OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 28 October 2004 [1]

I — Introduction

1. The present case concerns an Italian rule under which municipalities levy municipal duties on advertising, lay down certain provisions governing the practice of advertising in their territory (including rules on the number and location of available advertising spaces) and also operate their own municipal bill-posting service. It is essentially contended that the municipalities are operating as undertakings on a market for which they themselves also lay down the rules.

2. In this connection the Giudice di pace (Magistrate) of Genoa-Voltri (hereinafter also: the referring court) asks the Court to interpret the rules on competition laid down in the Treaty (Articles 82 EC, 86 EC, 87 EC and 88 EC) and freedom to provide services (Article 49 EC). With its questions, the referring court is making reference to the Court for a second time, after, by an order of 8 October 2002, the Court found a first reference for a preliminary ruling in the same case to be (manifestly) inadmissible. [2]

II — Legal framework

A — *Community law*

3. Articles 49 EC, 50 EC, 82 EC, 86 EC, 87 EC and 88 EC form the Community law framework for this case.

B — *National law*

Introduction

4. It is apparent from the submissions made to the Court that it is essentially possible to

1 — Original language: German.

2 — Order of October 2002 in Case C-190/02 Viacom I [2002] ECR I-8289.

advertise in Italian municipalities with advertising material, with bills for example, in three different ways. First of all, private individuals may affix their advertising material to private installations. Secondly, it is possible for private individuals to use public spaces (e.g. streets or the walls of public buildings) to put up their (private) advertising material. Thirdly, advertising messages may be affixed to municipal installations, for example on advertising hoardings, that are provided by the respective municipality; in this case, bills may be posted either by the private individuals themselves or by a municipal service (hereinafter: the municipal bill-posting service).

5. A *municipal advertising tax* is always payable; where the municipal bill-posting service is used, however, this tax is already included in the *charge* payable for the bill-posting service.

The national rules in detail

6. With regard to Italian national law, reference should be made, first of all, to Decreto legislativo No 446 of 15 December 1997 [3] (hereinafter: Decreto legislativo 446/97), Article 52 of which confers on provinces and municipalities the power to lay down by regulation rules governing their own income, subject to more precisely defined limits.

7. Decreto legislativo [4] No 507 of the President of the Republic of 15 November 1993 revising and harmonising the municipal advertising tax and the tax on public bill-posting [5] (hereinafter: Decreto legislativo 507/93) is also relevant to advertising in public spaces.

8. Article 1 of Decreto legislativo 507/93 provides:

'Outdoor advertising and public bill-posting shall be subject ... to a tax or a charge payable to the municipality in the territory of which it is carried out'.

3 — GURI No 298 of 23 December 1997, Suppl. Ord.

4 — Legislative decree.

5 — The title of this Decreto legislativo begins with 'Revisione ed amministrazione dell'imposta comunale sulla pubblicità e del diritto sulle pubbliche affissioni'; it is published in GURI No 288 of 9 December 1993, Suppl. Ord. As far as the present case is concerned, it applies as amended by Decreto del Presidente della Repubblica No 43 of 28 January 1998 and by Decreto legislativo No 112 of 13 April 1999.

9. Article 5(1) of Decreto legislativo 507/93 provides as follows:

'The municipal advertising tax ... shall be payable on the dissemination of advertising material using visual or acoustic means of communication, other than those subject to the bill-posting charge, in public places or places open to or visible to the public'.

According to the referring court, the tax is therefore due on any (private) advertising material disseminated in the territory of the municipality to which the tax is payable.

10. Under Article 6(1) of Decreto legislativo 507/93, taxable persons are 'those who ... are provided with the means by which the advertising material is disseminated'.

11. Under Article 9(7) of Decreto legislativo 507/93, special user charges and certain payments (e.g. a rental charge) may also be levied, in addition to the municipal advertising tax, if public installations are used for advertising.

12. Special provisions governing the municipal bill-posting service, which must be set up in all municipalities with more than 3 000 inhabitants, are laid down in Article 18 et seq. of Decreto legislativo 507/93. Article 18 (1) states:

'The municipal bill-posting service provides for the posting, by the municipality, on installations designed for that purpose, of notices of any material ...'.

13. Furthermore, Article 19(1) of Decreto legislativo 507/93 provides:

'In consideration of the public bill-posting service, a duty is payable jointly and severally by the person requesting the service and the person on whose behalf the service is requested, and inclusive of the advertising tax, to the municipality which performs that service'.

