On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Government of the Grand Duchy of Luxembourg 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 Articles 90 and 177;
Having regard to the Protocol on the Statute 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 Tribunal d'arrondissement of Luxembourg (criminal division) by judgment of that court of 20 February 1970, hereby rules:

Without prejudice to the exercise by the Commission of the powers conferred by Article 90 (3), Article 90 (2) cannot at the present stage create individual rights which the national courts must protect.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 14 July 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 1 JULY 1971[1]

Mr President,
Members of the Court,

The origins of the present case are somewhat distant.
By a treaty signed in Luxembourg on 27 October 1956 relating to the canalization of the Moselle, the Federal Republic of Germany, the French Republic and the Grand Duchy of Luxembourg concluded a very complex agreement whereby they undertook to make the stretch of the Moselle between Thionville and Koblenz accessible to ships up

1 — Translated from the French.

to a certain tonnage so that, taking into account the stipulations annexed to the same treaty, such ships could travel from Lorraine to the Atlantic.

The signing of this treaty and above all the achievement of these objectives posed for the Luxembourg Government the problem of establishing one or more ports on the Moselle on the part of that river which constitutes the border between the Grand Duchy and the Federal Republic of Germany and in respect of which there already existed international agreements of great antiquity to which we will later return.

The problem of the port installations on the Luxembourg bank of the Moselle was dealt with by a Law of 22 July 1963 relating to the establishment and operation of a river port in the vicinity of Mertert.

The essential provisions of this law are as follows:

1. A river port was to be established on the Moselle in the vicinity of Mertert, the exact area of this port being fixed by ministerial decrees.
2. The establishment and operation of this port was to be entrusted to a company with State participation (later named the Mertert River Port Company). The Luxembourg State gratuitously conveyed to this company the necessary land and took a 5 million franc holding in the initial capital of the company. Whatever percentage of the capital of the company the Luxembourg State's holding represented, the Luxembourg Government would designate at least half of the members of the board of directors and half of the members of the supervisory board.
3. Finally, Article 12 of the Law provided that the setting-up, development or operation of any port or loading or unloading wharf on the Moselle required Government permission granted upon the advice of the said company and that that company would also be consulted by the Government of the Grand Duchy with regard to the exercise of the right of inspection held by it pursuant to the international agreements on the installation of ports or wharfs on the German bank of the Moselle.

This last article of the Law of 1963 was later held to be inadequate and was extended and elaborated by a Law of 1968.

This Law contains two articles:

— Article 1 amends the original Article 12 by providing especially that permission to operate ports or wharfs outside the boundaries of the land conveyed to the Mertert Port Company can be rendered subject to restrictive conditions relating especially to 'the nature, the origin or destination, and the quantity of goods to be loaded or unloaded'.

— The second article of the Law of 1963 Article 13 which provides for criminal sanctions, first, in respect of any person operating a port or wharf without permission and, secondly, in respect of any person having obtained permission, who does not respect the conditions or limitations to which that permission is subject.

It is these latter provisions which are the direct origin of the case which has been referred to you by the Luxembourg court pursuant to Article 177 of the Treaty of Rome.

A Luxembourg family business, the company J. P. Hein, had for a long time operated a dredging undertaking on the Moselle.

The completion of the canalization obviously deprived this undertaking of its essential company object.

Therefore it sought to 'diversify', to use the modern expression.

After the adoption of the Law of 1963, the Hein undertaking requested from the competent authorities permission to enlarge the wharf which it had established in the vicinity of Bech Kleinmacher in order to carry out certain commercial operations there.

Various temporary authorizations were granted to it both before and after 14 July 1965, the date on which the port of Mertert came into service.

Finally, on 17 February 1967, the Luxembourg authorities gave the Hein company permission to use its wharf, but solely for strictly defined operations:

1. The operations were to be on behalf of the Hein company itself and not on behalf of others;
2. The operations were to comply with the following conditions: 'unloading of sand, or stone chippings, of grit, of gravel, and of pebbles from sand pits or quarries to be crushed or sorted by it (the Hein company) on the spot and the loading of these materials after crushing and sorting'.

In 1968, within the space of a few weeks, the managers of the ports of Trier in Germany and of Mertert in the Grand Duchy of Luxembourg learned that the Hein company had used its port for operations involving coal products.

