OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 22 January 1998 *

I — Introduction

1. In this case the Court has once again been asked to assess the compatibility with the Treaty rules on the free movement of goods and services and on competition of the Italian legislation governing ports. The reference concerns companies having exclusive rights at two of Italy's leading Mediterranean ports, where shipping companies are obliged to avail of their mooring services. It is in particular alleged that the fees charged are not compatible with Community law.

II — The legal and factual context

A — *Factual background and procedure before the national court*

2. Corsica Ferries France SA (hereinafter 'Corsica Ferries' or 'the plaintiff') is a French shipping company which, since 1 January 1994, has provided a regular liner service for the carriage of goods and passengers between various Corsican ports and, *inter alia*, the Italian ports of La Spezia and Genoa. For this purpose, it has used four roll-on roll-off ferries, [1] acquired on a time-charter basis from a Jersey-based company, and which fly the Panamanian flag. [2]

3. During the period 1 January 1994 to 29 February 1996 (hereinafter 'the material period'), Corsica Ferries was obliged by maritime regulations to pay to the Gruppo Antichi Ormeggiatori del Porto di Genova Coop. a r. l. and the Gruppo Ormeggiatori del Golfo di La Spezia Coop. a r. l. [3] sums in the respective amounts of LIT 669 838 425 and LIT 188 472 802 for the mooring services provided to it by those groups in respect of the calls made by its ferries at the Ports of Genoa and La Spezia. Since the plaintiff considered the compulsory nature of the mooring services to be contrary to

1 — The vessels are thus modern car-ferries designed to permit vehicles to be driven directly on at the start of the voyage and off at the end of it.

2 — Both the charterer, Tourship Ltd and Corsica Ferries are controlled by Tourship SA, a company established in Luxembourg.

3 — They will hereinafter be collectively described, for convenience, as 'the mooring groups'. When separate references are necessary, they will be described, respectively, as the 'Genoan mooring group' and 'the La Spezia mooring group'.

* Original language: English.

Community law, it made payment with the reservation that it did not accept the legality of the charge and might later seek its recovery.

4. On 2 July 1996 Corsica Ferries made an *ex parte* application to the Tribunale di Genova (District Court, Genoa, hereinafter 'the national court') pursuant to Article 633 et seq. of the Codice di Procedura Civile (Code of Civil Procedure, hereinafter 'the Code') for an injunction against the mooring groups seeking repayment of the abovementioned sums, and, jointly and severally, against the Ministero dei Trasporti e della Navigazione (Ministry of Transport and Shipping) for the total of the fees paid, plus interest. The plaintiff argued that the payments were unjustified because the services provided had not been requested by it, and that the charges imposed violated Community law relating to the freedom to provide services and the free movement of goods. It maintained that, notwithstanding the absence of binding national legislation, the tariffs were, in fact, obligatory. Furthermore, it contended that the port authorities, by approving tariffs agreed by the mooring groups themselves, facilitated the abuse by those groups of their exclusive rights at the ports in question and, thus, were responsible for breaches of Articles 85 and 86 of the Treaty.

5. The national court considered the following matters to be settled:

(a) pursuant to 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, [4] as interpreted by the Court in *Corsica Ferries*, [5] the registration of, or the flag flown by, vessels operated by the transport undertaking is not relevant;

(b) in Community law, charges, even if made for services which are compulsory by law, must be proportional to the cost of the service actually provided; [6]

(c) Member State legislation requiring undertakings to use the services of a local undertaking with an exclusive concession constitutes a barrier to imports; [7]

4 — OJ 1986 L 378, p. 1 (hereinafter 'the 1986 Regulation').

5 — Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 29.

6 — Reference is made to the Court's judgment in Joined Cases C-71/91 and C-178/91 *Ponente Carni and Cispadana Costruzioni* [1993] ECR I-1915.

7 — The Court's judgment in Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621 (hereinafter '*Ligur Carni*') is cited in support of this proposition.

(d) a Member State is in breach of the prohibitions laid down by the Community competition rules where an undertaking is induced, merely by exercising the exclusive rights conferred on it, to abuse its dominant position, or where those rights are liable to lead to a situation in which the undertaking is induced to commit abuses of that kind; [8]

(e) under Community law the Member States are liable for the harm caused to individuals as a result of infringements of Community law attributable to them. [9]

6. The national court has also taken the view, first, that a shipping company, established in one Member State and operating a regular liner service to another Member State, offers services 'which are inherently of a cross-frontier nature', secondly, that the mooring groups, having been vested by the public administration with the exclusive right to provide compulsory mooring services in the Ports of Genoa and La Spezia, are undertakings within the meaning of Article 90(1) of the Treaty and, finally, that those ports are 'areas which constitute a substantial part of the common market'.

B — *The judgment of the national court*

(i) The national legislative context

7. The national court describes mooring activities (*l'attività di ormeggio*) as consisting in 'attaching a vessel that has arrived in port to the dock using appropriate lines and cables'. [10] It points out that the Italian Codice della Navigazione (Shipping Code) [11] contains no provisions concerning this activity, apart from its Article 116(4) which indicates 'that mooring operatives form part of the personnel assigned to port services'. However, the national court states that legal provisions concerning mooring services are contained in Articles 208 to 214 of Regolamento di Esecuzione al Codice di Navigazione (Regulation for the application of the

8 — Reference is made to Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889 (hereinafter '*Porto di Genova*').

9 — The national court refers to Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5337 and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

10 — The sufficiency of this description is strongly contested in the observations submitted to the Court, particularly in those of the mooring groups (see especially paragraph 38 below).

11 — Royal Decree No 337 of 30 March 1942.

Shipping Code, hereinafter 'the national regulation'). According to the national court:

'That Regulation, which is an administrative measure, indicates the technical qualifications prescribed for operatives engaged in mooring activities and entered on the prescribed registers, the powers of the harbourmaster for regulation of the service and the arrangements for provision of the service.'

Taking the view that no legal provision or regulation makes the mooring service compulsory, the national court states that 'the tariffs provided for in Article 212 of the Regulation are laid down by the Head of the Maritime District', 'and then by the Administrative Authority'. [12]

8. The mooring services are provided by a single undertaking at both the Ports of Genoa and La Spezia. The national court states that the Genoan mooring group was established by Decree No 759 of 1 June 1953 of the President of the Consorzio Autonomo del Porto di Genova (Independent Consortium of the Port of Genoa, hereinafter 'the CAP'), approving the regulations governing the mooring and unmooring of vessels. Although Article 13(1) of Order No 2 of 1 March 1972 of the President of the CAP provides that the 'use of the services of mooring operatives for the mooring and unmooring of vessels *is optional*', Article 13(2) nevertheless provides that '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] Thus, according to the national court, the use of the services of the Genoan mooring group is rendered *de facto* compulsory. In contrast, as regards the Port of La Spezia, it points out that, under Article 2 of Decree No 20 of 16 July 1968 of the Capo del Compartimento Marittimo di La Spezia (Head of the Maritime District of La Spezia), recourse to the services of the La Spezia mooring group is compulsory for vessels exceeding a gross tonnage of 500. [14]

9. As regards the tariff-fixing role of 'the Head of the Maritime District' and 'the Administrative Authority' under Article 212 of the national regulation (see paragraph 7 above), the national court states that, though 'the law does not determine the criteria to be observed by the Administrative Authority in laying down the tariffs', they are sometimes 'laid down in accordance with agreements concluded between the undertakings in the sector and then brought into force by a

12 — As we shall see, the views on who is really responsible for the fixing of the tariffs are disputed in the observations submitted to the Court; see paragraphs 49 to 50 below.

13 — Quoted in the order for reference, emphasis in original.

14 — The exclusive position of the La Spezia group is effectively guaranteed by Article 25 of Decree No 20, which, by reference to Article 1174 of the Shipping Code, penalises the execution of mooring operations whenever 'persons in the employ of the [group]' are not used.

measure adopted by the Public Administration ...'. [15]

(ii) The questions referred

10. Having regard to the nature of the exclusive rights enjoyed by the mooring groups, the compulsory nature of the services they provide and the basis on which their tariffs are drawn up and levied, the national court took the provisional view that the provisions and practices concerned 'may 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'. Accordingly, it decided to refer the following questions to the Court pursuant to Article 177 of the Treaty:

'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?'

