# OPINION OF ADVOCATE GENERAL STIX-HACKL

## delivered on 7 November 2002 [1]

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1 — Original language: German.

## I — Introduction

1. The present cases, which have been referred by the Corte Suprema di Cassazione, concern an Italian law which provides that a port charge be levied on unloading and loading goods in specified Italian ports and that part of the proceeds be allocated to public undertakings entrusted with various tasks in those ports, including unloading and loading goods.

2. In substance, the question is whether the contested provision is to be regarded as a measure which infringes Article 90(1) of the EC Treaty (now Article 86(1) EC) on the ground that it creates a risk that the possibly dominant position it gives the recipient undertaking will be abused. What is also in question is whether such a provision is to be regarded as State aid or as compensation for services of general economic interest.

3. These questions arise in proceedings concerning an undertaking which loaded and unloaded goods itself, and accordingly did not use the services of the public undertaking entrusted with the dockside tasks, but which was none the less required to pay the port charge, which it is now contesting.

4. The undertaking required to pay the port charge considers that the charge is incompatible with Community law, in particular Article 86 of the EC Treaty (now Article 82 EC) in conjunction with Article 90(1) of the EC Treaty (now Article 86(1) EC) and Article 92 of the EC Treaty (now Article 87 EC).

## II — Relevant national law

### A — *The public undertakings concerned*

5. *Law No 961/67*,[2] as amended by *Law No 494/74*,[3] established the Aziende dei Mezzi Meccanici e dei Magazzini (Undertakings for technical means and warehouses, hereinafter 'AMMs') at the six Italian ports of Ancona, Cagliari, Leghorn, La Spezia, Messina and Savona.

2 — *Gazzetta Ufficiale della Repubblica Italiana* (hereinafter, 'GURI') No 272 of 30 October 1967.

3 — GURI No 274 of 21 October 1974.

6. According to their founding statute, the AMMs are public economic entities ('enti pubblici economici') and are subject to the control of the Ministero della marina mercantile (Ministry for Merchant Shipping). According to the national court, such a public entity is 'a legal person who, although forming part of the public authorities, pursues an activity on the market — sometimes by way of monopoly — as an undertaking, according to economic criteria'.

7. Under Article 2 of Law No 961/67, the AMMs are entrusted with 'managing the stevedoring equipment, warehouses, depots and all the other moveable and immovable State property, on behalf of the Merchant Shipping Authorities, for the movement of goods, providing for the acquisition, maintenance and development of such assets and undertaking any other activity in connection with all the above'. Article 2 of Law No 494/74 authorises the AMMs 'to set up and pursue other commercial services relating to the port and assume the management of non-State installations and plant and to carry out all the above in other ports falling within the jurisdiction of the Captain of the Port at which the AMMs have their registered offices'.

8. Each AMM must bear the costs of managing, maintaining and developing the assets it manages. The costs of acquiring new assets are borne by the State authorities in so far as the AMMs' budget is insufficient. In order to perform their statutory tasks, the AMMs have available to them the proceeds from the assets referred to above, as well as funds from loans and from other financial transactions. In addition, *Law No 355/76* [4] provides that two thirds of the port charge levied under *Law No 82/63* [5] is to be allocated to the AMMs.

B — *The contested port charge*

9. *Law No 82/63* introduced a port charge ('tassa portuale') on unloading and loading goods in specified Italian ports. [6] The port charge is assessed and levied by the State fiscal authorities.

4 — GURI No 147 of 5 June 1976.

5 — GURI No 52 of 23 February 1963.

6 — In addition to this port charge, Legislative Decree ('decreto legge') No 47/74, as amended and transformed into Law No 117/74 (GURI No 115 of 4 May 1974), introduced a *tassa erariale di sbarco e imbarco* (State charge on unloading and loading) of goods carried by sea or air in all Italian ports, but this is not paid over to the AMMs.

10. *Law No 355/76* applies the port charge under Law No 82/63 to cargo handling in any one of the six ports in which an AMM is established and allocates two thirds of the charge to the AMMs in order that they can carry out their duties.

11. The *Decree of the President of the Republic of 12 May 1977*[7] sets the port charge at ITL 15 (for specified goods such as phosphates and nitrates), ITL 35 (for other goods such as sand, gravel and cement) and ITL 90 (for other goods) per metric tonne.

**III — The main proceedings and the questions referred**

12. In the port of Cagliari,[8] Enirisorse SpA (hereinafter 'Enirisorse') unloads and loads domestic and imported goods using its own personnel and equipment.

13. By a payment order, the Ministry of Finance fixed the port charges due from Enirisorse in 1992 in respect of cargo handling. Enirisorse contested this notice on the ground that the Decree of 12 May 1977 setting the port charge under Law No 355/76 was unlawful.

14. After Enirisorse's action had been unsuccessful in the Tribunale Cagliari (Court of First Instance, Cagliari) and the Corte d'Appello Cagliari (Court of Appeal, Cagliari), Enirisorse appealed to the Corte Suprema di Cassazione claiming, *inter alia*, that the charge regulations in question were not compatible with Community law.

15. As a result, the Corte Suprema di Cassazione seeks a preliminary ruling from the Court on the following questions:

1. Does allocation to a public undertaking — operating in the market for dockside unloading and loading of goods — of a significant proportion of a charge (port charge on loading and unloading goods) paid to the State by operators which have not obtained any services from that undertaking, constitute a special or exclusive right or a measure contrary to the rules of the Treaty, in particular the rules on competition, within the meaning of Article 90(1) of the Treaty?

7 — GURI No 270 of 4 October 1977.

8 — It is to be inferred from the submissions of the Italian Government that in fact it is Portovesme port. However, this is not material since the Cagliari AMM also operates in Portovesme.

2. Irrespective of the reply to the preceding question, does the allocation to such a public undertaking of a significant proportion of the proceeds from the charge amount to abuse of a dominant position as a result of a State legislative measure and is it thus contrary to Article 86 in conjunction with Article 90 of the Treaty?

3. May the allocation to such an undertaking of a significant proportion of the abovementioned charge be defined as State aid, within the meaning of Article 92 of the Treaty, and does it therefore justify, in the event that the Commission is either not notified or adopts a decision finding the aid to be incompatible with the common market, pursuant to Article 93, the exercise by national courts of their powers — in accordance with the case-law of the Court of Justice — to ensure disapplication of illegal and/or incompatible aid?

4. Does the appropriation to the abovementioned public undertaking, *ab origine*, of a significant proportion of the proceeds from a State charge levied for or upon the unloading or loading of goods at ports, without such payment being reciprocated by any services rendered by the AMM itself, constitute a charge having an effect equivalent to a customs duty on imports (prohibited by Articles 12 and 13 of the Treaty), or an internal taxation imposed on products of other Member States in excess of that imposed on similar domestic products (Article 95), or a barrier to imports, prohibited by Article 30?

5. In the event that the national provisions are in conflict with Community law, do the factors set out in the foregoing paragraphs, considered individually, affect the charge as a whole or only the portion allocated to the AMM?

## IV — The first and second questions, and the fifth question in so far as it concerns abuse of a dominant position

16. Article 86(1) EC provides that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to the competition provisions.

17. Therefore, the question as to whether a particular national provision falls within the scope of application of Article 86(1) EC pre-supposes an analysis of whether it is compatible with, *inter alia*, the competition provisions, in the present case Article 82 EC. For that reason, the first two questions,

plus the fifth question in so far as it concerns abuse of a dominant position, are to be considered together. In substance, what must be determined is whether Article 82 EC in conjunction with Article 86 EC prohibits a national law which on the one hand entrusts a public supplier of port services with tasks relating to port infrastructure but on the other requires other economic operators who unload and load goods using their own assets to pay a charge part of which is allocated to that public undertaking.

A — *Submissions of the parties*

1. The admissibility of the first and second questions

18. The *Italian Government* submits that the first and second questions are inadmissible since the national court has not established the facts necessary to enable the questions to be answered. Thus, the relevant market has not been defined. This means that the questions are purely hypothetical.

19. By contrast, *Enirisorse* and the Commission regard the first and second questions as admissible, since the Court is, in principle, bound to give a ruling on questions concerning the interpretation of Community law. In that regard, they refer in particular to *TNT Traco* [9] and *Ambulanz Glöckner*. [10] The Commission is moreover of the opinion that it is for the national court to make findings as regards facts which do not appear sufficiently clearly from the documents but which are necessary to enable Community law to be applied in the main proceedings.

2. The questions referred

20. *Enirisorse* and the *Commission* submit that Articles 86 EC and 82 EC are applicable to the provisions in question. It is not disputed that the Cagliari AMM is an undertaking for the purposes of competition law and that the allocation of two thirds of the port charge constitutes the grant of a quasi-exclusive or special right to that AMM as compared with its competitors.

21. *Enirisorse* and the *Commission* point out that, when taken together, the ports managed by the AMMs cover a substantial part of Italy; *Enirisorse* adds that, when taken together, the AMMs have a dominant position.

9 — Case C-340/99 *TNT Traco* [2001] ECR I-4109.
10 — Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

22. In contrast to this, the *Italian Government* submits that Portovesme (the relevant port) is by no means a significant market in Community terms.

23. In the Commission's view, it is for the national court to determine, in the light of *Merci convenzionali porto di Genova* [11] and *Centre d'Insémination de la Crespelle*, [12] whether the AMMs have a dominant position, and the national court has clearly proceeded on the basis that they do.