At the mention of 'coal' the two port managers reacted as the old war-horses of long ago reacted when the trumpets sounded the charge.

First the port of Trier (and this clearly shows that this is not merely a dispute between nationals of Luxembourg) and then the port of Mertert brought before the Procureur d'État (Public Prosecutor) of Luxembourg complaints directed against the Hein company based on the provisions of Article 13 of the Law of 1968.

By a judgment of the Tribunal correctionnel of Luxembourg of 20 February 1970, confirmed by a ruling of the Cour supérieure de justice (Supreme Court) of the Grand Duchy of 15 February 1971, the competent Luxembourg courts ruled that:

1. The acts of which the defendants had been accused were established and were subject to penalties under the provisions of the Law of 22 July 1963 as amended by the Law of 26 June 1968;
2. Nevertheless, there were grounds for suspending the decision as to the guilt of the accused and the pronouncement of sentence until the Court of Justice of the European Communities had ruled on the following questions, referred to it in the circumstances set out in Article 177 of the Treaty of Rome:

'(a) Generally, whether in this field rights are conferred directly by Community law on individuals subject to national law and, in particular, whether such is the case in the matter dealt with by the Luxembourg Law of 22 July 1963 governing the establishment and operation of a river port on the Moselle, as amended by the Law of 26 June 1968 on the same subject;

(b) If the answer is in the affirmative, whether the provisions of the abovementioned Laws are, and to what extent, incompatible either with the letter and spirit of the Treaty of Rome, or with regulations or other obligations imposed by the competent bodies established by the said Treaties.'

I

The Commission and more especially the Government of the Grand Duchy expressly dispute that you are properly seised of these matters and request you to rule that the two questions are inadmissible:

— the first question, because it is too imprecise to enable you to reply to it;

— the second, as you have no jurisdicton to rule on the compatibility of a national law with the provisions of the Treaty.

A — With regard to the second question, clearly the Court has no jurisdiction to reply to it in its present form.

Nevertheless, this is not the first time that the Court has been confronted with such a difficulty and up to now it has

always overcome the problem without excessive adherence to form and in a spirit of trustful cooperation with national courts. In such cases, the Court has always accepted that, although inadequately formulated, the request was in reality for an interpretation of Community provisions to enable the national court to apply them correctly and to draw all the possible consequences (cf. especially the Judgment of 21 October 1970, *Lesage* v *Hauptzollamt Freiburg*, [1970] ECR 861).

I suggest that the same attitude should be taken in this case, although the fact that the Luxembourg court did not specify the provisions of Community law of which it needs an interpretation makes your task more difficult; this leads us to examine the admissibility of the first question.

B — With regard to the first question, it is clearly a matter for regret that the Luxembourg courts did not specify more clearly the provisions of the Treaty of Rome or of secondary Community law for which they seek to know the correct interpretation and scope.

Indeed in a case within the context of Article 177 of the Treaty, the Court can only interpret Community law in order to enable the national court to decide the case before it.

It is clear that the national court is better placed to decide which provisions of Community law require interpretation, and by specifying exactly which these provisions are it can make both its own task and that of the Court easier.

However, does the imprecise formulation of the question referred mean that it must be rejected as inadmissible?

I do not think so for two reasons:

1. It should be noted that while the decision of the Luxembourg court calls for the sharpest reservations with regard to the way in which it is formulated, from the point of view of the Community it deserves high praise with regard to the general considerations on which it is based.

Indeed it accepts, without even feeling it necessary to remark upon it, the principle whereby, even in criminal matters, the applicability of a national law adopted after the entry into force either of the Treaty of Rome or of a provision of secondary Community law may be rendered of no effect by the existence of the Community legal order.

In this connexion it should not be forgotten that the Cour supérieure de justice of Luxembourg was the first of the Supreme Courts of the Member States to affirm, in its judgment of 14 July 1954, the precedence of Community law.

This factor must, in my opinion, be taken into account in determining the extent of the attempt at interpretation which may be made in order to accept the admissibility of the reference.

2. I believe that this attempt will allow us to ascertain fairly exactly which provisions of the Treaty require interpretation to enable the Luexmbourg court to decide the case before it, and I will now attempt to demonstrate this.