15 — It cites, by way of example, Decree No 1074 of the President of the CAP of 12 August 1991.

III — Observations

11. Written and oral observations have been submitted by Corsica Ferries, the mooring groups, the Italian Republic and the Commission.

IV — The admissibility of the reference

12. In their written observations, the mooring groups and Italy have expressed reservations regarding the admissibility of the reference in the present case. Essentially, they contend that the details provided of the factual circumstances, particularly as regards the services provided by the mooring groups and the provisions of national law, do not suffice to permit the Court to provide a useful answer. Italy, referring to the Court's judgment in *Banchero*, [16] stresses the particular importance of a detailed exposition of the legal and factual context where the questions referred concern complex issues, such as, in the present case, the application of the Community's competition rules. The mooring groups also assert that the use by Corsica Ferries of the *ex parte* or summary procedure under Article 633 of the Code in the main proceedings has resulted in the national court presenting a one-sided and artificial picture of the legal and factual situation to the Court. They contend that even the national-law requirements, in particular, that the amount claimed be certain, are not satisfied in the present case, since, whatever view might be taken of the fees charged, some services were nevertheless provided to Corsica Ferries. Accordingly, even an answer by the Court favourable to Corsica Ferries would not simply enable the national court to order the repayment of the fees paid. The mooring groups, thus, contend that the utility of the reference for the proceedings before the national court is questionable, particularly as regards the Ministero dei Trasporti e della Navigazione, which, even if Corsica Ferries' substantive Community-law claims were upheld, could not, in their view, simply be ordered, on the basis of the case-law of the Court regarding Member State liability, to repay *all* of the fees levied on Corsica Ferries. [17]

13. The Commission, on the other hand, considers the reference to be admissible. In its view, the admissibility, in principle, of a reference in summary proceedings, such as under Article 633 of the Code, has already been decided by the Court in paragraph 12 of its judgment in *Corsica Ferries*. At the oral hearing, the Commission contended that, in any event, the observations submitted to the Court had furnished it with enough infor-

16 — Case C-157/92 [1993] ECR I-1085.

17 — Loc. cit., footnote 9 above.

mation to enable useful answers to be given to the questions referred. For its part, Corsica Ferries maintained at the hearing that the outline contained in the order for reference sufficiently describes the legal and factual context of the dispute.

14. In the circumstances of the present case, I agree with the Commission that it follows, in particular from the principle declared by the Court in paragraph 12 of its judgment in *Corsica Ferries*, that a reference made in summary proceedings, such as those under Article 633 of the Code, is admissible. I endorse the view expressed by Advocate General Van Gerven in his Opinion in *Corsica Ferries* that 'the basic philosophy underlying the preliminary rulings procedure' [18] is, as pronounced consistently by the Court, that it constitutes 'an instrument for cooperation between the Court of Justice and the national courts, whereby the Court of Justice provides the national courts with the criteria for the interpretation of Community law which they need to dispose of disputes which they are called upon to resolve'. [19]

15. As early as 1971, the Court recognised, in *Politi* v *Italy*, [20] what it confirmed three years later, in *Birra Dreher*, [21] namely, that references may be made even in *ex parte* proceedings. These decisions were made at a time when the Court adopted a more liberal and flexible attitude to references pursuant to Article 177 of the Treaty. The jurisdiction to make references at the *ex parte* stage nevertheless involves an issue of principle, though the Court has never suggested that its position should be changed. Beginning with *Simmenthal*, the Court accepted that 'the interests of the proper administration of justice' might require that a reference be made only 'after both sides have been heard'. [22] However, the Court has always declared that 'it is for the national court alone to assess whether that is necessary'. [23] On the contrary, in paragraph 12 of its judgment in *Corsica Ferries*, which concerned a reference made by the Tribunale di Genova in proceedings brought by Corsica Ferries under Article 633 of the Code, the Court reaffirmed that Article 177:

'... 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, although it may be in the interests of the proper administration of justice that there has been such a hearing.'

18 — See paragraph 9 of his Opinion.

19 — See, for example, Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 33.

20 — Case 43/71 [1971] ECR 1039, paragraphs 3 and 4.

21 — Case 162/73 *Birra Dreher* v *Amministrazione delle Finanze dello Stato* [1974] ECR 201, at paragraphs 2 and 3.

22 — Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453, paragraph 10. See also *Ligur Carni*, loc. cit., footnote 7 above, paragraphs 15 and 16 of the judgment and paragraphs 12 to 14 of Advocate General Darmon's Opinion.

23 — See, respectively, *Simmenthal* and *Ligur Carni*, ibid., paragraphs 11 and 16.

This restatement leaves no room for doubt as to the principle of the jurisdiction to entertain references for preliminary rulings made at the *ex parte* stage of national proceedings.

16. It does not automatically follow, however, that a reference made in the context of *ex parte* proceedings will always be admissible. The Court has, in response to particular problems presented by individual cases, identified a number of situations where it does not consider that it has jurisdiction. More to the point of the present case, it has in recent years, to quote from the Opinion of Advocate General Jacobs in *Leur-Bloem*, 'placed more emphasis on the need to give a ruling within the context of the factual situation of the case and has accordingly been more strict in demanding that national courts clearly specify the factual and legislative context in which a ruling is sought'. [24]

17. In my opinion, the national court, when considering whether to refer in summary proceedings, should bear in mind the fact that it is often only on hearing the other side that the precise factual and legal context can be defined. Furthermore, in references made in *ex parte* proceedings, the defendant will have its first opportunity of presenting its side of the case before this Court, giving rise to a real risk that it will raise both factual and national-law issues that have not been raised in the national proceedings, and thus creating grave difficulties for the Court. In *Union Laitière Normande*, in 1979, the Court emphasised that 'the need to afford a helpful interpretation of Community law [made] it essential to define the legal context in which the interpretation requested should be placed'. [25] The Court recalled this dictum two years later when, in *Irish Creamery Milk Suppliers Association* v *Ireland*, it was expressly asked, by the High Court of Ireland, to rule on the correctness of the exercise of the discretion to refer questions of interpretation before examining the facts. [26] Recalling its observation in *Union Laitière Normande*, it suggested that: [27]

'From that aspect it might be convenient, in certain circumstances, for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice so as to enable the latter to take cognizance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called upon to give.'

24 — See his joint Opinion of 17 September 1996 in Case C-28/95 *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam* and Case C-130/95 *Bernd Giloy* v *Hauptzollamt Frankfurt am Main-Ost*: the Court gave two separate judgments on 17 July 1997; see [1997] ECR I-4161 and ECR I-4291 respectively.

25 — Case 244/78 *Union Laitière Normande* v *French Dairy Farmers* [1979] ECR 2663, paragraph 5.

26 — Joined Cases 36/80 and 71/80 [1981] ECR 735, see paragraphs 6 and 7.

27 — Ibid., paragraph 6.

18. However, it immediately went on to stress that:

'[T]hose considerations do not in any way restrict the discretion of the national court, which alone has a direct knowledge of the facts of the case and of the arguments of the parties, which will have to take responsibility for giving judgment in the case and which is therefore in the best position to appreciate at what stage in the proceedings it requires a preliminary ruling from the Court.'