14. Articles 3 and 22(1) of Decreto legislativo 507/93 require municipalities, first, to lay down more precise rules governing taxation rates and the details for the levying of the municipal advertising tax — within certain limits prescribed by law — and, secondly, to adopt provisions on their municipal bill-posting service. Furthermore,

they must lay down rules governing the practice of advertising; they may restrict or prohibit certain forms of advertising for reasons in the general interest. It is also necessary to lay down rules governing the costs incurred, provisions on the issue of licences and a general plan for advertising installations. It must also be decided in what proportion public spaces may be used for non-commercial advertising and for commercial advertising and how much advertising space is available for direct bill-posting by private individuals.

15. In the municipality of Genoa, a municipal regulation applying Decreto legislativo 507/93 was adopted on 21 December 1998 (hereinafter: municipal regulation of 1998). [6] As can be seen from the file in the case, it includes a licence requirement (Article 6), safety rules for public highways (Article 14), restrictions for reasons of environmental and architectural conservation (Articles 18 and 19), and details on the payment of the municipal advertising tax (Article 23 et seq.) and the charge for using the municipal bill-posting service (Article 29 et seq.).

16. The municipal regulation of 1998 was repealed with effect only from 1 January 2001 and replaced by new legislation from that date. [7]

III — Facts and main proceedings

17. Proceedings are pending before the Giudice di pace of Genoa-Voltri between Viacom Outdoor S.r.l., [8] established in Milan, Italy (hereinafter: Viacom), and Giotto Immobilier SARL established in Menton, France (hereinafter: Giotto). Giotto sells property on the French Côte d'Azur, whilst Viacom provides advertising services for its customers.

18. Viacom invoiced Giotto in respect of remuneration for bill-posting advertising services that it had provided for Giotto in October 2000 in the Municipality of Genoa. As part of that remuneration, Viacom is also claiming a sum of ITL 439 385, i.e. EUR 226.92, as reimbursement for its expenditure on the municipal advertising tax

6 — New Regulation on the application of the advertising tax and on the performance of the public bill-posting service (Nuovo regolamento per l'applicazione dell'imposta sulla pubblicità e per l'effettuazione del servizio delle pubbliche affissioni). That municipal regulation was amended in 1999 and 2000.

7 — Article 39 of the municipal regulation of 26 March 2001 (Decision No 36/2001 of the Municipality of Genoa).

8 — Formerly: Società Manifesti Affissioni SpA.

which was payable to the Municipality of Genoa. Only this part of the remuneration is in dispute between the parties.

19. Viacom bases its claim for payment on a contract concluded between the parties on 9 September 2000. Under that contract, Giotto must pay Viacom remuneration for the bill-posting advertising service, which, in addition to the actual price of the service, also includes reimbursement of *'specific, documented charges'* (Italian: *'oneri specifici e documentati'*).

20. However, Giotto refuses to reimburse the expenditure in question, claiming that the municipal advertising tax is contrary to Community law. The referring court takes the view that the action brought by Viacom would have to be dismissed if the municipal advertising tax proved to be contrary to Community law.

IV — Reference for a preliminary ruling and proceedings before the Court of Justice

21. By an order of 10 March 2003, the Giudice di pace of Genoa-Voltri therefore stayed its proceedings and made reference to the Court of Justice for a preliminary ruling on the following questions:

'1. Is the entrusting to a public undertaking (municipalities) of the management of a tax and duties such as those considered above, on a market which constitutes a substantial part of the common market and on which the public undertaking holds a dominant position inconsistent contrary to:

(a) the application of Article 86 EC in conjunction with Article 82 EC;

(b) the application of Article 86 EC in conjunction with Article 49 EC?

2. Is the payment to that public undertaking of the revenue from the tax and charges in question inconsistent contrary to:

(a) the application of Article 86 EC in conjunction with Article 82 EC;

(b) the application of Articles 87 EC and 88 EC, inasmuch as it constitutes unlawful State aid (not notified) and incompatible with the common market?

22. In the proceedings before the Court of Justice, Viacom and the Commission submitted written and oral observations, whilst Giotto and the Italian Government submitted only written observations. Viacom, Giotto and the Italian Government also gave written answers to questions asked by the Court.