II

In order to unearth the questions in respect of which the Luxembourg court requires your interpretation, we must evidently 'clear the ground a little' *in limine litis*, and sometimes even undertake 'archaeological excavations'.

I would like to make the four following preliminary observations on this subject:

A — First observation

In the present case the Court has only to take into account the provisions of the Treaty of Rome and possibly of secondary Community law derived from that Treaty.

This simplifies the problem, since the Court knows how complex are the questions raised by the agreements relating to the canalization of the Moselle and by the application of such agreements when examined within the context of

the ECSC Treaty and the Court will also remember the controversies which have arisen on the subject[1].

However, the Luxembourg court has only referred to you, and moreover legally could only refer, questions relating to the EEC Treaty.

B — Second observation

In my opinion we should exclude from the argument the international treaties relating to the Moselle, even though part of the Luxembourg legislation of 1963 and 1968 is derived from those treaties more or less directly.

A number of these treaties are of very long standing.

As you know, the final act of the Congress of Vienna gave to Prussia all those parts of the Duchy of Luxembourg situated to the East of the Moselle, of the Sûre and of the Our, with the exception of the town of Vianden.

The delimitation of the borders of Luxembourg was fixed by a subsidiary treaty concluded at Aix-la-Chapelle on 26 June 1816 between the King of the Netherlands, in his capacity as Grand Duke of Luxembourg, and the King of Prussia.

Article 27 of this treaty establishes what is now customarily called the 'condominium' of Luxembourg and of Germany over the length of the Moselle border.

It provides in fact that 'wherever streams, rivers or larger waterways serve as the border, they shall be common to the two States, ... but each State shall have exclusive responsibility for ensuring the preservation of the banks situated on its side.

No change whatsoever may be made either to the course of the rivers or to the present state of the banks, nor may any concession or removal of water be granted without the cooperation and consent of the two governments ...'.

Further, more recently, the treaty on the canalization of the Moselle contains at least in one of its articles, Article 29, certain provisions relating to ports.

However, in my opinion, the existence of these international agreements has no direct influence on the application of the Treaty of Rome.

They are in fact merely agreements made between Member States before the entry into force of the Treaty and do not therefore fall within the sphere of application of Article 234, which only applies to treaties concluded between one or more Member States and third countries.

Moreover, in the judgment of this Court of 27 February 1962 (*Commission* v *Government of the Italian Republic,* [1962] ECR 1) you ruled that even where a treaty such as the General Agreement on Tariffs and Trade linked Member States both amongst themselves and with third countries, nevertheless 'in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force, including agreements made within the framework of GATT'.

I believe that the same applies *a fortiori* for agreements such as those mentioned above which were concluded solely between Member States or States to whose sovereign rights Member States have acceded.

I was rather uneasy in this respect to hear the Representative of the Luxembourg Government the other day propounding a theory according to which, since the Treaty of Aix-la-Chapelle was a 'political' treaty, that is to say, a treaty defining borders, none of its provisions could have been affected by the entry into force of the Treaty of Rome.

If one took this theory quite literally, it would clearly be exaggerated, as is

1 — Cf. on this point:
— Revue de la navigation intérieure et rhénane, 1957, page 147;
— Centre pour l'étude scientifique des transports de Rotterdam: Le régime relatif à la navigation de la Moselle, étude collective, 1960;
— Scholtens, in the Netherlands Periodical 'Verkeer' No. 4, 1960, pp. 200-215.

shown by the following example which I have deliberately chosen as bordering on the absurd: numerous peace treaties include, along with territorial clauses, obligations of a commercial nature (most favoured nation clause, etc.); nobody could claim that these economic or commercial stipulations have necessarily remained applicable after the entry into force of the common market Treaty because the territorial clauses contained in these same agreements continue to have effect.

Whatever the nature of treaties concluded before the entry into force of the Treaty of Rome, the provisions of the latter treaty take precedence over the stipulations of the earlier treaties where they cover the same ground.

In addition, it is because they well recognized this general principle of the precedence of the Treaty of Rome that its authors devoted one particular article, Article 233, to certain prior agreements binding on certain of the Member States as between themselves, which do not include the agreements with which we are here concerned.

If it were necessary, therefore, I believe the Court would have to restate this principle of the precedence of the Treaty of Rome in matters governed by it over other international agreements previously concluded between Member States.

However, is this necessary in the present case?