19. The accepted point of departure for the stricter approach of the Court in demanding a full account of the factual and legal context, detected by Advocate General Lenz in *Bosman*, [28] is its decision in *Telemarsicabruzzo*. [29] In that latter case the Court apparently accepted Advocate General Gulmann's proposal for a 'slightly more restricted attitude'. [30] Thus, it did not content itself with a mere reiteration of the need for specification of the 'factual and legal context'; it took the further step of declaring that there was no need to answer the question referred. In the period of some five years since that decision, the Court has, not infrequently by order, ruled inadmissible a number of references from national courts. [31] In its order in *Banchero*, upon which Italy relies, the Court repeated its now well-known dictum that 'the need to arrive at an interpretation of Community law which will be of use to the national court requires that that court should define the factual and legislative context of the questions which it refers or at least explain the assumptions of fact on which those questions are based'. [32]

20. In short, the admissibility, in principle, of a particular reference does not mean that the Court will always be in a position to respond to the questions referred. Having regard to the underlying purpose of Article 177, I would always emphasise, however, that exceptional circumstances must exist before the Court should refuse to

28 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921 (hereinafter '*Bosman*'), paragraph 73 of the Opinion.

29 — Joined Cases C-320/90, C-321/90 and C-322/90 [1993] ECR I-393. However, Bernard and Sharpston, in a major recent article entitled 'The Changing Face of Article 177 References' (1997) 34 *CMLRev.*, pp. 1113 to 1171, identify Case C-286/88 *Falciolo* [1990] ECR I-191 as the real source of recent developments in the case-law of the Court regarding aspects of the previous approach towards its jurisdiction under Article 177.

30 — Ibid., paragraph 20 of the Opinion.

31 — See also, for example, Case C-386/92 *Monin Automobiles* [1993] ECR I-2049, Case C-378/93 *La Pyramide* [1994] ECR I-3999, Case C-458/93 *Saddik* [1995] ECR I-511, Case C-257/95 *Bresle* [1996] ECR I-233, Case C-307/95 *Max Mara* [1995] ECR I-5083, Case C-326/95 *Banco de Fomento e Exterior* [1996] ECR I-1385, Case C-2/96 *Sunino and Data* [1996] ECR I-1543, Case C-101/96 *Italia Testa* [1996] ECR I-3081, Case C-191/96 *Modesti* [1996] ECR I-3937, Case C-196/96 *Lahlou* [1996] ECR I-3945 and Case C-66/97 *Banco de Fomento e Exterior* [1997] ECR I-3757.

32 — Loc. cit., paragraph 4 of the order.

answer questions referred. [33] The Court frequently reformulates the questions referred so as to orient its answers towards the really pertinent Community-law issues raised, and seeks to supplement the information provided by the national court by reference to the observations of the parties and of the Commission (and, occasionally, other Community institutions) or to the intervention of the Member States. [34]

21. The Court was prepared in *Corsica Ferries* to accept that the 'statement of facts' comprised in the order for reference could be supplemented by information contained in 'the written and oral observations submitted to [it]'. [35] Advocate General Van Gerven [36] had, however, advised that, in light of the insufficiency of the description of the national legal context and since an application under Article 633 of the Code had to concern an amount which was certain, only the questions pertaining to the alleged discrimination in the tariffs applied at the Port of Genoa were admissible. The Court essentially followed his recommendation. [37] In the present case, the voluminous written observations, particularly those submitted by the defendants, have furnished the Court with extensive information concerning the nature of mooring services and about the relevant Italian law. It is difficult to exclude the possibility that the decision to refer questions at the *ex parte* stage has contributed to the uncertainties of fact and law which, thus, confront this Court.

22. Where, in particular, the observations submitted to the Court reveal the possibility that a reference made might contain an incomplete, or even an incorrect, account of the relevant provisions of national law, the Court is placed in a very difficult position, since it is, in principle, bound by the national court's account. [38] Consequently, if that account is lacking in pertinent respects, the Court may be led to give its answers to the questions referred on a practically hypothetical or academic basis. Yet the Court, quite rightly, has always refused to answer purely hypothetical questions. [39]

23. In the present case, it is clear that the first two questions referred effectively raise the compatibility of the tariffs with

33 — See, in support of this view, the recent decision in Case C-105/94 *Celestini* v *Saar-Sektkellerei Faber* [1997] ECR I-2971, paragraph 22. In my Opinion in that case, I had expressed the view (paragraph 29) that the Court '... should refuse to answer questions referred, only in exceptional circumstances where it is very clear that no genuinely useful answer can be given'.

34 — See, for example, Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 23.

35 — Paragraph 13.

36 — See paragraph 11 and the first of his formal conclusions at paragraph 36 of his Opinion.

37 — It endorsed the Commission's view regarding the limited nature of the action before the national court and, consequently, ruled that it was only necessary to answer the questions concerning the alleged tariff discrimination.

38 — See, in this regard, Case C-352/95 *Phyteron International* [1997] ECR I-1729, paragraphs 11 to 14.

39 — See, for example, Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 6 and *Bosman*, loc. cit., footnote 28, paragraph 59.

Articles 30 and 59 of the Treaty. This would appear to arise from the claim of the plaintiff in the main action to recover all of the fees paid by it to the mooring groups. The defendants contend, to my mind not unreasonably, that, as they have provided services to the plaintiff, they are entitled, on any view, to some payment and, accordingly, that the plaintiff's claim fails to satisfy the requirements of Article 633 of the Code. It seems, however, from the order for reference that the national court may, indeed, accede to the plaintiff's claim if the basis of imposition of charges is found to be incompatible with Community law. The consequences of such a ruling, including its possible incompatibility with the requirements of Italian procedural law, are a matter for the substantive and procedural law of that Member State.

24. I am, thus, of the opinion that all of the questions referred by the national court in the instant case are admissible and should be answered by the Court, except, as indicated above, where I do not think that the information provided in the order for reference, viewed in the light of the conflicting observations provided to the Court, is sufficient. I would also recommend that, in answering the questions referred, the Court draw attention in its judgment to the specific difficulties presented by references made in *inaudita altera parte* or summary proceedings in the context of safeguarding the productiveness of the Article 177 procedure as an effective instrument for cooperation between the Court of Justice and the national courts.

V — Analysis

A — *The first question*

(i) Introduction

25. By its first question, the national court essentially wishes to know, particularly in the light of the judgment in *Ligur Carni*, whether it is compatible with Article 30 of the Treaty for Italian legislative or other rules to require shipping companies established in other Member States, and desirous of berthing vessels at Italian ports, to use the services of local mooring undertakings. Although not expressly couched in alternative terms, there is a second aspect to the question; namely whether the combination of the local undertaking's monopoly with the requirement of 'paying to that undertaking dues which may not be commensurate with the actual cost of the services provided' ('versando a detta impressa corrispettiva anche sproporzionati rispetto al costo effettivo dei servizi resi') would be compatible with Article 30.

(ii) Observations

26. The plaintiff submits that, as a result of the monopoly granted to the mooring

groups, it is obliged to pay significant sums for the provision of services of little or no value or use to it. It relies upon *Ligur Carni* to support its view that, as it also uses its ferries to transport goods from Corsica in France to Italy, the exclusive concessions granted to local mooring groups operate to render imports from another Member State 'more burdensome and more difficult'; accordingly, it submits, the impugned national rules constitute a measure having equivalent effect to a quantitative restriction on imports contrary to Article 30 of the Treaty. [40]

27. The mooring groups submit that it would undermine the distinction that ought to exist between the field of application, on the one hand, of Article 30 and, on the other, of Article 59 if the former were regarded as capable of applying to national rules that are not intended to regulate trade in goods and that do not have any, other than wholly uncertain, indirect or aleatory, effects on the free movement of goods. They refer to the judgments, and Opinions of Advocates General Lenz and Léger respectively, in *Peralta* and *Centro Servizi Spediporto* v *Spedizioni Marittima del Golfo* in support of their view that rules concerning the provision of transport services cannot, merely because the object of the relevant transport service is goods, be regarded as falling within the scope of Article 30. [41] In this respect, they contend the incidence of the costs of the services which they provide on the final cost of imported products to be no more than 0.05%. In the alternative, they submit that, even if Article 30 may apply in principle, the Court should apply its *Keck and Mithouard* [42] case-law and find that the impugned rules do not have as their object the regulation of trade and do not, in law or in fact, distinguish between imported and domestic products.