24. *Enirisorse* and the *Commission* considers that the contested national provision enable the abuse of a dominant position, since it allows the Cagliari AMM to strengthen its dominant position. The *Commission* adds that the analysis in *TNT Traco* [13] can be applied to the present case. In that case, the Court held that the receipt by an undertaking of remuneration for a service it had not provided constituted abuse of a dominant position. The only difference is that in *TNT Traco* the postal dues were paid directly by the undertakings to Poste Italiane, whereas in the present case the port charge is paid to the AMMs via the State.

25. On the other hand, the *Italian Government* emphasises that creating a dominant position by granting exclusive or special rights within the meaning of Article 86(1) EC is not *per se* incompatible with Article 82 EC. Furthermore, it has not been proved that the Cagliari AMM has abused the rights granted to it.

26. *Enirisorse* and the *Commission* considers that Article 86(2) EC cannot be used to justify the provision. The order of the national court does not refer to any facts showing that the allocation of funds is necessary to assume the provision of services of general economic interest. The fact that AMMs are not established in all Italian ports proves that their activities are not indispensable.

27. By contrast, the *Italian Government* considers the contested provision to be justified under Article 86(2) EC in any case. The port charge is necessary on socio-economic grounds and has been imposed in the public interest: in the six ports in which the AMMs have been established, trading income is so low that it does not ensure finance sufficient to maintain the port facilities. The disputed provision is intended to ensure the survival of those ports generally as well as the efficient functioning of their facilities, and to guarantee the safety of ships' berths and the availability of port services at reasonable prices.

11 — Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889.

12 — Case C-323/93 *Centre d'insémination de la Crespelle* [1994] ECR I-5077.

13 — Cited above, note 9.

B — *Legal analysis*

1. The admissibility of the first and second questions

28. According to settled case-law, in the context of the cooperation between the Court and the national courts provided for by Article 234 EC, it is solely for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. [14]

29. In exceptional circumstances, the Court can examine the conditions in which the case was referred to it by the national court and may refuse to rule on a question referred for a preliminary ruling only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [15]

30. Those requirements are of particular importance in the field of competition law, which is characterised by complex factual and legal situations. [16]

31. The order referring the present case contains few details of the services the AMMs supply and of the ports concerned. However, the parties had the opportunity to provide supplementary material at the oral hearing, so as to enable the Court to give clear guidance in the light of the facts of the case, which ultimately have to be established by the national court. Therefore, the first and second questions are admissible.

2. The questions referred

32. To answer the first and second questions, it is necessary to determine whether the facts as established by the national court fall within the personal and substantive scope of application of Article 86(1) EC.

14 — *TNT Traco* (cited above, note 9), paragraph 30, under reference to Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38.

15 — Case C-35/99 *Manuele Arduino* [2002] ECR I-1529, paragraph 25, under reference to *Bosman* (cited above, note 14), paragraph 61, and *PreussenElektra* (cited above, note 14), paragraph 39.

16 — Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 70. See also Joined Cases C-320/90 to 322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 7.

33. For that reason, whether the AMMs are undertakings within the meaning of Article 86(1) EC must be considered first, and then the substantive scope of application of Article 86(1) EC.

(a) Whether the AMMs are public undertakings

34. The concept of an undertaking has been defined in the Court's case-law as encompassing, 'in the context of competition law... every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'. [17]

35. The entities the subject of the present case, the AMMs, are engaged in an economic activity in that they supply services, in particular the unloading and loading of ships, in return for remuneration.

36. There is likewise no doubt that the AMMs are public undertakings. This is shown by their legal form, namely *enti pubblici economici*, as well as by the ministerial control to which they are apparently subject.

17 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

(b) Whether the AMMs are undertakings having special or exclusive rights

37. In my opinion, this question is not relevant to the applicability of Article 86(1) EC, since the AMMs are public undertakings.

38. Article 86(1) EC provides that undertakings for whose actions States must take special responsibility by reason of the influence which they may exert over such actions are subject to all the rules laid down in the Treaty, and in particular to the competition provisions. [18] This applies not only to public undertakings but to any undertaking whose special position results from the grant of special or exclusive rights. Thus, the applicability of Article 86(1) EC depends on the ability of the State to influence the undertaking concerned. [19] Accordingly, public undertakings are always within the scope of application of Article 86(1) EC, whether or not they have also been granted special or exclusive rights.

18 — See, for example, Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom* v *Commission* [1982] ECR 2545, paragraph 12.

19 — See Schwarze and von Burchard, *EU-Kommentar*, Article 86 of the EC Treaty, paragraph 8.

(c) Whether there is a dominant position

39. However, whether the facts as set out by the national court fall within the substantive scope of application of Article 86(1) EC in conjunction with Article 82 EC as well must also be examined.

40. Whereas Article 82 EC applies 'only to anti-competitive conduct engaged in by undertakings on their own initiative, not to measures adopted by States', [20] the Court has consistently held that the aim of Article 86(1) EC is 'to specify in particular the conditions for the application of the competition rules laid down by Articles 85 and 86 [now Articles 81 and 82 EC] to public undertakings, to undertakings granted special or exclusive rights by the Member States and to undertakings entrusted with the operation of services in the general economic interest'. [21] Accordingly, Article 86(1) EC enables the competition rules to apply to anti-competitive practices which could not otherwise be attributed to the undertaking concerned.

41. Given the cross-reference in Article 86(1) EC, what must next be examined is whether the requirements of Article 82 EC have been met. The first requirement of Article 82 EC is that the undertaking concerned must have a dominant position within the common market or in a substantial part of it.

(i) The relevant market

42. The Court has repeatedly stated that when considering the possibly dominant position of an undertaking, 'the definition of the market is of fundamental significance... as is the delimitation of the substantial part of the common market in which the undertaking may be able to engage in abuses which hinder effective competition'. [22]

43. The Court has consistently held that the relevant market, 'must be judged in the context of [a] market comprising the totality of the products [or services] which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products [or services]'. [23]

20 — Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 10.

21 — See in particular Case 30/87 *Bodson* [1988] ECR 2479, paragraph 16.

22 — See Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 36, and Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743, paragraph 57.

23 — Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37.

44. The national court has held that the market in the present case is for cargo handling services in ports. [24] The objectively relevant market in this case would therefore appear to be the market for those services; but it is for the national court to define that market by reference to the particular features of the services in question. [25] It will in particular have to examine the extent to which cargo handling may be distinguished from other port services.

45. It is also for the national court to define the relevant market's geographical extent. [26] This is disputed in the present case. The national court appears to consider that it is the particular port at which an AMM is established. The Italian Government submits that it is the port of Portovesme as a part of Cagliari port, because the AMMs operated in both ports. By contrast, Enirisorse submits, and indeed emphasised at the oral hearing, that it is all ports in which an AMM is established and, obviously having regard to the requirements of Community law, points out that this includes the port of Leghorn, which is a significant international cargo handling centre and is therefore comparable to the port of Genoa. At the oral hearing, the Commission took the ports of Cagliari and Portovesme as a basis.

46. In this connection it is to be noted that although the activity of each AMM is geographically restricted, all the AMMs are subject to the same legislative provisions regardless of where they operate. This could lead to homogeneity of competitive conditions, which would allow all the ports having an AMM to be regarded together as the geographically relevant market. On the other hand, the fact that the Cagliari and Portovesme port facilities are on an island might suggest that there is no homogeneity.

47. It is for the national court to make a definitive ruling. However, in doing so it will have to bear in mind 'the need to take into account the market on which conditions of competition are sufficiently homogeneous, that is to say an area in which the objective conditions of competition applying to the services in question and in particular consumer demand are similar for all economic agents'. [27]

24 — See the amended proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services (COM (2002) 0101 final) (OJ 2002 C 181 E, p. 160), Article 4 of which defines port services as, 'services of commercial value that are normally provided against payment in a port and which are listed in the Annex'. It appears from the Annex that 'port services' include in particular cargo handling, 'including (a) loading and unloading; (b) stevedoring, stowage, transhipment and other intra-terminal transport; (c) storage, depot and warehousing, depending on cargo categories; (d) cargo consolidation'.

25 — See for example *Sydhavnens Sten & Grus* (cited above, note 22), paragraph 60.

26 — Paragraph 60.

27 — *Ambulanz Glöckner* (cited above, note 10), paragraph 34, under reference to Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 44.

(ii) The AMMs' dominant position

48. The next question is whether and, if so, to what extent the contested provision either gives the AMMs a dominant position on the relevant market or, if they already have such a position, extends it.

*Dominant position as defined in the case-law*

49. For the purposes of Article 82 EC, a dominant position is, 'a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers'. [28]

50. However, the application of Article 82 EC is, 'not precluded by the fact that the absence or restriction of competition is facilitated by laws or regulations'. [29] Instead, it appears from the case-law on Article 86(1) EC in conjunction with Article 82 EC that a position of economic strength falls within the above definition even if created by legislation. [30] For there to be such a position of economic strength, the relevant undertaking must be enabled to influence the market *at will*. [31] If it can, then, 'irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market'. [32]

*Dominant position as the result of the grant of exclusive rights*

51. According to the Court's findings in *Dusseldorp and others*, [33] the grant of exclusive rights in a substantial part of the common market must be regarded as conferring on the undertaking concerned a dominant position for the purposes of Article 86 EC.

28 — See in particular *Michelin* (cited above, note 23), paragraph 30, and *Bodson* (cited above, note 21), paragraph 26.

29 — *Bodson* (cited above, note 21), paragraph 26.

30 — See for example Case C-38/97 *Autotrasporti Librandi* [1998] ECR I-5955, paragraph 27, under reference to Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38.