For my part, I do not think it is.

The Luxembourg court did not ask itself that question.

In addition, Article 109 of the Treaty of Vienna, of which the Treaty of Aix-la-Chapelle is merely an implementing provision, and Article 29 (2) of the treaty on the canalization of the Moselle, provide a principle of non-discrimination which is perfectly in conformity with the obligations undertaken by the Member States when they ratified the EEC Treaty.

In these circumstances, I do not think that it is indispensable to refer in your judgment to this question of the possible interference of prior treaties with the provisions of the Treaty of Rome.

C — Third observation

My third remark relates to a question which was raised by the Hein company and by the Commission in its observations before the Court. It concerns the matter of whether you can restrict yourself in the present case to interpreting certain provisions of the Treaty or whether you must also interpret in the context of this case a text of secondary Community law. Regulation No 1017/68 of the Council.

In agreement with the Commission, I think that this Community regulation should be excluded from the discussion, but I clearly recognize that this solution is not self-evident.

Indeed, this regulation, which applies the rules of competition to transport by rail, road and inland waterway, provides in Article 1 that it covers not only transport undertakings in the strict sense of the word, but also the operations of 'providers of services ancillary to transport'. Therefore, the question may then be raised whether companies operating ports do not fall within the category of 'providers of services ancillary to transport'.

I do not believe that this is so, for two reasons:

— on the one hand, in the very specialized vocabulary of the law relating to transport, the expression 'providers of services ancillary to transport' generally has a relatively limited scope: transport commission agents, bulking or handling undertakings, and so on;

— on the other hand, and more important, application of Regulation No 1017/68 to port undertakings would give rise to extremely illogical consequences.

In fact, the regulation only applies to river transport. It follows that if one wanted to apply it to ports, only river

ports would be subject to it, while ports which were both river and sea ports would be subject to it only in respect of one part of their activity, which would be extremely difficult to separate from the rest.

I therefore believe that you have only to interpret treaty provisions in relation to the present case.

D — Fourth observation

This leads me directly to my last remark: which provisions of the Treaty can serve to enlighten the Luxembourg court?

Without any doubt, Article 90 is the only one the meaning and scope of which was discussed by the Government of the Grand Duchy, the Commission and the Hein company.

However, should we not also examine another article of the Treaty, Article 37?

I ask this question because I believe that we can properly inquire whether a monopoly, even though it is restricted to the use of a small part of the river frontage of one State, falls within the scope of Article 37 if such a monopoly, however restricted, is combined with a system of authorizations relating to the whole of the public river area and giving the public authority powers as extensive as those granted by Article 12 of the Luxembourg Law of 22 July 1963, as amended by the Law of 1968.

Upon reflection and, I will not conceal it, not without a certain amount of hesitation, I do not think that in this case you need interpret Article 37 of the Treaty, for two reasons:

(a) However wide the powers that you believe you have in separating from decisions of national courts the questions which they in fact wish to refer, they cannot go so far as to lead you to examine questions which the national court clearly did not intend to refer to you (cf. in this respect the Judgment of 6 May 1971, *Cadillon* v *Firma Höss*, Case 1/71, [1971] ECR 351).

In this case, it is clear in view of the grounds of the judgment referring the questions to you, that the Luxembourg court only referred to you problems which are concerned with the compatibility of the Luxembourg Law with the provisions of Chapter 1 of Title I of Part Three of the Treaty relating to competition policy and not with those contained in Part Two of the Treaty.

(b) Above all, it is evident that the Mertert Port Company is not a body through which, *de jure*, the Luxembourg State 'either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States'. The provisions of the international treaties relating to non-discrimination which I mentioned above are sufficient evidence of this.

The only remaining possible question with regard to the application of Article 37 is whether this body does not *de facto* play an equivalent rôle.

A consideration of this point could be very delicate; according to certain information which has appeared in the press, the primary effect of the creation and the operation of this port, whose financial deficit is causing anxieties for the Luxembourg tax-payer, has been to increase traffic on the German and Belgian railways.

However this may be, to decide on such a question would entail an examination of factual considerations which this Court may not undertake within the context of the powers conferred by Article 177 of the Treaty.

The discussion must therefore be concerned solely with Article 90.