V — Assessment

A — *Admissibility of the questions referred*

23. The order in Viacom I, [9] by which the first order for reference from the referring court was found to be (manifestly) inadmissible, does not preclude a further reference to the Court by the Giudice di pace of Genoa-Voltri. The Court has held that the authority of a preliminary ruling (or an order) does not preclude the national court or tribunal to which it is addressed from taking the view that it is necessary to make a further reference to the Court before giving judgment in the main proceedings. [10] However, it must still be clarified whether the questions that have now been referred are admissible.

24. It is settled case-law that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case 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 concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. [11] The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of, or the assessment of the validity of a provision 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. [12]

25. There are doubts as to the admissibility of these questions in two respects: first, with regard to their relevance to the decision in the main proceedings and, secondly, with

9 — Cited in footnote 2.

10 — Order in Case 69/85 *Wünsche III* [1986] ECR 947, paragraph 15.

11 — See Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38, Case C-153/00 *Der Weduwe* [2002] ECR I-11319, paragraph 31, Case C-448/01 *EVN AG and Wienstrom* [2003] ECR I-14527, paragraph 74, and Joined Cases C-480/00, C-481/00, C-482/00, C-484/00, C-489/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Ribaldi* [2004] ECR I-2943, paragraph 72.

12 — Case C-415/93 *Bosman*, paragraph 61, Case C-379/98 *PreussenElektra*, paragraph 39, and Case C-499/00 *Ribaldi*, paragraph 72, as well as Case C-448/01 *EVN AG and Wienstrom*, paragraph 76, and Case C-153/00 *Der Weduwe*, paragraph 33, each cited in footnote 11.

regard to the description of the factual and legal context of the main proceedings.

1. Relevance of the questions

26. Two problems essentially arise in the present case in connection with the relevance of the questions referred for a preliminary ruling.

27. First of all, the Commission has raised the question whether the decision in the main proceedings can actually depend on an assessment of the overall system forming the basis of Decreto legislativo 507/93. In the Commission's view, only those elements of the Italian rules that actually relate to the municipal advertising tax should be the subject of these preliminary ruling proceedings.

28. It may be sufficient, in connection with freedom to provide services (Article 49 EC), to concentrate solely on the effects of the municipal advertising tax as such on cross-border trade. However, a useful statement by the Court on the competition rules (Articles 82, 87 and 88 EC) requires a further-reaching overview of all the circumstances under which advertising material is disseminated in Italian municipalities. Only then is it possible to consider meaningfully whether municipalities might be abusing a possible dominant position where they operate both as undertakings and as regulatory authorities in the field of advertising by means of bill-posting. Only then is it also possible to determine whether payment of the income from the municipal advertising tax to regional or local authorities that also themselves operate as undertakings in the field of advertising by means of bill-posting constitutes prohibited State aid within the meaning of Article 87 EC.

29. Secondly, the questions referred for a preliminary ruling would be found to be irrelevant if Giotto were *in any case* contractually obliged to reimburse the municipal advertising tax that had been paid, irrespective of whether or not that tax was lawful. The outcome of the main proceedings would not then be contingent on the compatibility of that tax with Community law.

30. However, the question whether an obligation to that effect was imposed on Giotto is solely a matter of interpretation of the contract of 9 September 2000 [13] and the

13 — As has been mentioned, Giotto is contractually obliged to reimburse 'specific, documented charges' (Italian: *'oneri specifici e documentati'*).

applicable national law and therefore falls within the exclusive jurisdiction of the referring Court and not the Court of Justice. [14]

31. In its order for reference, the Giudice di pace makes clear his position on this issue. As he stresses, if the municipal advertising tax was unlawful, the plaintiff's claims would be unfounded and its action would therefore have to be dismissed. [15] The Court for its part cannot make any other assumption.

32. Against this background, it is not evident in the present case that the questions referred might be irrelevant to the decision. Rather, they bear a relation to the actual facts of the main action and its purpose and the problem described by the referring court is not merely hypothetical either.

33. Finally, it should also be mentioned that it is not necessary in the present case to make a declaration of inadmissibility on account of the existence of a contrived (fictitious) legal dispute.