28. The Commission is also of the view that Article 30 is inapplicable. In its written observations, it cites, *inter alia*, paragraphs 24 and 41 respectively of the judgments in *Peralta* and *Centro Servizi Spediporto* and, in particular, the Court's declaration that the purpose of 'legislation which makes no distinction according to the origin of the goods transported' 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

40 — It could also be argued, although Corsica Ferries has not sought to do so in the present case, that they are incompatible with Article 34 of the Treaty as equivalent to a quantitative restriction on exports, since, presumably, it also carried Italian exports on its car-ferries during the material period.

41 — See, respectively, Case C-379/92 *Peralta* [1994] ECR I-3453 and Case C-96/94 [1995] ECR I-2883 (hereinafter '*Centro Servizi Spediporto*'). The mooring groups refer, in particular, to paragraph 40 of the Opinion of Advocate General Léger in *Centro Servizi Spediporto* where he referred, with approbation, to Advocate General Lenz's statement at paragraph 51 of his Opinion in *Peralta* that the demarcation should be based on the principle that 'all situations in which the barrier to the movement of goods is merely the reflection of a barrier to (cross-border) services' must be regarded as being subject to the provisions of Article 59 of the Treaty.

42 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

in order for the obligation which it lays down to be regarded as being such as to hinder trade between Member States'.

(iii)Analysis

29. I agree with the Commission and the mooring groups. The applicability of Article 30 of the Treaty to a national measure does not, of course, depend on the degree of its effects on trade. It is clear from the case-law of the Court that no *de minimis* rule operates in respect of Article 30. [43] Nevertheless, the Court, both before and after its decision in *Keck and Mithouard*, has consistently required that rules that apply indistinctly to national and imported products must, if an impediment to trade for the purposes of Article 30 is to be established, have some protective effect. This may be illustrated by the judgments in *Peralta* and *Centro Servizi Spediporto*, for example, which concerned rules affecting, respectively, maritime and road-haulage transport operators but whose application was not linked to the origin of the goods transported. The Court took the view, notwithstanding the indirect and consequential effects of such rules on the cost of transporting imported products, that such rules could not be regarded, in principle, as falling within the scope of Article 30. I think that the principles declared in that case-law may be applied in the present case. A general obligation to employ the services of a local mooring group whenever a transport operator, regardless of its Member State of establishment, causes one of its ships to call at an Italian port cannot, in principle, be regarded as a measure having equivalent effect to a quantitative restriction.

30. I think that the analogy made by Corsica Ferries to the obligation affecting the transporters of fresh meat in *Ligur Carni* is misconceived. Although the objective of the rules impugned in the instant case is, like in *Ligur Carni*, to reserve the provision of a service to undertakings themselves involved in providing services, there the similarity ends. In *Ligur Carni* the scope of the application of the impugned regional Italian rule was specific: municipal transport of meat from the local slaughterhouse to its final destination was either to be entrusted to a local transport undertaking or executed by the transporter responsible for having brought the meat to that municipality (from either other parts of Italy or other Member States) on payment of 'a certain sum to the [local] undertaking holding the concession'. [44] The Court took the view that this rule constituted a measure having equivalent effect to a quantitative restriction, 'since its effect [was] to make importation of goods from other Member States more burdensome and more difficult ...'. [45] In contrast, the scope of the impugned rules in the present case is general

43 — See, for example, Case 16/83 *Prantl* [1984] ECR 1299, where the Court declared that, for Article 30 purposes, it was not necessary that an impugned measure have an appreciable effect on trade; see paragraph 20.

44 — See *Ligur Carni*, loc. cit., paragraph 36.

45 — Ibid., paragraph 38.

and, as the agent for the Commission aptly pointed out at the hearing, their application is not dependent upon the transport of any specific goods. Thus, the rules apply *whenever* a ship berths at an Italian port, regardless of what, *if any*, goods are transported thereon. The trigger for their application is the use, by the providers of maritime transport services, of Italian ports and, consequently, their effects on the cost of importing goods is entirely incidental. Therefore, I would reject Corsica Ferries' argument that the requirement to use the services of the local mooring group falls within the scope of Article 30 of the Treaty.

31. The plaintiff maintains, in addition, that, since more imported than domestic goods are arguably transported to Italy by maritime means of transport, excessive fees for mooring services more gravely affect imports. Although such effects could, in theory, be sufficiently adverse for Article 30 to apply, [46] the national court has made no findings in respect of the level of fees charged by the mooring groups. Consequently, I do not think that the Court has any information on which it can base an answer to that aspect of the first question.

32. For the reasons stated above, I am satisfied that national rules such as those at issue in the instant case are not incompatible with Article 30 of the Treaty.

B — *The second question*

33. By its second question the national court wishes to know whether the exclusive concession given to the local mooring groups, combined with the claimed discretionary fixing of the tariffs, constitutes an impermissible restriction on the freedom to provide maritime transport services. I do not think that the manner in which the tariffs are fixed can, independently of the compatibility with Article 59 of the Treaty of the grant of the exclusive concession regarding mooring services, constitute a restriction on the freedom to provide services, although it may, of course, exacerbate the effects of any restriction that is found to exist in the grant of those concessions. Corsica Ferries, however, also refers to the possibility that the charging of excessive fees might constitute a breach by Italy of Article 90 in conjunction with Article 59. Since the national court has not

46 — In Case 31/67 *Stier* v *Hauptzollamt Hamburg-Ericus* [1968] ECR 235, though admittedly in the context of a case concerned with internal taxation, the Court stated that the imposition of a charge '... of such an amount that the free movement of goods within the Common Market would be impeded as far as those goods are concerned' would not be permitted ([1968] ECR 235, at p. 241). In Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, the Court noted, with reference to *Stier*, that 'the only possibility of approaching an adverse effect of that kind on the free movement of goods' would be 'by reference to the general rules contained in Article 30 et seq. of the Treaty'; see paragraph 13.

raised this issue in its third question, I do not think that it would be either appropriate or necessary for the Court to address it in its answer. [47]

(i) The prima facie application of the freedom to provide services

34. The Council, by the adoption of the 1986 Regulation, [48] as noted by the Court in *Corsica Ferries*, has applied the principle of freedom to provide services under Article 59 of the Treaty to maritime transport between Member States. [49] Moreover, the plaintiff, as a company established in France and controlled by a Luxembourg company and providing services in Italy, comes clearly within the scope *ratione personae* of Article 59 of the Treaty and Article 1 of the 1986 Regulation. [50]

(ii) The existence of discrimination

35. Unlike in the earlier case of *Corsica Ferries*, the impugned rules in the instant case would not appear to contain any overt or covert discrimination contrary to Article 59 of the Treaty and Article 9 of the 1986 Regulation. On the one hand, at the Port of Genoa the obligation to use the mooring services provided by the Genoan mooring group applies *de facto* to all shipping companies, whereas at La Spezia, on the other hand, all operators of vessels whose gross tonnage exceeds 500 must have recourse to the services of the La Spezia mooring group. Nevertheless, the plaintiff has referred to the fact that more national than non-national transport undertakings may operate vessels which escape the obligation to use the mooring groups services. [51] Although it is, thus, possible that the rules applicable at the Port of La Spezia might indirectly be discriminatory, I do not think that Corsica Ferries could rely on any such eventual discrimination. An undertaking such as the plaintiff which operates large modern car-ferries, cannot be compared with a hypothetical group of competing national transport undertakings operating vessels whose gross tonnage does not exceed 500. To my mind, in the absence of relevant findings of fact regarding the plaintiff's Italian competitors by the national court, such a comparison would not answer the question that has been referred in

47 — The plaintiff, in its written observations on the second question, also raised the possibility that the imposition of excessive charges attributable to Italian public authorities could constitute a breach of Articles 9 and 12 of the Treaty. Since it is for the national court alone to determine what questions ought to be referred to the Court, the plaintiff's attempt to invoke Articles 9 and 12 of the Treaty is manifestly inadmissible: see, for example, Case 44/65 *Hessische Knappschaft* v *Singer* [1965] ECR 965, at p. 970, and Joined Cases C-134/91 and C-135/91 *Kerafina* v *Greek State and Others* [1992] ECR I-5699, paragraph 16, as well as paragraph 13 of the Opinion of 2 October 1997 of Advocate General Cosmas in Case C-309/96 *Annibaldi* v *Sindaco del Commune di Guidonia et Presidente Regione Lazio*, not yet published in the ECR.