In this respect, in view of the main areas of injury apparent from the grounds of the judgment referring the matter to this Court, I believe that the following three questions may be discerned in the abovementioned judgment:

1. Is a company with State participation, set up by a law, to whose capital a State has subscribed and for whose management that State holds special powers under a national Law, one

of the undertakings referred to by Article 90?

2. If the first question is answered in the affirmative:
   In what circumstances should such an undertaking, where it is entrusted with the establishment and operation of a river port, be regarded as operating 'services of general economic interest' within the meaning of the provisions of Article 90 (2)?
3. Does Article 90 (2) have direct effect?

III

The reply to the first question thus elucidated seems to me to be necessarily in the affirmative.

Article 90 as a whole applies in fact to public undertakings in general or to undertakings, whether public or private, to which States grant special or exclusive rights.

Article 90 (2) sets up special rules for such of these undertakings as are 'entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly'.

The concept of public undertakings, derived from the Anglo-Saxon concepts of 'public corporation' or of 'public enterprise', is an economic concept rather than a legal one and, in spite of the considerable attention devoted to this question, particularly during the symposia of Brussels in 1963 and of Bruges in 1969, it would be dangerous to attempt a general definition of them in a Community context at the present moment.

This definition may only emerge gradually from the case-law of the Court which, evolving case by case, will outline the concept, as also, under the supervision of this Court, will Community regulations, directives or decisions.

However, with regard to a company such as the one established by the Luxembourg Law of 1963, the solution to the question is, in my opinion, relatively simple.

Certainly, the fact that the State participates in the capital of a company is not to my mind, of itself sufficient to give to this company the character of a public undertaking within the meaning of Article 90 of the Treaty.

It is possible to find cases where State participation in the capital of an undertaking does not *ipso facto* make the latter a public undertaking.

However, in my opinion, such a company must be regarded as a public undertaking when two factors are added to State participation in the capital.

1. The establishment of the company must arise from a unilateral act of the public authorities—in the present case, from a law. Certainly, the setting-up of the company entails a contract between those participating in the contribution of its capital, but the unilateral act of the public authorities is the basis of that contract, certain stipulations of which would, in many cases, be illegal in the absence of that unilateral act.

2. The participation of the State in the management of the company must be irrespective of the amount of the capital held by it. In my opinion, this is an essential factor. Where, in a company with State participation, the number of members representing the public authorities on the managing bodies depends not on the proportion of capital held or on particular conditions of the company contract, but on provisions contained in a unilateral act of the public authorities, then the company is not a private undertaking with mere financial participation from the State or another public body, but a public undertaking within the meaning of Article 90 of the Treaty. In fact the public body acts not only as a shareholder, but also by virtue of its *'imperium'*. Such is certainly the case of the company which the Luxembourg court is called upon to evaluate. By the terms of the Law of 1963, the State shall designate at least half of the board of directors and of the supervisory board and it shall continue to designate them even if the distribution of the capital

changes considerably following an increase or reduction of capital.

Let me add that in this case, the company the nature of which the Luxembourg court has to evaluate appears to be not merely a public undertaking but an undertaking to which are granted, at least within certain limits, special and exclusive rights.

Therefore, without great hesitation, I suggest that you should rule that a company with State participation set up by a law, to whose capital a State has subscribed and in whose management the said State holds special powers under national law, is one of the undertakings referred to in Article 90 of the Treaty.

IV

The second question will, I believe, require you to give details of the scope of Article 90 (2).

Indeed, while paragraph (1) of that article sets out the principles applicable to all public undertakings, paragraph (2) makes particular provision for undertakings operating services of general economic interest.

As one writer has excellently put it (the Drago report at the symposium of Brussels of March 1963), 'the concept of a public undertaking does not coincide with that of services of general economic interest but there is common ground between the two'.

In my opinion, it is precisely in one of these areas of 'common ground' that in certain circumstances a public undertaking entrusted with the operation of a port is placed.

As all the participants emphasized at the symposia of Brussels and of Bruges, the concept of services of general economic interest is extremely broad and apparently it was for this reason that the authors of the Treaty chose it in preference to the concept which is more traditional in certain national laws but is probably narrower, that of economic public service or of public service of an industrial and commercial nature.

