that it satisfies the double condition that 'special' tariff obligations for certain specified categories of passenger or goods, or on certain routes, should be involved, and that, in addition, they should be contrary to the commercial interests of the undertaking.

12 This interpretation is confirmed by the sixth paragraph of Article 2, which excludes from the definition of tariff obligations 'general measures of price policy' and 'measures taken with respect to transport rates and conditions in general with a view to the organization of the transport market or of part thereof'.

13 A legal obligation of general application whereby transport rates are submitted for approval by public authority cannot, therefore, of itself, be regarded as constituting a 'tariff obligation' within the meaning of the provision cited.

On the second question

14 The second question asks whether Articles 4 and 5 of Regulation No 1191/69 must be interpreted as meaning that 'economic disadvantages' within the meaning of the Regulation can arise only when they make themselves felt over a long term, or, at the very least, over more than a year.

15 This question arose over an application made by the appellant in the main action under Regulation No 1191/69 with a view to obtaining compensation in respect of one year — 1972 — for the economic disadvantages it claims to have incurred as a result of public service obligations in handling parcels traffic, notwithstanding that, in the following year, this type of transport was provided by another undertaking.

16 In the appellant's view, the Regulation does not rule out the possibility of economic disadvantages extending over a period of only a year and accordingly giving rise to compensation under the Regulation.

17 On the other hand, without ruling out the possibility that economic disadvantages could be established on the basis of results in a single financial year, the Minister of Transport normally requires these disadvantages to be shown as existing over a longer period of account.

18 Compensation for economic disadvantages worked out for a single year could only be given in association with disadvantages of a fundamental nature and not with purely temporary losses, and without prejudice to exploration by the competent public authority of improvements in operational procedures which could avoid the losses incurred.

19 Articles 4 and 5 of Regulation No 1191/69, whose object is to define the meaning of 'economic disadvantages' and to prescribe the methods whereby their existence may be established, does not, in principle, exclude the possibility that such disadvantages can extend over the period of a single year.

20 These provisions do not, however, exclude the right of the competent authorities of Member States to take into account the whole of a transport undertaking's economic situation and its methods of operation.

21 These authorities cannot, therefore, be denied the power to look into the causes of the economic disadvantages claimed by transport undertakings or the right to withold compensation in cases where the disadvantages appear to be purely temporary or accidental and, on a longer-term assessment, capable of being offset in due course, or neutralized by a change of operating methods.

22 Moreover, the existence of such powers is expressly recognized in certain provisions of the Regulation, especially the fifth paragraph of Article 5 (1) under which economic disadvantages are to be determined taking due account of the effects of the obligation 'on the undertaking's activities as a whole', and Article 7, under which any decision to maintain a public service obligation may be accompanied by 'conditions designed to improve the yield of the operations affected by the obligation in question'.

On the third question

23 The third question is whether, insofar as compensation is calculated on the basis that equal account must be taken of passenger and goods traffic in a situation where the obligations to operate and to carry are maintained in respect of passenger services operated by the appellant but terminated in relation to goods, the decision of the Minister to maintain the obligations to operate and to carry in relation to passenger traffic is consistent with Article 10 of Regulation No 1191/69.

24 It is clear from the evidence that the main action is concerned with the allocation, in calculating compensation for maintenance of certain public service obligations, of the 'total costs' within the meaning of the Regulation borne by the undertaking in a situation in which the public service obligations are maintained for passenger traffic but terminated for goods traffic.

25 In this connexion, the appellant in the main action believes that, in such a situation, the costs should in principle be allocated to the branch of operations for which the public service obligations have been maintained.

26 The Minister of Transport, on the other hand, considers that the costs in question must be distributed among the various categories of transport, each of them receiving its proportionate allocation.

27 In a situation where there has been partial termination of obligations to operate and to carry, the assessment of the financial burdens which termination of the obligation might eliminate must, under the third paragraph of Article 5 (1) of Regulation No 1191/69, be carried out 'by allocating among the various categories of traffic the total costs borne by the undertaking by reason of its transport activities'.

28 Furthermore, in order to determine the costs allocable to that part of the undertaking's activities affected by the public service obligation, the second paragraph of Article 10 (1) provides for allocation of the total costs borne by the undertaking among the various parts of its transport activities.

29 From these provisions it is apparent that, in a situation where public service obligations are maintained only in regard to one part of the operation, the

Regulation provides for a distribution of the 'total costs' of the undertaking over the various transport activities involved.

30 The mere prospect for a transport undertaking of discontinuing certain activities following termination of public service obligations is insufficient to justify allocating the whole of the 'total costs' to the activities it has been compelled to maintain, as this could take place only where those activities are in fact discontinued.

31 Apart, however, from laying down the principle of 'apportionment' in this way of the total costs, the Regulation does not specify how the general expenditure should be allocated between the various transport activities.

32 Consequently, any method of allocation based on the characteristics and volume of the activities in question, including allocation on a 'lump sum' basis, must be regarded as consistent with the Regulation.

Costs

33 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

34 As these proceedings are, insofar as the parties to the main action are concerned, in the nature of a step in the action pending before the Section for Administrative Litigation of the Raad van State, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway;

Having regard to the Protocol on the Statue of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Section for Administrative Litigation of the Raad van State by order of 28 February 1973, hereby rules:

1. **Article 2 (5) of Regulation No 1191/69 must be interpreted as meaning that a legal obligation in general terms requiring transport rates to be approved by public authority cannot in itself be deemed to constitute a 'tariff obligation' within the meaning of the Regulation.**
2. **Without excluding the possibility that 'economic disadvantages' within the meaning of the Regulation can subsist over a period of only a year, Articles 4 and 5 of Regulation No 1191/69 equally do not exclude the right of Member States, in assessing these disadvantages, to take into account the whole of the transport undertaking's economic situation over a longer period, and to withhold compensation for disadvantages which appear to be temporary or accidental.**
3. **In a case where public service obligations have been partially terminated, Article 10 of Regulation No 1191/69 must be interpreted as meaning that, having regard to the characteristics and volume of the activities involved, there shall be an apportionment of the 'total costs' within the meaning of the Regulation between the transport activities in respect of which these obligations are maintained and those in which they are terminated. The Regulation does not exclude the use for this purpose of lump-sum allocations.**

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 27 November 1973

A. Van Houtte — Registrar

R. Lecourt — President