48 — Regulation No 4055/86, loc. cit., footnote 4 above.

49 — See, in particular, paragraph 26.

50 — Under Article 1(4), the concept of 'maritime transport services' shall be considered to comprise, *inter alia*, 'intra-Community shipping services'; to wit, 'the carriage of passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State'.

51 — In its oral observations, Corsica Ferries maintained, without being contradicted, that all vessels benefiting from the exemption are operated by Italian nationals or undertakings, either for the provision of local cabotage services or for fishing.

the present case. The 500-tonne threshold cannot, without more, be compared with the fishery-protection measures at issue in *Commission* v *Ireland*, which applied to 'scarcely any boats in the Irish fishing fleet'. [52] The proper comparator for Corsica Ferries must be Italian transport undertakings using vessels of analogous size to its car-ferries. Since such Italian operators would be subject to the same tariffs as the plaintiff, no question of direct or indirect discrimination arises.

(iii) The existence of a restriction on the freedom to provide services

36. Next, it is necessary to consider whether the exclusive concessions may, none the less, be considered to constitute a non-discriminatory restriction upon the freedom of transport undertakings like the plaintiff to provide maritime transport services to and from Italian ports.

(a) The nature of mooring services

37. Unfortunately, it is in respect of the nature of mooring services that the unilateral character of the presentation made to the national court, which is clearly reflected in its order for reference, is most striking. According to Corsica Ferries, the mooring operation consists essentially of the tying and untying of a vessel using appropriate lines and cables (see paragraph 7 above) and amounts to no more than receiving ropes from the ship and fixing them to mooring posts on the dock and vice versa.

38. However, an entirely different picture emerges from the observations of the mooring groups. They strongly contest the commonplace description advanced by the plaintiff. They contend that the service constitutes one of the three technical nautical services provided at ports which are fundamental for maintaining safety in port waters and, furthermore, that it possesses all of the characteristics of a service provided in the public interest. [53] They refer, in particular, to the following aspects:

(i) the correct mooring of the boat to the quay, including the securing of the boat to the mooring post;

(ii) ensuring that the moored vessel remains fast at its berth during the entire duration of its stay in the port, and, in

52 — Case 61/77 [1978] ECR 417, paragraph 70.

53 — The other two services are, in their view, piloting and tugging.

particular, when the loading and unloading of the passengers and goods transport thereon is in progress;

(iii) intervening whenever it is necessary to modify or reinforce the mooring of the vessel, particularly whenever changeable weather conditions might necessitate moving it to another berth;

(iv) ensuring before the vessel casts off that its proposed path out of the port is clear and, where there are obstacles, to remove them before the anchor is lifted;

(v) to cooperate fully with the crew of the vessel during its exit from the port and until it reaches the open sea.

They point out that these services must be provided on a 24-hour basis, 365 days per year and under the supervision of the appropriate maritime authorities, particularly the harbourmaster. In this respect, the harbourmaster may call upon the mooring groups to provide other assistance, in particular when dangerous weather conditions occur at the port.

39. In the light of the view I shall presently take regarding the issue of a restriction on the provision of services, it is unnecessary to express a view about the competing descriptions. Nor would it be appropriate. That remains a matter for the national court. Obviously, protection against the risks to human life and health, as well as the environment, posed by reckless or negligent mooring and unmooring of ships, particularly at large and busy ports like Genoa and La Spezia, constitutes a legitimate policy goal for Member States to pursue in the absence of appropriate harmonising Community measures. [54] It is, of course, for the national court to determine if that objective is achieved, or better achieved, by the grant of exclusive mooring-services concessions.

(b) Observations on the existence of a restriction

40. The plaintiff contends essentially that, as a French company providing maritime trans-

54 — The first step towards the development of a Community-wide policy was taken by the Commission with the publication, on 24 February 1993, of a communication entitled 'Towards a Common Maritime Security Policy'; see COM(93) 66 final.

port services between Corsica and Italy, the obligation to use the services provided by the local mooring groups constitutes a restriction on its freedom to provide cross-border services, whereas, at French ports, such services are optional. The mooring groups rely particularly on the view of Advocate General Elmer in *Job Centre* that the *Keck and Mithouard* line of case-law developed by the Court in respect of Article 30 of the Treaty could equally be applied to Article 59 of the Treaty. [55] Thus, since the impugned rules are not intended to regulate trade in services and since their effects thereon all occur in Italy and affect all providers of maritime transport services equally, they do not restrict the provision of such services and, hence, fall outwith the scope of Article 59. The Commission is in general agreement with this view. [56]

(c) Analysis

41. It must first be noted that the supposed restriction in the present case does not relate to the provision of mooring services. Corsica Ferries, while asserting the right to use its own trained crews and the modern equipment present on its well-appointed car-ferries in order to berth its own ferries, has not claimed that the grant of exclusive concessions in Italy to local mooring groups constitutes, *per se*, a restriction on the freedom to provide cross-border mooring services at Italian ports. The restriction that it has alleged relates, instead, to the provision of maritime transport services and comprises essentially the *de jure* or *de facto* prohibition affecting maritime transport operators of providing themselves for the berthing of their ships and, in particular, the additional costs which compulsory recourse to local mooring groups may entail.

42. The Court has consistently held that '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 it 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'. [57] It is difficult to formulate an objective definition of the sorts of national measures that are capable of constituting such 'restrictions'. In its recent judgment in *Reisebüro Broede* v *Sanker*, they were formulated as those which, though

55 — Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 27 of the Opinion.

56 — In its view, the increased costs which may result from the impugned rules do not affect the costs of services provided by non-Italian undertakings more adversely than those of domestic maritime transport undertakings.

57 — See, for example, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12 and Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 16.

applicable equally to national and non-national providers of services, were, none the less, '... liable to prohibit, impede or render less advantageous the activities of a provider of a service established in another Member State where he lawfully provides similar services'. [58]

43. In cases like *Säger* and *Reisebüro Broede* the national rules involved the Member State, on whose territory the service-provider wished to provide a particular service, prohibiting its provision in the absence of the possession of qualifications which were not required by the Member State of establishment of the service-provider. It is easy to see that such rules, though non-discriminatory, may constitute restrictions on the freedom to provide cross-border services. On the one hand, as the Court noted in *Reisebüro Broede*, they may make it impossible to provide the service in the host Member State, since the activities there of the foreign service-provider are provided on a purely temporary basis. [59] In cases like *Säger*, on the other hand, the obligation imposed on the service-provider, who remains in its own Member State, to obtain a licence from the Member State of receipt of the service, that is itself dependent on possession of a particular (national) diploma in that State, is equally capable of impeding access to the relevant market. National service-providers are likely to be better placed to adapt their activities to the requirements of such a measure. Thus, the detrimental effects of a rule, such as that involved in *SETTG*, where a Greek law imposed a mandatory legal form of employment relationship on non-national tour guides desirous of occasionally providing services on a self-employed basis in Greece, was unmistakable. [60] In the words employed by the Court in *Alpine Investments*, such rules 'directly affect [...] access to the market in services in ... other Member States and [are] thus capable of hindering intra-Community trade in services'. [61]

44. I think that the measures in the present case are much closer to those discussed in *Peralta*. Their effects on the freedom to provide services are too remote and indirect to be capable of directly affecting access to the market in the provision of maritime transport services. The requirement to use the services of local mooring groups does not subject the provision of the services at issue, namely the maritime transport services, to any conditions other than the compulsory use of an incidental service. In the absence of any relevant findings of fact by the national court, I am not satisfied that any 'restriction' for the purposes of Article 59 of the Treaty subsists in the instant case. [62]

58 — See, for example, Case C-3/95 [1996] ECR I-6511 (hereinafter '*Reisebüro Broede*'), paragraph 25.