31 — Case C-18/88 *GB-Inno-BM* [1991] ECR I-5941, paragraph 25, under reference to Case C-202/88 *France* v *Commission* ('*Telecommunications terminals equipment*') [1991] ECR I-1223, paragraph 51.

32 — Joined Cases C-395/96 P and 396/96 P *Compagnie Maritime Belge Transports and Others* v *Commission* [2000] ECR I-1365, paragraph 37, under reference to *Michelin* (cited above, note 23), paragraph 57.

33 — Case C-203/96 *Chemische Dusseldorp and Others* [1998] ECR I-4075, paragraph 60. That case concerned whether a provision granting a single undertaking the exclusive right to incinerate dangerous waste throughout the entire territory of the Member State was compatible with Article 86(1) EC in conjunction with Article 82 EC.

52. Therefore, where the State grants an undertaking exclusive rights, whether this creates a dominant position depends solely on whether those rights exist in relation to the whole or a substantial part of the common market.

53. Thus, in *GT-Link* [34] the Court stated that 'an undertaking which has a legal monopoly in a substantial part of the common market may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty [now Article 82 EC]... Such is also the case where a public undertaking is the owner of a commercial port and on that ground has the sole right to levy in that port the duties payable for the use of port facilities'.

54. There was a similar result in *TNT Traco*. [35] That case concerned postal dues which were to be paid directly to the Italian Post Office by *inter alia* providers of express courier services, even where the Post Office had not supplied any services to them. The Court held that 'Poste Italiane must also be considered as an undertaking which has been granted by the Member State concerned special or exclusive rights within the meaning of Article 90(1) of the EC Treaty [now Article 86(1) EC], having been given the exclusive right to collect, carry and deliver mail... without being required to pay — as must all other persons providing the same services — postal dues'. [36] A little further on, the Court held that 'it is not in dispute that Post Italiane... has a dominant position within the meaning of Article 86 of the EC Treaty [now Article 82 EC]', [37] though in a different context it spoke of, 'creating a dominant position by the grant of special or exclusive rights'. [38]

*The allocation of State funds cannot, in itself, constitute the grant of exclusive rights*

55. As regards the question which the above case-law says is decisive, namely, whether the AMMs have been granted exclusive rights, all the parties assumed that the contested allocation of funds was to be regarded as the grant of exclusive rights.

56. However, I think that the allocation of funds in the manner adopted in the present case cannot in itself be regarded as the grant of an exclusive right and accordingly cannot by itself satisfy that condition for

34 — Cited above, note 22, paragraph 35.
35 — Cited above, note 9.
36 — Cited above, note 9, paragraph 40.
37 — Cited above, note 9, paragraph 43.
38 — Cited above, note 9, paragraph 44.

the existence of a dominant position as interpreted in the above case-law.

57. In his Opinion in *Ambulanz Glöckner*,[39] Advocate General Jacobs defined special or exclusive rights within the meaning of Article 86(1) EC as rights 'granted by the authorities of a Member State to one undertaking or to a limited number of undertakings which substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions'.

58. At first sight, in the present circumstances the allocation of State funds to the AMMs[40] appears to constitute such a selective, beneficial measure. This is because where cargo can be handled by the undertakings themselves in the ports in which the AMMs are established, the port charge affects competition between the AMMs and those undertakings who handle their own cargo by burdening the latter with the additional costs arising from the port charge, whereas the allocation of funds strengthens the AMMs' economic position, and thereby their position in the cargo handling services market.

59. Notwithstanding that, it appears to me that to regard the allocation of funds itself as the grant of a special or exclusive right is problematic. Where State funds are allocated to an undertaking, the recipient has a passive role, in contrast to the way in which a special or exclusive right is usually exercised; moreover, influence on the market cannot be considered entirely independently of the level of demand. Clearly, the fact that in the present case the funds allocated are in effect paid precisely by competitors weighs against these considerations. However, if that were in itself a sufficient argument, one would have to accept that every transfer of funds from one market participant to another market participant, even if indirect, was encompassed by Article 82 EC in conjunction with Article 86(1) EC, whether or not the recipient was thereby enabled to influence behaviour on the market, as is necessary in the case of special or exclusive rights.

60. The allocation of part of the port charge to the AMMs is to be distinguished from *GT-Link* and *TNT Traco* at least in so far as the AMMs do not themselves decide on levying the charge and accordingly cannot influence its amount. The AMMs are merely the passive beneficiaries of a State financing measure.

39 — Cited above, note 10, paragraphs 83 to 89.

40 — As regards compensation for any public service burdens, see my considerations below relating to State aid, paragraphs 142 ff.

61. Against this it might again be said that from an economic point of view it makes no difference whether the charge is levied by the recipient itself or by the State. However, I consider that from a legal point of view it does make a difference that in both the cases cited the public undertaking had been granted exclusive rights, for example the right to levy whatever charge it liked, whereas in the present case the AMMs do not have such a right. It is exactly such a right which enables the undertaking concerned to influence the relevant market *at will*. [41]

62. Last but not least in this connection, there must be discussed the problem of concurrence with State aid law. If one regards the selective allocation of State funds to a particular undertaking as the grant of an exclusive right to that undertaking, with the consequence that such a grant itself gives the undertaking a dominant position, the law on State aid is deprived of all effect. [42] However, it must be recalled that the two sets of rules are applied differently — I need refer only to the Commission's exclusive competence to investigate the compatibility of aid with the common market. [43]

63. In a case in which the public undertaking differs from other economic operators only in the fact that it receives State aid, it does not appear possible for it to derive its dominant market position solely from the fact of selective granting of funds. A dominant position of the AMMs may, however, arise from the statutory definition of their tasks in relation to port infrastructure. [44]

64. Thus, it is for the national court to determine whether on that approach the AMMs actually have a dominant position.

41 — It is to be observed that in *TNT Traco* (cited above, note 9), it was not in dispute that Poste Italiane dominated the relevant market: see paragraph 43.

42 — In this connection, it is to be borne in mind that State aids distort competition by giving a particular undertaking an 'unearned cost advantage' (Rawlinson, in Lenz, *EG-Vertrag Kommentar*, Article 87 EC, paragraph 10.

43 — In this connection, one must remember the Court's case-law, according to which inconsistencies between Article 87 ff. EC and other provisions of the Treaty are to be minimised. In Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 42, proceedings under Article 88(2) EC, the Court spoke of an, 'obligation on the part of the Commission to ensure that Articles [87 EC] and [88 EC] are applied consistently with other provisions of the Treaty'.

44 — See in particular Case C-82/01 P *Aéroports de Paris* [2000] ECR-9297, paragraphs 106 and 107: 'ADP, as the owner of the airport facilities, is alone in being able to authorise access. ...ADP ... enjoys a legal monopoly ... to manage the airports concerned and is alone able to grant authorisation to carry out groundhandling activities there and to determine the terms on which those activities are carried out.
In those circumstances, the Court of First Instance could properly conclude ... that ADP wields economic power which enables it to prevent effective competition from being maintained in the relevant market by giving it the opportunity to act independently'.
In te present case the State appears to remain in ownership of the port installations. That said, it appears possible to make a comparison in so far as, pursuant to Law No 961/67, the AMMs have a monopoly over the operation of the requisite infrastructure. Should that be confirmed, the AMMs would then be in a position to exercise a determining influence on access to the market for the provision of port services, with the result that a dominant position could be presumed.

In doing so, it will have to take into account the advantages the AMMs derive from their tasks relating to port infrastructure, market behaviour and the intensity of demand.

(iii) A substantial part of the common market

65. If the AMMs, or each of them individually, were none the less held to have a dominant position on the relevant market (which requires to be defined more precisely), there would then have to be determined whether that market is to be regarded as a substantial part of the common market.

66. The Court has held that 'regard must be had in that context to the volume of traffic in the port in question and its importance in relation to maritime import and export operations as a whole in the Member State concerned'. [45]

67. The Court applied these criteria in *Merci convenzionali porto di Genova*, [46] which concerned the market for cargo handling services in the port of Genoa, and there held that the market, as so defined, was to be regarded as a substantial part of the common market because of its importance to international trade. Therefore, even a part of a Member State may constitute a substantial part of the common market, depending on its economic importance.

68. A dominant position in a substantial part of the common market may also be constituted by a contiguous series of monopolies territorially limited but, 'together covering the entire territory of a Member State'. [47]

69. It is for the national court to determine, on the basis of the actual economic data and the geographical situation, whether the Cagliari ports managed by the AMM or, as the case may be, all six ports in which an AMM is established are to be regarded as a substantial part of the common market. If the national court were to decide that the ports should be considered together, the economic importance of the individual ports would recede into the background in so far as the AMM ports could be regarded as a substantial part of the geographical territory of Italy within the meaning of the case-law cited above.

70. It is only if the national court decides that the AMMs have a dominant position on the relevant market and that that

45 — *GT-Link* (cited above, note 22), paragraph 37, under reference to *Merci convenzionali porto di Genova* (cited above, note 11), paragraph 15.

46 — Cited above, note 11.

47 — *Centre d'insémination de la Crespelle* (cited above, note 12), paragraph 17.

market constitutes a substantial part of the common market that the question as to whether there is abuse must be considered.

(d) Whether there is abuse

71. The next requirement of Article 82 EC is that the undertaking concerned must have abused its position, and the final requirement is that such abuse may affect trade between Member States. Article 86(1) EC provides that certain State measures are to be equated to conduct on the part of the undertaking concerned.