For myself, I think that an undertaking entrusted with the running of a river port operates a service of general economic interest when two conditions are fulfilled:

(a) the port should of course be public and not, except perhaps in quite exceptional cases, a port reserved for the needs of one or more undertakings;

(b) the traffic using the port should be involved in general economic activity.

This qualification may appear unnecessary if one is only examining the case before the Luxembourg court, since the port of Mertert on its own handles almost all the river traffic of Luxembourg. Nevertheless, I believe that such qualification is useful in order that you may reserve for the future the position which you will be led to adopt if the problem is put to you, for example, with regard to the continually increasing activities of undertakings which operate public ports reserved for what is now called 'pleasure craft'.

I therefore believe that if these two conditions are fulfilled, an undertaking entrusted with the management of a port operates a service of general economic interest.

V

There remains the third question which may be deduced from the decision of the Luxembourg court: whether Article 90 (2) is directly applicable and whether, of itself, it creates individual rights which may be relied on before national courts.

While the Commission and the Luxembourg Government disagree as to the answer to be given to this question, they are nevertheless in agreement on one point.

They believe in fact that the first two paragraphs of Article 90 must be read together and that if direct effect is attributed or denied to one of those paragraphs, the same must necessarily be true of the other.

I do not accept this point of view.

I believe that these two paragraphs establish two independent systems which, al-

though linked with each other, do not necessarily have the same legal scope.

Paragraph (1) sets out the *obligations which are incumbent on States* with regard to their public undertakings or to those undertakings to which they grant special rights.

Paragraph (2) imposes, within certain limits which it lays down, *obligations on certain undertakings*: those entrusted with the operation of services of a general economic nature or having the character of a revenue-producing monopoly.

Thus, in my view, the decision taken by this Court in respect of the direct effect of Article 90 (2), which is the only provision of which the Luxembourg court requires an interpretation, will in no way prejudice the decision which you may one day take on the subject of the direct effect or otherwise of Article 90 (1).

With regard to Article 90 (2), I believe that it fulfils none of the conditions adopted in the case-law of the Court for determining which provisions of the Treaty have direct effect.

Broadly speaking, as Mr Advocate-General Gand stated in Case 57/65 (*Lütticke* v *Hauptzollamt Saarlouis,* [1966] ECR 205, at p. 216), the requirements laid down in the case-law of the Court for the existence of direct effect in respect of a provision of the Treaty imposing an obligation on Member States or individuals are as follows:

1. That the obligation should be clear;
2. That it should be unconditional;
3. That it should not assume for its implementation any legal measure by the Community institutions.

It appears to me that a glance at Article 90 (2) shows that this provision fulfils none of these conditions.

That paragraph doubtless lays down an obligation of principle: that incumbent upon undertakings to which it applies, to implement the rules of the Treaty; but this obligation is qualified by an important reservation, in that it only applies 'in so far as the application of such rules does not obstruct the performance, in law or in fact, of the participating tasks' assigned to the undertaking.

Finally, the paragraph ends with what we might call 'a reservation within a reservation': non-application of the rules of the Treaty must not affect the development of trade *to such an extent* as would be contrary to the *interests of the Community*.

In other words, the undertakings referred to in Article 90 (2) must in principle comply with the Treaty; nevertheless, they may avoid compliance with the rules there laid down if those rules obstruct the performance, in law or in fact, of the tasks assigned to them, but only in so far as failure to comply with those rules does not affect trade to an extent contrary to the interests of the Community.

One cannot really say that this is a clear and unconditional obligation.

Its implementation therefore requires the intervention of the Community authorities, which moreover is provided for by Article 90 (3).

Who other than those authorities could in fact decide in particular whether measures or actions contrary to the rules contained in the Treaty affect the development of trade and whether they affect it to an extent *contrary* to the interests of the Community?

I therefore suggest that you should rule that Article 90 (2) does not have direct effect.

It is my opinion therefore that the Court should rule as follows:

1. A company with State participation set up by a law, to whose capital a State subscribed and in whose management the said State holds special powers under national law, is one of the undertakings referred to in Article 90 of the Treaty.

2. Where such an undertaking is entrusted with the establishment and operation of a public river port, the traffic using which is involved in general economic activity, that undertaking operates a service of general economic interest within the meaning of Article 90 (2) of the Treaty.

3. Article 90 (2) of the Treaty is not directly applicable and therefore cannot of itself create individual rights which the national courts must protect.