59 — See, ibid., paragraph 27.

60 — Cited in footnote 57 above: see, in particular, paragraphs 17 and 18 of the judgment and paragraph 27 of the Opinion of Advocate General Lenz.

61 — Case C-384/93 [1995] ECR I-1141, paragraph 38.

62 — Indeed, even if the national court were ultimately to find that the mooring groups provide a purely routine service, there is no reason to suppose that the effects of what would then have to be classified as excessive tariffs would bear more onerously upon non-national as opposed to national maritime transport operators.

45. In the light of this conclusion, I do not find it necessary to consider whether the alleged restriction can be justified.

C — *The third question*

(i) Introduction

46. The third question referred by the national court raises the possible application, on the one hand, of Article 85 in conjunction with Article 5 and, on the other, of Article 86 in conjunction with Article 90(1) of the Treaty. First, the national court wishes to know whether Article 85, in conjunction with Article 5, of the Treaty is opposed to national legislation obliging users of ports to pay tariffs for mooring services that have been agreed by all of the individual members of a national association of mooring-service providers. Secondly, it wishes to ascertain whether national rules are compatible with Articles 86 and 90(1), read in conjunction, where they not only confer, *de jure* or *de facto*, a monopoly in respect of the provision of mooring services at ports but also permit the individual grantees of such concessions, at ports of such size and importance for intra-Community trade as Genoa and La Spezia, effectively to charge tariffs that are out of proportion to the actual cost of providing the mooring services in question, and, moreover, that vary from port to port. Having regard to the statement of the national court that Italian 'law does not determine the criteria to be observed' by the appropriate public authorities 'in laying down the tariffs', as well as the central complaint that those tariffs result from an anti-competitive agreement between the various providers of mooring services in Italy, I must begin by summarising the diametrically opposing accounts of the tariff-determination process furnished effectively only in the observations submitted to the Court.

(ii) The rules governing the formulation of mooring tariffs

47. The view expressed by the national court (see paragraph 9 above) is that the appropriate administrative authorities sometimes adopt and subsequently render compulsory the mooring tariffs as devised under 'agreements concluded between the undertakings in the sector ...'. The plaintiff fully supports this assessment. The relevant agreement, in its view, was entered into on 26 July 1990 by ANGOPI (the association of mooring groups) and by the Comita Utenza Portuale (the representatives of certain associations of undertakings which use port services). [63] According to Corsica Ferries, the parties to that agreement, on 20 September 1990,

63 — Corsica Ferries states in its written observations that the port users who are parties to the agreement include shipping agents, forwarders and representatives of shipowners. In its opinion, the excessive tariffs agreed have little effect on such users since, in reality, they affect principally the providers of maritime transport services.

requested the Ministro della Marina Mercantile (Minister for the Merchant Navy) to adopt 'without delay the measures necessary to ensure the application of the agreement'. On 15 May 1991, the Minister replied to the effect that the determination of the tariffs was a matter for agreement between the providers of mooring services. [64] Consequently, Corsica Ferries submits that the Italian authorities effectively divested themselves, at least during the material period, of the powers which they possessed under Article 212 of the national regulation and confined themselves to approving and rendering compulsory tariffs drawn up pursuant to a private agreement.

48. The mooring groups, Italy and the Commission contradict this assessment in their observations to the Court. The mooring groups assert that the tariffs are adopted by the Ministero dei Trasporti e della Navigazione both directly and through its various decentralised organs. That ministry adopts, by decision, a framework (il modello organizzativo) for the determination of the tariffs at each Italian port, having regard to both the number of mooring enterprises and the equipment which they must acquire in order to provide the services, as well as the universal, public-service nature of those services. Since both the mooring groups and all groups representing port users are involved in the discussions preceding the fixing of the tariffs, it is contended that the process is fully transparent and objective. Law No 160/89 of 5 May 1989 (hereinafter 'the 1989 Law') lays down a number of provisions in respect of maritime transport and concessions. [65] The mooring groups contend that, under Article 9 of the 1989 Law, an objective 'cost-plus' system of tariff-determination was established; namely one whereby tariffs were determined essentially in accordance with the gross tonnage of the vessel, with discounts being permitted for frequent users of port facilities, such as car-ferry operators like Corsica Ferries. The purpose of the 'cost-plus' system is to allocate the costs involved in providing a universal mooring service on a proportional basis among the various users of the port. [66] The principles underlying this system were, during the material period, set out in various ministerial circulars. [67] It would appear that Decree No 1453 of 20 October 1994 of the CAP of Genoa and Order No 231 of 27 September 1994 of the Head of the Maritime District of La Spezia conform with the provisions set out in the circulars and, accordingly, provide for a bracket-rate system of tariffs. [68]

49. In the light of the stark difference between the observations of Corsica Ferries

64 — See Telegram No 5201974 (hereinafter 'the Telegram'), a copy of which was annexed to the written observations of the plaintiff.

65 — GURI, No 103 of 5 May 1989.

66 — The mathematical formula used is said to take into account all expenditure incurred in the provision of mooring services, including salaries based on the national legal minimum wage, alongside various allegedly objective correction factors.

67 — Namely, Circulars Nos 95/1990 and 98/1991 of the Ministry of the Merchant Navy, repealed lastly by Circular No 8/1994 of 29 September 1994.

68 — Thus, according to the written observations of the Commission, under Decree No 1453 at the Port of Genoa the minimum rate of LIT 30 000 applied to boats with a gross gauge of between 0 and 250 tonnes, while the maximum rate of LIT 2 631 000 applied to those whose gauge was between 80 001 and 90 000 tonnes.

and the other parties as well as the Commission regarding the tariff-elaboration process, the Court asked the plaintiff, by way of a written question, whether its assessment could be reconciled with that of the other parties in so far as the 1989 Law was concerned. In its response, Corsica Ferries submits essentially that the relevant provision (Article 9(7) of the 1989 Law) concerns only cabotage services and that, in any event, it confers no power on the Ministro della Marina Mercantile to adopt rules unifying tariffs at a national level. Moreover, it points out that no legal measures have been adopted to implement the 1989 Law in respect of maritime transport since ministerial circulars have no binding legal effects in Italian law. [69] It contends that the general tariff-determination criteria contained in the circulars at issue merely represent the fruit either of arbitrary administrative decisions or prohibited agreements which have been approved and made compulsory by public authorities.

50. The characterisation of the scope of the circulars advanced by Corsica Ferries in its written response to the Court's question was expressly contradicted by the agent representing Italy at the hearing. He contended that the 1989 Law and the circulars remained relevant to the present reference, in spite of the criticisms advanced by Corsica Ferries. He submitted that the restructuring of mooring tariffs for cabotage was extended by the circulars in question to maritime transport; in other words, the circulars were applied as if they were legally binding.

(iii) Jurisdiction of the Court

51. The Court has no power within the context of the Article 177 procedure to resolve this regrettable conflict regarding the rules governing the tariff-determination process. It cannot, therefore, in my view, provide a definite response to the third question. Nevertheless, the link between that question and the dispute before the national court is clear; if the plaintiff's assessment of the tariff-fixing process is correct, the liability of Italy for any resultant breaches of the competition rules would, subject to a possible defence under Article 90(2) of the Treaty, be quite clear. The national court might, therefore, uphold the application of the plaintiff in the main proceedings and order the fees levied to be repaid. It is, however, disquieting, to say the least, that the Court lacks the benefit of the views of the national court on a body of national legal and administrative provisions which seem possibly to be relevant. It is appropriate, none the less, briefly to examine the principles of Community law that would be relevant to an assessment by the national court of the claim for reimbursement of Corsica Ferries based on EC competition law.

69 — The judgment of the Italian Constitutional Court of 1 June 1995, GURI of 1 June 1995, is cited in support of this contention. Although the plaintiff accepts that Article 9(7) allows the Ministro della Marina Mercantile to fix tariffs in the absence of agreement amongst the relevant economic operators, this may only be done, it points out, after the relevant parliamentary committees are consulted, which, the plaintiff asserts, did not occur in the instant case.