(i) Abuse

72. The starting point for the analysis is the now established case-law of the Court, according to which, 'although merely creating a dominant position by the grant of special or exclusive rights is not, in itself, incompatible with Article 86 of the EC Treaty [now Article 82 EC], a Member State breaches the prohibitions laid down by Article 90(1) of the EC Treaty [now Article 86(1) EC] in conjunction with Article 86 [now Article 82 EC] if it adopts any law, regulation or administrative provision that creates a situation in which an undertaking on which it has conferred exclusive rights cannot avoid abusing its dominant position'. [48]

73. Should the national court decide that in the particular circumstances of the present case, for example the tasks entrusted to the AMMs in relation to the port infrastructure, the geographical situation or the limited economic importance of the ports in question, or indeed the amount of funds allocated, the AMMs are able to influence the relevant market at will, it would then have to be examined whether the State has created a situation in which the AMMs cannot avoid infringing Article 82 EC. [49]

74. In the present case, the relevant categories of abusive conduct are on the one hand abuse by charging excessive amounts and on the other abuse by creating barriers to entry.

75. There is abuse by charging excessive amounts where 'the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way

48 — *TNT Traco* (cited above, note 9), paragraph 44, under reference to *GT-Link* (cited above, note 22), paragraph 33 and *Dusseldorp and Others* (cited above, note 33), paragraph 61. See also *Sydhavnens Sten & Grus* (cited above, note 22), paragraph 66.

49 — See also *Sydhavnens Sten & Grus* (cited above, note 22), paragraph 67: 'The Court has thus held that a Member State may, without infringing Article 86 of the Treaty, grant exclusive rights to certain undertakings provided they do not abuse their dominant position or are not led necessarily to commit an abuse', under reference to Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 41.

as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition'. [50]

76. A particular example of this category is that, 'an undertaking abuses its dominant position where it charges for its services fees which are unfair or disproportionate to the economic value of the service provided'. [51]

77. According to the Court, '[t]hat must be all the more so where an undertaking in a dominant position is paid for services which it has not itself supplied'. [52]

78. On the other hand, in his Opinion in *TNT Traco*, Advocate General Alber pointed out that levying a charge could not be equated to abuse in the form of imposing a charge for services which had not been performed, since a dominant undertaking could not bring about such imposition by its own conduct. [53]

79. This restrictive interpretation of Article 86(1) EC is not without difficulty, in that this provision is intended to cover precisely those cases in which the State causes or forces the undertaking it influences to engage in conduct which that undertaking would not have engaged in of its own accord.

80. Likewise, applying the solution in *TNT Traco* to the present case appears just as unconvincing. I do agree with the Commission that from an *economic* point of view it makes no difference whether the public undertaking levies the charge itself or receives the proceeds (or part of the proceeds) of a charge levied by the State. However, I consider that from a legal point of view there is a material difference in that in the one case the State 'causes' the undertaking to conduct itself in a particular way, whereas in the other (the present case) the undertaking appears not to conduct itself in any way at all in relation to the charge.

81. For that reason, I think that abuse should be considered by reference to the effects of the contested provision. According to the Court's case-law, a State measure which extends the dominant position of an undertaking to which the State has granted special or exclusive rights constitutes an infringement of Article 86 EC in conjunction with Article 82 EC. [54]

50 — *United Brands* (cited above, note 27), paragraphs 248 ff.

51 — *TNT Traco* (cited above, note 9), paragraph 46, under reference to *Centre d'insémination de la Crespelle* (cited above, note 12), paragraph 25 and *GT-Link* (cited above, note 22), paragraph 39.

52 — *TNT Traco* (cited above, note 9), paragraph 47.

53 — Opinion in Case C-340/99 (cited above, note 9), paragraph 66 f.

54 — See *Ambulanz Glöckner* (cited above, note 10), paragraph 40, under reference to *GB-Inno-BM* (cited above, note 31), paragraph 21, and *Dusseldorp and Others* (cited above, note 33), paragraph 61.

82. In *TNT Traco*, Advocate General Alber considered that extending the Italian Post Office's dominant position on the relevant market by imposing a burden on its competitors in a different market, and thereby distorting competition to the benefit of the Italian Post Office, constituted abuse. [55]

83. In the present case, the Commission too puts forward the view it had already put forward in *TNT Traco*, namely that extending a dominant position on a particular market by imposing a burden on all competitors constituted abuse. In the present case as well, it is possible to say that the allocation of funds has strengthened the AMMs' position on the market for cargo handling services.

84. In my opinion, the fact that the allocation of part of the proceeds of the port charge distorts the market could constitute abuse of the AMMs' possibly dominant position. The Italian Government submitted that the allocation of funds was, in effect, a price support: it enabled the AMMs to supply their port services at lower than market prices. It is to be inferred from this submission that the AMMs charged prices that were too low, rather than too high, and were thus disproportionate to market prices. Where such conduct is deliberately directed against competitors, it constitutes abuse. [56]

(ii) Affecting trade between Member States

85. If it were held that the AMMs have abused their possibly dominant position, there would finally have to be considered whether the particular abuse of a dominant position may affect trade between Member States. [57]

86. Trade between Member States is affected only if, 'it [is] possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States. Moreover, that effect must not be insignificant'. [58]

55 — Cited above, note 53, paragraph 74.

56 — On this point, the Court has already held that there is abuse where an undertaking in a dominant position selectively cuts its prices, where the lower prices are directed against a competitor (see *Compagnie Maritime Belge Transports and Others* (cited above, note 32), paragraph 117).

57 — See, for example, *Bodson* (cited above, note 21), paragraph 22, *GT-Link* (cited above, note 22), paragraph 44 and *Ambulanz Glöckner* (cited above, note 10), paragraph 48.

58 — *Ambulanz Glöckner* (cited above, note 10), paragraph 48, under reference to Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 16.

87. In the case of services, that effect may consist in, 'the activities in question being conducted in such a way that their effect is to partition the common market and thereby restrict freedom to provide services... Similarly, trade between Member States may be affected by a measure which prevents an undertaking from establishing itself in another Member State with a view to providing services there on the market in question'. [59]

88. It is for the national court to determine whether, having regard to the economic characteristics of the local market for cargo handling services, there is a sufficient degree of probability that the allocation of part of the proceeds of the port charges to the AMMs will actually prevent other economic operators from providing comparable services in the respective Italian ports. [60] As regards the present case, it is in particular possible that other undertakings who want to offer cargo handling services in the ports of Cagliari or Portovesme, or who want to handle their own cargo, are deterred or prevented from entering the Cagliari market by the lower prices the AMMs are able to charge because of the allocation of part of the proceeds of the port charge.

(e) Justification under Article 86(2) EC

89. If, in the light of the above considerations, the national court should determine that the contested national provision infringes Article 86(1) EC in conjunction with Article 82 EC, the last point requiring to be determined is whether the services are of general economic interest within the meaning of Article 86(2) EC, as the Italian Government submits they are.

90. The Court has consistently held that a Member State may rely upon Article 86(2) EC to justify the grant, to an undertaking entrusted with the operation of services of general economic interest, of exclusive rights which are contrary to Article 82 EC, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community. [61]

91. Therefore, what must be examined is whether the AMMs have been entrusted with the operation of services of general economic interest and whether the selective

59 — *Ambulanz Glöckner* (cited above, note 10), paragraph 49, with further references.

60 — In this connection, see *Ambulanz Glöckner* (cited above, note 10), paragraph 50.

61 — *Sydhavnens Sten & Grus* (cited above, note 22), paragraph 74.

allocation of funds is necessary to enable them to perform the particular task assigned to them.

(i) Services of general economic interest

92. The application of Article 86(2) EC is conditional on [62] the Member State defining the content of the obligations and duties imposed in entrusting the particular task, and on these obligations being specific to the particular undertaking and its business, being linked to the subject-matter of the service of general economic interest in question and being designed to make a direct contribution to satisfying that interest.

93. According to the documents in the present case, the AMMs supply services direct to the State, in that they manage and maintain part of the port facilities. [63] However, they also supply services to other economic operators, in that they compete in the market for cargo handling services and offer their own services on that market.

94. The services the AMMs supply could be of general economic interest in two ways. The Italian Government submits in the first place that they promote the efficient functioning of the port facilities and the safety of ships' berths, and in the second place that the AMMs are required to ensure the availability of cargo handling services at reasonable prices in smaller ports. In other words, the AMMs are required to ensure the existence of high quality port infrastructure and access to it, by means of a universal service in what are, in purely economic terms, clearly less attractive ports.

95. The Court has already rejected the proposition 'that the operation of any commercial port constitutes the operation of a service of general economic interest or... that all the services provided in such a port amount to such a task'. [64] However, the Court has held that certain port services constitute services of general economic interest, for example a general mooring

62 — Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraphs 65 to 69.

63 — See in particular Law No 961/67, cited above.

64 — *GT-Link* (cited above, note 22), paragraph 52. See also *Merci convenzionali porto di Genova* (cited above, note 11), paragraphs 25 ff., and the Opinion of Advocate General van Gerven in the same case, paragraph 27.

service [65] or certain privileges relating to a river port. [66]

96. What is decisive in determining whether a service is of general economic interest is whether the service concerned is 'of general economic interest exhibiting special characteristics compared with that of other economic activities'. [67] In *Corsica Ferries II*, [68] the special characteristic was that for safety reasons the services were required to be available at all times to all persons using the port. In *GT-Link*, the Court did not preclude the possibility that, 'the mere provision of the port infrastructure' could be classified as a service of general economic interest. [69] Finally, in *SIOT*, [70] the Court recognised 'the more general benefits derived from the use of harbour waters or installations for the navigability and maintenance of which the public authorities are responsible'.

97. Therefore, in my opinion the national court will have to determine in particular the extent to which the AMMs have been entrusted with the task of maintaining the ports' infrastructure and supplying port services in the form of cargo handling as a universal service. In doing so, it will have to have regard to the criteria laid down in the case-law: the offer of services to everyone, at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria. [71]

98. As regards port infrastructure, it is to be observed that maintaining port facilities in itself promotes those facilities' safety, and with it the safety of maritime transport within the port. What is unclear in the main proceedings is the extent to which the services which the AMMs supply to the State, as described above, exhibit special characteristics which, because of the costs incurred, could justify granting compensation assessed by reference to usage. [72] This obscurity doubtless results from the fact that those services are not the subject-matter of the main proceedings.

99. Making cargo handling services available at reasonable prices depends on the question as to a universal service and requires a refined approach. On the one hand, according to the case-law cited above, [73] 'dock work consisting of loading, unloading, transhipment, storage and general movement of goods or material of any kind is not necessarily of general economic

65 — *Corsica Ferries France* (cited above, note 49), paragraph 45.

66 — Case 10/71 *Muller and Others* [1971] ECR 723, paragraph 11.

67 — See in particular *GT-Link* (cited above, note 22), paragraph 53.

68 — Cited above, note 49.

69 — Cited above, note 22, paragraph 54.

70 — Case 266/81 *SIOT* [1983] ECR I-731, paragraph 21.

71 — See, for example, Case C-393/92 *Almelo and Others* [1994] ECR I-1477, paragraph 48. See also *Corbeau* (cited above, note 20), paragraph 15, and *Commission* v *France* (cited above, note 62), paragraphs 57 f. See also Blum and Logue, *State monopolies under EC Law*, pp. 175 ff.

72 — With regard to the market for groundhandling services at airports, Article 16(3) of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ 1996 L 272, p. 36) provides for the possibility of a fee being collected with regard to access to airport installations, particularly in the case of self-handling market operators. The interpretation of that provision forms the subject-matter of Case C-363/01, which is a present pending.

73 — Cited above, note 64.

interest exhibiting special characteristics compared with that of other economic activities'. On the other hand, Article 6 of the Commission's amended proposal for a Directive on Market Access to Port Services (COM (2002) 0101 final) provides that the grant of authorisations to persons offering port services may be made subject to, 'public service requirements relating to safety, regularity, continuity, quality and price and the conditions under which the service may be provided'.

100. Thus, the fact referred to by the Italian Government, namely that each of the ports in which the AMMs are established has only a small trading income, might be regarded as a 'special characteristic' within the meaning of the above case-law.

(ii) Necessity

101. However, even if the tasks assigned to the AMMs could actually be regarded as being of general economic interest, it is for the Government of the Member State concerned to show to the satisfaction of the national court that the grant of exclusive rights — in the present case, the allocation of funds [74] — is necessary to enable the undertaking to perform the particular task, and that, without the contested measure, the undertaking in question would be unable to carry out the task assigned to it. [75]

102. Therefore, the question is whether the allocation of funds is necessary to enable the AMMs to perform the tasks entrusted to them. [76] It could be held to be necessary only if the Italian Government could show that the funds allocated compensated for the burdens resulting from the particular tasks. Yet the Italian Government's own submissions suggest that this is at least doubtful.

103. First, the Italian Government is required to identify clearly the burdens resulting from the assumption of the particular tasks. [77]

74 — See my considerations above (paragraphs 55 ff.) concerning whether the allocation of funds constitutes the grant of exclusive rights. In the context of Article 86(2) EC, there is nothing to preclude analysing the allocation of funds as the grant of exclusive rights, since Article 86(2) EC can also be used to justify the grant of State aid.

75 — *Dusseldorp and Others* (cited above, note 33), paragraph 67.

76 — See *Commission* v *France* (cited above, note 62), paragraph 96: the exception from the Treaty provisions applies where it is necessary to enable the undertaking entrusted with the task to perform the particular task under economically acceptable conditions.

77 — See above, paragraph 101.

104. In addition, the allocation of part of the proceeds of the port charge is clearly not the AMMs' only source of finance. The national legal framework provides that the costs of acquiring new assets are to be borne by the State, in so far as the AMMs' budget is not sufficient. In that connection, it is clear that State intervention to assure a balanced budget is entirely variable. Moreover, the AMMs have available to them the income from the assets they manage as well as funds from loans and from other financial transactions.

105. Therefore, it appears that it is almost impossible to prove that the burdens on the AMMs resulting from any particular tasks match the funds granted by the State to compensate for those burdens. It appears that the goal of Commission Directive 2000/52/EC, [78] namely transparency of financial relations between Member States and public undertakings, has not been achieved. [79] The impossibility of matching the burdens on the AMMs to the State compensation will also be relevant to the part of the judgment in the main proceedings relating to State aid. [80]

106. Moreover, Law No 84/94 apparently transferred the management of the port facilities concerned, together with the allocation of part of the proceeds of the port charge, to the State port authorities, but not the unloading and loading of goods, which continue to be done by the AMMs. From that it is clear that the contested allocation of funds may well not have been necessary for ensuring the availability of cargo handling services at reasonable prices.

107. Thus, the circumstances of the case suggest that there is no justification under Article 86(2) EC; but it is none the less for the national court to carry out a definitive analysis by reference to the criteria given above.

(f) The fifth question, in so far as it concerns abuse of a dominant position

108. By its fifth question, in so far as it concerns abuse of a dominant position, the Corte Suprema di Cassazione asks in substance how the existence of abuse of a dominant position in breach of Article 86(1) EC would affect the disputed charge provisions.

78 — Commission Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings (OJ 2000 L 193, p. 75).

79 — In this connection, it is to be observed that one of the aims of the amended proposal for a Directive on Market Access to Port Services (cited above, note 24) is transparency of the financial relations between Member States and ports: see in particular Article 12 on accounting for port service activities.

80 — See below, paragraphs 138 ff.

109. In the first place, it is to be recalled that Article 82 EC, 'has direct effect and confers on individuals rights which the national courts must protect' [81] in the context of Article 86 EC as well. The Court has also held that persons or undertakings on whom port charges incompatible with Article 86(1) EC in conjunction with Article 82 EC have been imposed by a public undertaking are in principle entitled to repayment of the charges unduly paid. [82]

110. However, the charge in the present case is levied not by a public undertaking but by the State, which allocates a substantial part of the proceeds to the AMMs. The contested charge provisions strengthen the AMMs' possibly dominant position only in so far as part of the proceeds of the charge is allocated to the AMMs.

111. Therefore, if the national court is able to establish abuse of a dominant position, only the part of the proceeds of the charge which is allocated to the AMMs would be incompatible with Community law.

81 — *GT-Link* (cited above, note 22), paragraph 57.
82 — *GT-Link* (cited above, note 22), paragraph 61.

## V — The third question, and the fifth question in so far as it concerns State aid

112. Article 87 EC provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

113. By its third question, the national court asks in substance whether the allocation of a significant part of the contested port charge to the AMMs constitutes State aid. The national court also asks whether, if this question is answered in the affirmative, the failure to notify the aid to the Commission requires the national court to disapply the contested provision. Finally, it asks whether the levying of the charge or only the allocation of part of the charge is incompatible with Community law.

### A — *Submissions of the parties*

114. *Enirisorse* and the *Commission* submits that the Cagliari AMM is an undertaking and that the allocation of part of the

proceeds of the port charge is selective. The allocation affects trade between Member States and distorts or threatens to distort competition in that the AMM competed with undertakings from other Member States which want to handle cargo using their own resources.

115. The allocation is a financial advantage and is clearly granted through State resources. However, in this connection the *Commission* observes that in *PreussenElektra*,[83] the Court held that an obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices did not involve any direct or indirect transfer of State resources to undertakings which produced that type of electricity, with the consequence that there was no State aid within the meaning of Article 87(1) EC. Although there is clearly a transfer of State resources in the present case (since the port charge is to be paid to the State which in turn allocates part of the proceeds to the AMMs), the present case is comparable with *Preussen-Elektra* in economic terms, since in both cases the State created a system for transferring resources. Deciding by reference to the identity of the payee — the State in the present case, and an undertaking in *PreussenElektra* — is not compatible with the principle that questions relating to State aids depended principally on their effects.

83 — Cited above, note 14.

116. The Commission also submits that it is for the national court to establish whether the measure affects trade between Member States and distorts or threatens to distort competition.

117. The *Italian Government* emphasises that the disputed measure does not constitute unlawful State aid. The port charge is necessary on socio-economic grounds and is in the public interest.[84] It refers to the low trading income in Portovesme port and submits that prices in such a port would increase greatly if one were to calculate the costs of the AMMs' services by reference to economic criteria alone. According to the judgment in *Preussen-Elektra*,[85] the costs of providing a public service could be distributed between a larger number of undertakings in order to ensure the availability of that service.

118. In any case, the measure is also justified under Article 87(3)(c) EC as an aid to facilitate the development of certain economic activities and of certain economic areas.

119. Therefore, Article 88(3) does not entitle the national court to intervene.

84 — As regards this submission, see above, paragraph 28.

85 — Cited above, note 14.