(iv) Analysis

(a) Prima facie application of the competition rules

52. The national court has made a number of relevant findings of fact in its order for reference. In the first place, it has found (what is scarcely open to doubt) that Corsica Ferries offers services that are 'inherently of a cross-frontier nature'. The mooring groups claim that the effects of the tariffs on the costs of providing transfrontier maritime transport services are not such as to affect trade between Member States. If Italy is responsible for reinforcing on a nationwide basis the effects of local anti-competitive agreements, I do not think that the potential effect of such action could be described as being *de minimis* merely because the extra cost for each individual maritime transport undertakings might still be relatively minor. [70] In any event, the application of the Treaty competition rules does not depend on the establishment of an actual effect on competition. A potential effect suffices, and appears difficult to exclude in this case. [71]

53. Secondly, it is claimed that the majority of the holders of concessions for the provision of mooring services at Italian ports have, at least, coordinated their positions in respect of the tariffs to be charged apparently through their representative association, ANGOPI. In this respect, the mooring groups essentially dispute the view of the national court that the actual tariffs applied result from agreements between mooring groups, as endorsed by the maritime authorities. In their view, the joint activities of the providers of mooring services are confined to participating in essentially a transparent and objective administrative tariff-fixing process which is carried out under the overall supervision of the relevant minister. It is, of course, for the national court to make the final findings as to whether, for the purposes of Article 85 of the Treaty, there is an anti-competitive agreement between undertakings [72] at the Ports of Genoa and La Spezia, or a decision of associations of undertakings (for example, ANGOPI and the Comita

70 — The sums whose recovery is sought in the application brought by the plaintiff in the main proceedings (see paragraph 3 above) would hardly appear to be exiguous.

71 — See, for example, Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, at p. 249, and, most recently, Case C-55/96 *Job Centre Coop* [1997] ECR I-7119, paragraph 36 (hereinafter '*Job Centre II*').

72 — As the national court has found expressly that both the Genoan and La Spezia mooring groups are undertakings for the purposes of Article 90(1) of the Treaty, I think that they should also be regarded as undertakings for the purposes of Articles 85 and 86 of the Treaty since, though Article 90 refers to 'undertakings to which the Member States grant special or exclusive rights', the underlying notion is no different from that used in Articles 85 and 86. The statement of the national court simply recognises the fact that the mooring groups have, of course, been granted certain exclusive rights by the maritime authorities at the Ports of Genoa and La Spezia. In this respect, I am of the view that the reference by the mooring groups at the hearing to Case C-343/95 *Cali & Figli* v *SEPG* [1997] ECR I-1547 is misconceived. In that case, the Court found that an anti-pollution surveillance service provided compulsorily at the oil port of Genoa-Multedo was not of such an economic nature as would justify the application of the Treaty rules on competition since it constituted 'a task in the public interest which forms part of the essential functions of the State as regards the protection of the environment in maritime areas' and was, thus, 'connected by its nature, its aims and the rules to which it is subject with the exercise of powers relating to the protection of the environment in maritime areas' (see paragraphs 22 and 23). Although it is alleged in the instant case that the mooring service provided by the mooring groups is one provided in the general economic interest, I do not think that its supposed public-service objective suffices to denude it of its inherent commercial nature.

Utenza Portuale). Only in the event of such a finding will the issue arise as to whether Italy is responsible for the anti-competitive effects of such an agreement or decision. [73]

54. Finally, as regards the possible application of Article 86, the national court has found that the grant to the mooring groups of their exclusive rights has had the effect of placing each of them in a dominant position on a substantial part of the common market. In this respect, I think that it is sufficient to note that, in *Porto di Genova* and *Corsica Ferries*, the Court has already held, in respect of statutory monopolies concerning, respectively, dock work and the provision of pilotage services at the Port of Genoa, that, 'having regard 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'. [74] However, I assume that Italian legal procedure allows the opposing parties to contest this finding in adversary proceedings. Nevertheless, if the mooring groups have committed any abuses of their respective dominant positions, Italy, which is responsible for granting them their legal monopolies, may be responsible.

(b) Article 85

55. The principles governing the potential responsibility of Member States for breaches of Article 85 of the Treaty are now well established. The Court has most recently confirmed in *Sodemare and Others* v *Regione Lombardia* [75] that it is 'settled case-law that Articles 85 and 86, read in conjunction with Article 5 of the Treaty, require Member States to refrain from introducing or maintaining in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings'. [76] Essentially,

73 — The third question referred in this case is concerned with the responsibility of Italy for possible anti-competitive activities and does not, therefore, raise the potential concurrent responsibility of the mooring groups themselves for such activities, if they were still engaged in by such undertakings on their own initiative. Such liability would, of course, not arise if the mooring groups were effectively obliged by the Italian rules to apply anti-competitive tariffs rendered obligatory by the relevant Italian maritime authorities: see, for example, the recent decision in Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, where (at paragraph 33) the Court held that 'if anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 85 and 86 *do not apply*' (emphasis added); as well as the decision of the Court of First Instance in Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 60 and 61. It is noteworthy that, in his Opinion of 18 December 1997, Advocate General Tesauro has recommended that the Court reject the appeal brought by one of the applicants (Somaco) in *Asia Motor France and Others* v *Commission*; see Case C-401/96 P *Somaco* v *Commission*, not yet published in the ECR.

74 — In my Opinion of 9 October 1997 in Case C-163/96 *Criminal Proceedings* v *Raso and Others*, I expressed the view (see paragraph 55) that a monopoly in respect of the provision of temporary labour at the Port of La Spezia was capable of constituting, as the national court had stated in its reference in that case, a dominant position on a substantial part of the common market.

75 — Case C-70/95 [1997] ECR I-3395.

76 — Ibid., paragraph 41.

there are two broadly defined ways in which Member States may infringe their obligations under Article 85 in conjunction with Article 5. First, they may require or favour the adoption of anti-competitive practices involving two or more undertakings or associations of undertakings, or reinforce the effects of such practices. Secondly, they may deprive their own rules of their legislative character by delegating public decision-making power to private economic operators.

56. In the present case, it is common ground that the impugned tariffs were, at least formally, adopted by the relevant maritime authorities at the Ports of Genoa and La Spezia. The core contention of the plaintiff is that those authorities merely rubber-stamp tariff brackets drawn up collusively either by the members of ANGOPI, or by that association in collusion with representatives, or representative associations, of other port users. I have already referred to the absence of consensus regarding this contention. The Court has, in particular, been referred to various ministerial circulars which, whatever their legal value in Italian public law, must, at the very least, influence port authorities when fixing mooring tariffs. That the decisions of such authorities may, despite those circulars, still approve automatically or largely endorse tariffs predetermined by anti-competitive agreements is, of course, possible. However, in the absence of any findings by the national court regarding those circulars — to which, it must be stressed, it was not referred by the plaintiff in its application —, I am not satisfied, on the information available to the Court, that, in respect of the tariffs applied at its ports for the provision of mooring services, Italy, through its decentralised port or maritime authorities, has committed any infringement of Article 85, read in conjunction with Article 5, of the Treaty. If this conclusion appears rather lacklustre, I can only revert to the leitmotif of this Opinion: the absence of a satisfactory factual and legal matrix for a helpful decision in the case. The plaintiff has chosen to raise serious issues regarding alleged anti-competitive agreements and the possible existence and abuse of a dominant position within the constraints of a national procedure which does not admit of the opposing party being heard or of considered judicial determination of central issues of law and fact. When pressed at the hearing to justify this choice, counsel for the plaintiff pleaded the delays inherent in the adversarial procedure in Italy, an argument which scarcely coincides with fundamental legal principles regarding fairness of procedures. To be more precise, Advocate General Gulmann, in his Opinion in *Telemarsicabruzzo*, placed particular stress on the need for findings of fact in competition cases. In this case, unlike in cases such as *Meng*, [77] *Reiff*, [78] and *Dip and Others*, [79] those criteria are missing.

77 — Case C-2/91 [1993] ECR I-5751.