120. *Enirisorse* and the *Commission* submit that the contested provision cannot be justified under Article 86(2) EC. The Commission cannot find any facts in the judgment of the national court showing that the services are necessary and of general economic interest. For that reason, the judgment in *Ferring*[86] cannot be applied to the present case. Enirisorse submits in addition that the fact that the AMMs are not established in all Italian ports proves that their activities are not necessary. Both it and the Commission also think that the provision is unlawful in any case, because it has not been notified to the Commission.

B — *Legal analysis*

1. The admissibility of the third question

121. The national court itself raises the question as to the admissibility of the third question. The subject-matter of the main proceedings is the obligation to pay the charge and the lawfulness of the *levying* of the charge, whereas the third question expressly concerns the *allocation* of part of the proceeds of the charge to a public undertaking.

86 — Case C-53/00 *Ferring* [2001] ECR I-9067.

122. Therefore, the question as to whether the allocation of funds is to be regarded as State aid might be immaterial to the question posed in the main proceedings as to the lawfulness of levying the charge. The Court has held that, '[p]ersons liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that contribution'.[87] The Court therefore held that the question as to whether a tax exemption constituted State aid was clearly not relevant in proceedings concerning an obligation to pay a charge. This case-law might be understood as meaning that classifying a measure as State aid necessarily leads to charges paid having to be repaid, but not to an exemption from the charge.

123. The subject-matter of the main proceedings in the present case is the obligation to pay the charge. Indeed, at the oral hearing Enirisorse even stated that its purpose in making submissions on State aid law was to avoid paying the port charge.

124. None the less, in my opinion the third question in conjunction with the fifth question is admissible, and this for a number of reasons.

87 — Case C-390/98 *Banks & Co.* [2001] ECR I-6117, paragraph 80, under reference to Case C-437/97 *EKW and Others* [2000] ECR I-1157, paragraphs 51 to 53, and Case C-36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraphs 26 to 29.

125. In the first place, according to the case-law of the Court cited above, it is in principle for the national court to determine the need for a preliminary ruling. [88]

126. It is also to be observed that the French Government submitted a similar argument in *Ferring* [89] and *GEMO*. [90] In *Ferring*, the argument was rejected by Advocate General Tizzano; [91] the Court did not refer to it in its judgment. In *GEMO*, Advocate General Jacobs adopted the reasoning of Advocate General Tizzano. [92]

127. In the present case, moreover, the national court considered it appropriate to refer the case to the Court precisely because of the question as to whether, in determining the existence of State aid, the levying of the charge can be separated from the allocation of part of its proceeds, that is to say its application. Given that context, the third question appears to be a preliminary question to the fifth question. It therefore appears to be necessary to examine the substance of the third question, even if only to clarify whether it is for Community law to answer the question as to whether the invalidity of the contested allocation of the funds, if established under Article 88(3) EC, extends to the levying of the charge. [93]

128. It follows that the third question is admissible.

2. The third and fifth questions

129. By the first part of the third question, the Corte Suprema di Cassazione asks in substance whether the allocation of part of the port charge to the AMMs constitutes State aid within the meaning of Article 87(1) EC.

(a) The conditions for the existence of aid

130. A measure is prohibited by Article 87(1) EC if:

88 — See above, paragraphs 28 ff., and the case-law cited in note 14.

89 — Cited above, note 86.

90 — Case C-126/01 [2003] ECR I-13769. See the Opinion of Advocate General Jacobs.

91 — Cited above, note 86, paragraphs 20 to 24 of the Opinion.

92 — Cited above, note 90, in particular paragraphs 35 to 48 of the Opinion.

93 — See below, paragraphs 177 ff.

— it grants a unilateral advantage favouring certain undertakings or the production of certain goods;

— the advantage is granted directly or indirectly through State resources;

— the advantage distorts or threatens to distort competition;

— and the measure affects trade between Member States.

131. In the present case, it is clearly not disputed that the AMMs are *undertakings* for the purposes of competition law. [94]

132. Moreover, not all port undertakings in Italy are allocated part of the proceeds of the port charge, but only the AMMs established in six Italian ports, such that one of the measure's characteristics is *selectivity*. [95]

133. Furthermore, the allocation constitutes a *transfer of State resources*, since it is paid directly out of the proceeds of the port charge levied by the State finance department. It is therefore a positive transfer by the State, which also distinguishes the present case from *Preussen-Elektra*. [96]

134. As regards the questions of *distortion of competition* and *affecting trade between Member States*, it is to be recalled that, 'when an advantage conferred by a Member State strengthens the position of a class of undertakings in relation to other undertakings competing in intra-Community trade the latter must be regarded as affected by that advantage'. [97]

135. In the present case, the contested measure may well concern international trade in goods, as it is connected with port services. From that, it may be inferred that goods from other Member States are transshipped in the ports concerned, such that (subject to the national court making a definitive finding) it appears likely that trade between Member States is affected.

94 — See above, paragraphs 35 f.

95 — As regards the requirement of selectivity, see in particular Case C-143/99 *Adria-Wien Pipeline and Another* [2001] ECR I-8365, paragraphs 34 f.

96 — Cited above, note 14.

97 — *Ferring* (cited above, note 86), paragraph 21, under reference to Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11.

136. It is also to be assumed that the AMMs compete with undertakings from other Member States, and in particular with undertakings who handle their own cargo, in the market for cargo handling services, so that it likewise appears likely that a distortion of competition is threatened.

137. Ultimately, the main question is whether the contested measure *favours* the AMMs. The Italian Government denies that it does, on the basis that it is compensation for services of general economic interest.

(b) State compensation payments for services of general economic interest: the current state of the debate

138. The approach the Court has taken to State compensation payments for services of general economic interest in its recent case-law [98] has given rise to debate not only in academic writing [99] but also among the Advocates General, [100] principally because such services are a focal point of political interest. [101]

139. Given my reflections [102] on the possibility of justifying the contested measure under Article 86(2) EC, I broach this issue only for the sake of completeness, in case the Court were to consider it appropriate to assess the national measure under State aid law first.

(i) The *Ferring* judgment [103] in the light of previous case-law and the practice of the Commission

140. In substance, *Ferring* concerned the question whether an exemption from tax was within the scope of State aid law where it was intended to compensate for the burdens resulting from being entrusted with services of general economic interest.

98 — See in particular *Ferring* (cited above, note 86), and also *Adria-Wien Pipeline* (cited above, note 95).

99 — See in particular Nettesheim, *Europäische Beihilfeaufsicht und mitgliedstaatliche Daseinsvorsorge*, EWS 2002, 253; Gundel, *Staatliche Ausgleichszahlungen für Dienstleistungen von allgemeinem wirtschaftlichen Interesse: Zum Verhältnis zwischen Artikel 86 Absatz 2 EGV und dem EG-Beihilfenrecht*, RIW 2002, 222; Ruge, EuZW 2002, 50.

100 — See the Opinion of Advocate General Léger in Case C-280/00 *Altmark Trans and Another* [2003] ECR I-7747, and of Advocate General Jacobs in *GEMO* (cited above, note 90).

101 — See the documents cited by Advocate General Jacobs in note 50 of his Opinion in *GEMO*. See also the Communication from the Commission — A Methodological Note for the Horizontal Evaluation of Services of General Economic Interest (COM (2002) 331 final) and the Exploratory Opinion of the Economic and Social Committee of 17 July 2002 on Services of General Interest (No 860-2002). In this connection, reference may also be made to Article 36 of the Charter of Fundamental Rights: 'The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union'.

102 — See above, paragraph 92 et seq.

103 — Cited above, note 86.

141. The starting point for the Court's reasoning was the finding that 'the fact that undertakings are treated differently does not automatically imply the existence of an advantage for the purposes of Article 92(1) of the Treaty [now Article 87(1) EC]'. [104] From that, it followed that there was no such advantage 'where the difference in treatment is justified by reasons relating to the logic of the system'. [105]

142. According to the Court, the fact that certain undertakings were exempt from the tax contested in that case could be regarded as compensation for the services they provided in discharging their public service obligations, and did not constitute State aid in so far as the tax corresponded to the additional costs the exempted undertakings actually incurred in discharging their public service obligations. [106]

143. Therefore, compensation paid by the State in respect of burdens resulting from the discharge of public service obligations is not State aid provided that the compensation does not exceed the costs actually incurred, because to that extent there is no economic advantage.

144. This approach to compensation payments at the stage of determining whether there is State aid is noteworthy since the Court thereby departed from its own case-law [107] and the Commission's practice, [108] without considering the consequences of the change.

145. However, the approach the Court adopted in *Ferring* is not materially different from its approach in *ADBHU*. [109] In that case it took the view that the subsidy envisaged in Council Directive 75/439/EEC, [110] which was financed in accordance with the 'polluter pays' principle, in that case by a charge imposed on products which after use were transformed into waste oils, or on waste oils, and which did not exceed annual uncovered costs actually recorded, did not constitute aid but consideration for the services performed by the collection or disposal undertakings.

104 — Paragraph 17.

105 — See the similar formulation in *Adria-Wien Pipeline* (cited above, note 95), paragraph 42: 'According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity'.

106 — Paragraph 27.

107 — See the case-law cited in notes 112 and 113. On the case-law prior to *Ferring*, see Koenig, Kühling and Ritter, *EG-Beihilfenrecht*, p. 33.

108 — On the Commission's practice in making decisions, see J.-Y. Chérot, *Financement des obligations de service public et aides d'État*, Europe 2000, p. 4. An example of the Commission having regard to the State aids approach is to be found in its Decision of 10 June 1998 concerning State aid in favour of Coopérative d'exportation du livre français (CELF) (OJ 1998 L 44, p. 37). The Commission investigated the compensation at dispute in that case, which related to a French scheme for promoting book exports, by reference to Article 87(1) EC and Article 87(3)(d) EC. Since it considered the latter provision to be applicable, it did not analyse Article 86(2) EC.

109 — Case 240/83 [1985] ECR 531, paragraph 18.

110 — Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23).

146. The Court of First Instance rejected this approach in one of its judgments, [111] specifically on the basis that the concept of aid had to be interpreted objectively, that is to say regardless of the purpose for which the funds were allocated, with the consequence that the question as to whether the advantage conferred compensated for a burden was to be dealt with as part of the question of justification. The judgment was confirmed by order of the Court of Justice, albeit without any discussion of the question as to whether, conceptually, there was any actual aid. [112]

147. In *Banco Exterior de España*, [113] this Court reverted to the view that a tax exemption granted to publicly-owned banks in Spain was to be classified as aid, although Article 86(2) EC was inapplicable as long as the Commission had not found the aid to be incompatible with the common market.

(ii) Criticism of the *Ferring* judgment

148. In his opinion in *Altmark Trans*, [114] Advocate General Léger proposed that the compensation approach adopted in *Ferring* should be abandoned.

149. In substance, Advocate General Léger considered three points:

— the objective nature of the concept of aid;

— the compensation approach was liable to deprive Article 86(2) EC of its effect, because the provision would no longer apply to cases where the compensation granted did not exceed the costs of the public service obligations (in other cases, this provision could not apply anyway, since any over-compensation which constituted aid in such cases could not be necessary within the meaning of the provision);

— the compensation approach diminished the Commission's surveillance role in reviewing measures for financing public services.

111 — Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229. The Court of First Instance confirmed this approach in Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125.

112 — Case C-174/97 P *FFSA and Others* v *Commission* [1998] ECR I-1303.

113 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877. See also the express statement in Case C-332/98 *France* v *Commission* [2000] ECR I-4833, paragraphs 31 ff.

114 — Cited above, note 100.

150. Finally, in his opinion in *GEMO*, [115] Advocate General Jacobs discussed both the judgment in *Ferring* and the arguments put forward by Advocate General Léger.

151. He came to the conclusion that neither the compensation approach nor the State aid approach provided for an ideal solution in all cases. [116]

152. In summary, Advocate General Jacobs favoured a distinction based (i) on the nature of the link between the financing granted and the general interest duties imposed and (ii) on how clearly those duties had been defined. [117] Accordingly, he favoured applying the compensation approach in cases, 'where the financing measures are clearly intended as a *quid pro quo* for clearly defined general interest obligations'. [118] In his opinion, other cases should continue to be subject to the Commission's State aid law surveillance.

(iii) Opinion and conclusions for the present case

153. If one proceeds on the basis that the determination of whether a measure constitutes State aid requires an investigation into 'whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions', [119] then it must be examined whether the recipient undertaking supplies a service which is normally supplied in return for consideration and whether the consideration actually given was reasonably proportionate to that service.

154. Therefore, the compensation approach taken in *Ferring* may be adopted only where the service and the consideration are clearly identifiable. However, as regards services of general economic interest, it is to be observed that it is difficult to find a standard for assessing the proportionality of the compensation, since services of general economic interest are supplied usually 'where market forces alone do not result in a satisfactory provision of services'. [120]

155. However, where the general interest duties have not been clearly defined, it is not possible to adopt the compensation approach. This is because in such cases it is *ex hypothesi* impossible to calculate the burdens (i.e. the costs) resulting from them with sufficient precision. In such cases, it is impossible to find the direct and manifest link to the obligations undertaken which Advocate General Jacobs required.

115 — Cited above, note 90.
116 — Paragraph 117.
117 — Paragraph 118.
118 — Paragraph 119.
119 — See in particular Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60.
120 — See, for example, Communication from the Commission — Services of general interest in Europe, COM (2000) 580 final, p. 3.

156. As regards the present case, I have already explained that in my opinion the AMMs' general interest duties (if they have any) have not been defined sufficiently clearly. [121] This is enough to preclude a finding that there is no *de facto* economic advantage at the stage of determining whether there is State aid. In addition, it is clear that any burdens which may result from performing services of general economic interest are financed from a number of sources, without any clear allocation. [122]

157. It cannot be disputed that criteria such as a direct and manifest link between the burdens imposed and the compensation for them need to be refined. However, issues relating to services of general economic interest are of an 'evolutionary character' (as the Commission recently emphasised), [123] and such criteria do provide a flexible standard of assessment. In this connection it is to be observed that requiring a direct or manifest link between the burdens imposed and the compensation for them does not in principle preclude the possibility that services of general economic interest may be entrusted by means other than a procurement procedure. This is to be welcomed, since Community law does not recognise a general obligation to conduct procurement procedures and it is not impossible that other ways of entrusting services, for example existing *de facto* avenues of negotiation, could ensure that the State need pay only a reasonable consideration for services supplied to it.

158. As regards the argument that the compensation approach is not compatible with the objective nature of the concept of aid, I think that where one examines whether the State allocation compensates or over-compensates for a disadvantage in considering the question whether an advantage has been granted, one need at that stage have regard only to the effects of the allocation of funds. The purposes for which the funds are allocated need be investigated only in so far as is necessary to establish whether the services are of general economic interest. [124]

159. I do not think that the argument that Article 86(2) EC might be deprived of its effect leads to a different conclusion. Even if this were the case with respect to Article 87(1) EC, Article 86(2) EC would be unaffected as regards the application of the other competition provisions and in the area of fundamental freedoms. One might regret that Article 86(2) EC would not apply in the same way in the context of State aid law as it would in the context of the rest of competition law. However, this point cannot be decisive. Such a difference already exists in other respects: for

121 — See above, paragraph 106, under reference to paragraph 101.

122 — See above, paragraph 108.

123 — See the Communication cited in paragraph 101, point 3.1(a).

124 — However, in this regard it must be remembered that the Court's supervisory role is limited, since the Member States are given a wide discretion when awarding contracts for services.

example, in the context of Article 86(2) EC the requirement that the measure distorts competition is less stringent than the requirement in State aid law that the burden must be no more than compensated for. [125]

160. Finally, the Commission's role has to be considered. The Commission's review powers (which are in any case restricted as regards the lawfulness of the contract to provide services) give rise to the consequences of Article 88(3) EC, in particular the prohibition on putting the proposed measures into effect. However, precisely this prohibition appears difficult to justify in the case of services of general economic interest. It was because of exactly this point that doubts arose as to the State aid approach. [126] If a compensation payment in fact over-compensates, the Commission is free to introduce infringement proceedings against the Member State concerned.

161. In result, it is to be considered that the allocation of a significant part of the proceeds of a port charge to a public undertaking constitutes State aid within the meaning of Article 87 EC if the allocation of funds has no direct and manifest link to the burdens resulting from the supply of clearly identifiable services of general economic interest.

125 — See in particular *Commission* v *France* (cited above, note 62), paragraph 59: it is necessary where the application of the Treaty provisions obstructs the performance, in law or in fact, of the special obligations. It is not necessary that the survival of the undertaking itself be threatened.

126 — See the Opinion of Advocate General Tizzano in *Ferring* (cited above, note 86), paragraphs 77 ff.

(c) The national courts' task under Article 88(3) EC

162. By the second part of the third question, the national court asks in substance whether national courts are authorised or required to intervene under Article 88(3) EC where a State aid has not been notified to the Commission.

163. According to the Court's case-law, the national courts are involved in the system for the review of State aid through 'the direct effect attributed to the prohibition on implementation of planned aid laid down in the last sentence of Article 93(3) of the EC Treaty [now the last sentence of Article 88(3) EC]... National courts *must* offer to individuals the certain prospect that all appropriate conclusions will be drawn from an infringement of that provision, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures' [127] (emphasis added).

127 — *Adria-Wien Pipeline* (cited above, note 95), paragraphs 26 f., under reference to Case C-354/90 *FNCE and Another* [1991] ECR I-5505, paragraph 12.

164. National courts come under this obligation whenever the prohibition in the last sentence of Article 88(3) EC is infringed.

165. Therefore, the answer to the question posed by the Corte Suprema di Cassazione is that national courts are required to intervene whenever a national provision contains an aid measure which has not been notified to the Commission.

(d) The fifth question, in so far as it concerns State aids

166. By its fifth question (in so far it concerns State aids), the national court asks in substance whether the whole charge or only the part allocated to the AMMs is to be regarded as State aid.

167. The Court designates charges dedicated to a particular purpose as 'parafiscal charges'. In the case of such charges, which are characterised by the fact that when they are levied they are already destined to finance a particular allocation of funds, State aid law distinguishes between two transactions, namely the increase of State funds resulting from the levying of the charge and the use of those funds by allocating the proceeds to the recipient. The dedication of purpose creates a certain link between levy and allocation. [128]

168. However, the fact that it is possible to distinguish between levying a charge and using its proceeds is shown clearly by the national provision contested in the present case. There has been a general provision relating to levying a port charge since 1963, but there was no provision for dedicating a significant proportion of the charge to a particular purpose until 1973.

169. In *FNCE*, [129] the Court discussed the introduction of a parafiscal charge without distinguishing between levy and application. By contrast, in *Compagnie commerciale de l'Ouest*, the Court did distinguish between the charge itself and its application, stating that 'a parafiscal

128 — Thus, in Case 47/69 *France* v *Commission* [1970] ECR 487, paragraphs 17 f., concerning charges intended to finance a particular grant of aid, the Court considered that, 'both... the method of financing and... the close connexion which makes the amount of aid dependent upon the revenue from the charge' were to be taken into account in assessing the effects of the aid.