78 — Case C-185/91 [1993] ECR I-5801.

79 — Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others* v *Comune di Bassano di Grappa and Comune di Chioggia* [1995] ECR I-3257.

(c) Article 86

57. According to the plaintiff, Italy is responsible for the abuse by the mooring groups of their dominant positions at the Ports of Genoa and La Spezia. Relying in particular on *Porto di Genova*, it says that there are two aspects to the alleged abuse. First, the use of unnecessary services forced upon Corsica Ferries and, secondly, the tariffs charged for those unwanted services bear no relation to the cost of their provision, as appears from the fact that they vary unjustifiably from port to port. As regards cost, the plaintiff contends that not only are the tariffs based on the global costs of providing a permanent mooring service, but that they also include various other 'supplementary' components, such as a 1% levy for technical assistance provided by ANGOPI to individual mooring groups and a 1% levy for a form of 'insurance' fund. It is also alleged that the tariffs are not applied on a wholly objective basis because of the effects of a supposedly non-transparent discount policy. Corsica Ferries asserts that the mooring groups are led inevitably to commit these abuses as a consequence of the right granted to them by the impugned Italian rules. Furthermore, it is alleged that they are not covered by the derogation contained in Article 90(2) of the Treaty, since a mooring service cannot be regarded as a 'service of general economic interest'.

58. Not surprisingly, the mooring groups, supported by Italy, deny the existence of any abuse. In so far as the charging of tariffs exceeding the actual cost of the service provided is concerned, they rely upon Article 90(2) of the Treaty and contend that such tariffs are necessary to permit mooring enterprises to carry out effectively the task of providing a universal service. The differences in tariffs charged from port to port reflect the influence of local circumstances that the tariff-calculation formula takes into account, by way of corrective factors, when calculating the tariffs. At the hearing, it was asserted that Corsica Ferries has suffered no abuse by the mooring groups of their dominant position, since it benefits from one of the largest discounts. The Commission, though expressly reserving its position at the hearing regarding the practice of offering discounts on the published tariffs, submits that the participation of port users in the tariff-fixing process would seem to guarantee that the tariffs fixed are not unreasonable. However, it contends that, in the final instance, it is for the national court to determine whether they are excessive, having regard not only to the immediate costs of providing mooring services to undertakings like Corsica Ferries but also to the costs of maintaining the universal service.

59. It is well established that the mere creation by a Member State of a dominant position through the grant of an exclusive right cannot, in itself, be regarded as incompatible with Article 86 of the Treaty, [80] and that

80 — See, for example, the recent decision in *Job Centre II*, loc. cit., footnote 71 above, paragraph 31.

'a Member State will contravene the prohibition contained in [Articles 86 and 90(1)] only if the undertaking in question, merely by exercising the right granted to it, cannot avoid abusing its dominant position'. [81] Since Member States are, thus, at liberty, in the absence of specific Community rules, to create statutory monopolies, the only issue in the present case is whether the adoption by the port authorities of the tariff brackets that were applied to Corsica Ferries constitutes an abuse of those groups' dominant positions *for which Italy is responsible.*

60. Since Community law does not currently preclude Italy granting exclusive rights in respect of the provision of mooring services at its ports, the alleged abuse at issue essentially comprises the charging of tariffs that exceeded the costs of providing the service, plus a reasonable profit margin. For my own part, I find it difficult to see how any mere excess in the price of a service, established to the satisfaction of the national court, could result, in the context of Corsica Ferries' claim via Article 633 of the Code, in the refund of the full amount of the fees paid. However, consistently with the position I have already adopted in section IV above, I shall assume that the national court might treat any abusively excessive charging as justifying a complete refund. [82]

61. It is claimed in the present case that the mathematical formula for calculation of the tariffs includes an element over and above costs and profit margin that is intended to cover the cost of providing mooring services on a universal basis. In my opinion, the compatibility with Article 86 of the Treaty of the inclusion of that incidental element depends on whether the service at issue may be regarded as constituting, for the purposes of Article 90(2), a service 'of general economic interest'. The Court has consistently held that, as 'a provision which permits, in certain circumstances, derogation from the rules of the Treaty, there must be a strict definition of those undertakings which can take advantage of it'. [83] In *Porto di Genova*, the Court held that the provision of dock-work services was not of a kind that was necessarily of a general economic interest because it did not

81 — Ibid.

82 — In Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161, the Court held that, where a levy has been paid in contravention of Community law, although a right to reimbursement will in principle arise, 'it is for the national court to assess, according to its national law, in each individual case, whether and to what extent the levy paid may be recovered ...'; see paragraph 25, as well as Case 222/82 *Apple and Pear Development Council* v *Lewis* [1983] ECR 4083, where, at paragraph 41 of its judgment, the Court held that it was for 'the national court to determine, according to its national law, whether and to what extent [an] entitlement to a refund is offset by the advantages accruing directly to the person concerned as a result of the activities [giving rise to the underlying charge]'.

83 — See Case 127/73 *BRT* v *SABAM and NV Fonior* [1974] ECR 313, paragraph 19 and Case C-242/95 *GT-Link* v *DE Danske Statsbaner* [1997] ECR I-4449, paragraph 50.

exhibit special characteristics compared with that of other economic activities, [84] while, in *GT-Link* v *DE Danske Statsbaner*, it took the view that the operation of a commercial port was not an operation of a service of general economic interest. [85] In this case, however, it is contended that the objective of the national rules is to ensure, in the interests of port security, that a universal mooring service is available. As the Court has stated in *BRT* v *SABAM and NV Fonior*, it is 'the duty of the national court to investigate whether an undertaking which invokes the provisions of Article 90(2) for the purpose of claiming a derogation from the rules of the Treaty has in fact been entrusted by a Member State with the operation of a service of general economic interest'. [86] I am satisfied, however, that, if the national court were to find that the relevant Italian maritime authorities had entrusted the mooring groups with such a task, then the application of the prohibition contained in Article 86 to the additional component of the tariffs representing the additional cost of providing, at all times and to all users of the Ports of Genoa and La Spezia, a universal mooring service would be liable, within the meaning of Article 90(2), to obstruct the performance of that task. For that reason, the inclusion of such an element in the charges would not be incompatible with Article 86 read in conjunction with Article 90(1).

VI — Conclusion

62. In the light of all of the foregoing, I recommend that the Court answer the questions referred by the Tribunale di Genova as follows:

(1) National rules or administrative practices in one Member State which debar indistinctly both domestic shipping companies and shipping companies established in other Member States from berthing or unmooring their vessels on entry and departure from ports in the first-mentioned State, unless they use the mooring services provided by undertakings enjoying statutory exclusive rights in respect of the provision of such services, and which require such

84 — Loc. cit., see paragraph 27. Indeed, Advocate General Van Gerven had pointed out that 'if such operations fall within the concept of services of general interest, then that concept can cover practically all economic activities'; see paragraph 27 of his Opinion.

85 — Loc. cit., see, in particular, paragraph 52.

86 — Loc. cit., paragraph 22.

shipping companies to pay to those undertakings dues which may not be commensurate with the actual cost of the services provided, are not incompatible with Article 30 of the Treaty;

(2) Council Regulation (EEC) No 4055/86 of 22 December 1986 in conjunction with Article 59 of the Treaty does not preclude a Member State from imposing a requirement on all shipping companies, regardless of their Member State of establishment, whose ships call at its ports to use mooring services provided by holders of exclusive concessions at those ports;

(3) A Member State which confers on an undertaking an exclusive right to provide mooring services on a market found to constitute a substantial part of the common market and to charge obligatory tariffs which may not be commensurate with the actual cost of providing the services, does not infringe Article 86, read in conjunction with Article 90(1), of the Treaty, in the absence of specified abuse and, in particular, does not do so merely because the tariffs include an element designed to cover the costs of a universally available nationwide mooring service;

(4) In the absence of specific findings by the national court, it is not possible to provide an answer to the third question in so far as it relates to an infringement of Article 85, read in conjunction with Article 5, of the Treaty.