129 — Cited above, note 127.

charge like the one at issue in this case may, depending on how the revenue from it is used, constitute State aid incompatible with the common market'. [130]

170. This distinction has been confirmed and (subject to terminological differences) applied in a series of judgments concerning parafiscal charges, the Court having classified sometimes the application of the proceeds of the charge [131] and sometimes the levying of the charge [132] as State aid.

171. The case-law is not clear as to whether only the application of the charge or also the levying of the charge is to be classified as aid. In *Lornoy, Demoor and others* and *Claeys*, Advocate General Tesauro discussed this question in detail, classified the levying of the charge as aid, and concluded that if the requirements of the last sentence of Article 88(3) EC were satisfied, the taxpayer could object to the levying of the charge or seek its recovery before the national courts. None the less, he also considered a more restrictive interpretation under which the only consequence of the fact that aid was unlawful under Community law was that the aid could not be granted, and that the lawfulness of levying the charge was unaffected. [133]

172. In the present case, competition is distorted by the application of the proceeds of the charge by means of the funds allocation. Therefore, in theory, only the allocation of funds can constitute aid. For that reason, in so far as the fifth question concerns State aid, the answer to it is that only the part allocated to the AMMs is to be classified as State aid.

173. Whether the infringement of Article 88(3) EC affects the lawfulness of

130 — Joined Cases C-78/90 to C-83/90 *Compagnie commercial de l'Ouest and Others* [1992] ECR I-1847, paragraph 35.

131 — Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez Nutrition Animale* [1992] ECR I-3899, paragraph 24: 'Although the charge in question does in certain respects come within the scope either of Article 12 or of Article 95 of the Treaty, the use to which the revenue from it is put, or the machinery for its reimbursement, may nevertheless constitute a State aid, possibly incompatible with the common market' and in the operative part of the judgment, 'The reimbursement of a parafiscal charge like the one at issue in this case, or the use to which the revenue from it is put, may constitute State aid incompatible with the common market'; Case C-266/91 *CELBI* [1993] ECR I-4337, operative part of the judgment: 'The use made of the revenue from a parafiscal charge, such as that at issue, may constitute a State aid incompatible with the common market'; Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 28: 'Although the parafiscal charge in question may be prohibited either by Articles 12 and 13 or by Article 95 of the Treaty, the use to which the revenue from that charge is put, for the benefit of domestic products, may nevertheless constitute State aid incompatible with the common market' and in the operative part of the judgment, 'A parafiscal charge of the kind at issue in the main proceedings may, depending on how the revenue from it is used, constitute State aid incompatible with the common market'.

132 — Case C-72/92 *Scharbatke* [1993] ECR I-5509, operative part of the judgment: 'The collection of a parafiscal charge of that kind may, depending on how the revenue from it is used, constitute State aid incompatible with the common market'.

133 — Joined Opinions in Case C-17/91 (cited above, note 131), Joined Cases C-144/91 and C-145/91 *Demoor and Others* [1992] ECR I-6613 and Case C-114/91 *Claeys* [1992] ECR I-6559.

levying the charge is a separate question. In the operative part of the judgment in *FNCE*, [134] the Court stated that the last sentence of Article 88(3) EC 'is to be interpreted as imposing on the authorities of the Member States an obligation whose infringement will affect the validity of measures giving effect to aid'. As regards this point, the Court stated in the grounds of the judgment that, '[n]ational courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures'. [135]

174. In my opinion, it follows that the question as to which national measure is affected by that invalidity is a matter exclusively for national law, subject as usual to the principles of equivalence and effectiveness. [136]

134 — Cited above, note 127.

135 — Paragraph 12.

136 — See also the Opinion of Advocate General Jacobs in *GEMO* (cited above, note 90), paragraph 44: 'Under the principle of procedural autonomy it is then in my view for the national legal order to determine precisely which national measures are affected by that invalidity and what consequences that invalidity has for example for the refund of charges collected on the basis of the measures concerned. The only limitations on that autonomy are the principle of equivalence and the principle of effectiveness'.

## VI — The fourth question: the allocation in terms of free movement of goods, as a charge having an effect equivalent to a customs duty or as discriminatory internal taxation (Articles 28, 25 and 90 EC)

### A — *Submissions of the parties*

175. *Enirisorse* submits that the disputed provision infringes Articles 28 EC, 25 EC and 90 EC. This affects the whole of the charge provisions.

176. The *Commission* submits that since the present case concerns a taxation measure, Article 28 EC does not apply. Furthermore, the Commission does not regard the measure as a charge having an effect equivalent to a customs duty within the meaning of Article 25 EC. The measure is to be assessed under Article 90 EC on the basis that it is an internal tax. It applies without distinction to domestic and imported goods, and therefore cannot be held to be a discriminatory internal tax.

177. The *Italian Government* does not regard the contested provision as infringing the free movement of goods, or as a charge having an effect equivalent to a customs duty, or yet as an internal tax infringing Article 90 EC.

B — *Analysis*

178. By its fourth question, the national court asks in substance whether the contested provision is compatible with the Treaty provisions relating to free movement of goods, the prohibition on charges having an effect equivalent to customs duties and the principle of equal treatment in the context of internal taxation.

179. The fourth question refers to 'the appropriation..., *ab origine*, of a significant proportion of the proceeds from a... charge' and not to the actual levying of the charge. However, in order to give a useful answer to the question, it is to be understood as asking whether the charging provision is compatible with the abovementioned Treaty provisions.

1. Free movement of goods

180. The Court has consistently held 'that the scope of Article 30 [now, after amendment, Article 28 EC] does not extend to the obstacles to trade covered by other specific provisions of the Treaty, and that obstacles of a fiscal nature or having an effect equivalent to customs duties which are covered by Articles 9 to 16 and 95 of the Treaty [now, after amendment, Articles 23 EC to 25 EC and 90 EC] do not fall within the prohibition laid down in Article 30 [now, after amendment, Article 28 EC]'. [137]

181. It follows that the contested provision relating to the levy of the port charge is to be assessed under Articles 25 EC and 90 EC.

2. A charge having an effect equivalent to a customs duty

182. It must first be recalled that '[t]he Court has consistently held... that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that under the system of the Treaty the same imposition cannot belong to both categories at the same time'. [138] The Court has also held that '[t]he essential

137 — *Lornoy* (cited above, note 131), paragraph 14, under reference to Case 74/76 *Ianelli and Volpi* [1977] ECR 557 and *Compagnie commerciale de l'Ouest* (cited above, note 130).

138 — Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 19, under reference to *CELBI* (cited above, note 131), paragraph 9.

feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products, applying systematically to categories of products in accordance with objective criteria irrespective of the origin of the products'. [139]

183. The order of the national court states that the contested charging provision applies without distinction to domestic and imported goods and therefore that it is not a condition of the imposition of the charge that the goods must have originated in another (Member) State. This assessment of the substance of the charge is not altered by the fact that according to the national court, Italian law regards the disputed port charge as equivalent to a 'diritto doganale' (customs duty). Therefore, it is not a charge having an effect equivalent to a customs duty.

3. Internal taxation

184. Article 90 EC provides that no Member State is to impose, directly or indirectly, on the products of other Member States internal taxation in excess of that imposed on similar domestic products or of such a nature as to afford indirect protection to other domestic products. 'It is therefore beyond question that application of a higher charge to imported products than to domestic products or application to imported products alone of a surcharge in addition to the duty payable on domestic and imported products is contrary to' the prohibition of discrimination laid down in Article 90 EC. [140]

185. There is no suggestion in the national court's order that the contested provision infringes this prohibition of discrimination.

186. Therefore, the answer to be given to the fourth question is that the State charge levied on the unloading or loading of goods in ports does not constitute a charge prohibited by Article 25 EC as having an effect equivalent to an import duty, an internal tax on products from other Member States in excess of the charge levied on similar domestic products within the meaning of Article 90 EC or a barrier to imports, prohibited by Article 28 EC.

139 — Case C-212/96 *Chevassus-Marche* [1998] ECR I-743, paragraph 20, under reference to Case 90/79 *Commission v France* [1981] ECR 283, paragraphs 12 to 14.

140 — *Haahr Petroleum* (cited above, note 138), paragraph 27.

## VII — Conclusions

187. Therefore, I suggest to the Court that the questions referred by the Corte Suprema di Cassazione should be answered as follows:

The allocation to a public undertaking — operating in the market for cargo handling service in the ports concerned — of a significant proportion of a charge levied on unloading or loading goods in certain ports, and paid to the State by operators

(1) can constitute a measure infringing Article 82 EC in conjunction with Article 86(1) EC where the recipient undertaking has a dominant position in the relevant market as defined by the national court, and that market is a substantial part of the common market. It is for the national court to determine whether these conditions are fulfilled in the circumstances of the case. If the national court were to find that there has been abuse of a dominant position, only the part of the proceeds of the charge that is allocated to the AMMs would be incompatible with Community law;

(2) constitutes State aid within the meaning of Article 87(1) EC, which requires that the national courts intervene if the conditions of Article 88(3) EC are met. The question as to which domestic measure is affected by the invalidity is a matter for national law;

(3) does not constitute a charge prohibited by Article 25 EC as having an effect equivalent to an import duty, an internal tax on products from other Member States in excess of the charge levied on similar domestic products within the meaning of Article 90 EC or a barrier to imports, prohibited by Article 28 EC.