34. As far as can be seen, the Court has rejected a reference for a preliminary ruling because it was based on a contrived legal dispute only once. On that occasion, however, the proceedings before the Court revealed that the parties had inserted a certain clause into their contract in an "artificial expedient" in order to induce the national court to give a ruling on a certain point of law. [16]

35. There are not sufficient grounds to support such an assumption in the present case. In particular, under the case-law, the fact that the parties are in agreement as to the interpretation of Community law, that is to say as to the result of the preliminary ruling proceedings desired by both sides, makes the dispute between them no less real. [17] However, where it is *not manifestly apparent* from the facts set out in the order for reference that the dispute is in fact fictitious, the questions referred for a preliminary ruling are — in this respect — admissible. [18]

14 — It must be noted that in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case and any interpretation of national law is a matter for the national court (see, inter alia, Case C-386/02 *Baldinger* [2004] ECR I-8411, paragraph 14, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 10, and Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25, with further references.

15 — Page 3 of the order for reference, section B. (II). It is exclusively for the national court to interpret a civil contract in accordance with the relevant rules of its national law. In this way the present case differs from Der Weduwe, for example, where, without giving further reasons, a Belgian court had based its order for reference on a purely hypothetical assumption, namely on an uncertain interpretation of Luxembourg law, i.e. foreign law that was not its own (judgment cited in footnote 11, paragraphs 37 to 39).

16 — Case 104/79 *Foglia* I [1980] ECR 745, paragraph 10.

17 — Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, paragraph 14.

18 — See also Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 12.

2. Description of the factual and legal context

(a) Legal context

36. Furthermore, the Court has consistently held that the need to provide an interpretation of Community law which will be of use to the national court makes it necessary for the referring court to define the factual and legal context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based. [19] A precise description of the factual and legal context is necessary in particular in the area of competition, which is often highly complex. [20] That description should not least give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the EC Statute of the Court of Justice, [21] bearing in mind that only the order for reference is notified to the interested parties. [22]

37. As far as the legal context of its reference for a preliminary ruling is concerned, the referring court refers to Decreto legislativo 507/93 and explains its main content, albeit briefly. The text of that legislation and the text of Decreto legislativo 446/97 are annexed to the order for reference. In particular, the required information about the municipal advertising tax [23] is given and the differences with the charge payable for using the municipal bill-posting service are explained. It is also explained in which areas municipalities are entitled to adopt implementing rules (e.g. licence requirements, restrictions on advertising for reasons in the general interest, definition of spaces for bill-posting, rules on the municipal bill-posting service). The rules of Italian law that apply at national level and the information needed to understand those rules is therefore sufficiently clear from the order for reference and from the papers in the main proceedings.

38. The situation is different as regards the implementing rules applicable at municipal level. In their written answers to a question asked by the Court, Viacom and Giotto both stated that the municipal regulation of 1998

19 — See the judgments in Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6, and Case C-176/96 *Lethonen and Castors Braine* [2000] ECR I-2681, paragraph 22, and the orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraph 4, Case C-66/97 *Banco de Fomento e Exterior* [1997] ECR I-3757, paragraph 7, and Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 15; see also the order in Case C-190/02 *Viacom I* (cited in footnote 2, paragraph 15).

20 — See the judgment in Case C-176/96 *Lethonen and Castors Braine* (cited in footnote 19, paragraph 22) and the orders in Case C-157/92 *Banchero* (cited in footnote 19, paragraph 5), Case C-116/00 *Laguillaumie* (cited in footnote 19, paragraph 19) and Case C-190/02 *Viacom I* (cited in footnote 2, paragraph 22).

21 — Judgment in Joined Cases C-480/00, C-481/00, C-482/00, C-484/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Ribaldi* (cited in footnote 11, paragraph 73), order in Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 *Cannito and Others* [2004] ECR I-1605, paragraphs 6 to 8 with further references, judgment in Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* (cited in footnote 19, paragraph 6) and order in Case C-190/02 *Viacom I* (cited in footnote 2, paragraph 14).

22 — Judgment in Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6, order in Case C-66/97 *Banco de Fomento e Exterior* (cited in footnote 19, paragraph 7), judgment in Case C-176/96 *Lethonen and Castors Braine* (cited in footnote 19, paragraph 23), order in Case C-116/00 *Laguillaumie* (cited in footnote 19, paragraph 14) and order in Case C-190/02 *Viacom I* (cited in footnote 2, paragraph 14).

23 — With regard to the detailed requirements see paragraphs 19 and 20 of the order in Case C-190/02 *Viacom I* (cited in footnote 2).

was applicable in Genoa in the year in question, 2000. [24] However, in its order for reference the referring court mentions two more recent decisions by the Municipality of Genoa, by which the municipal regulation of 1998 was replaced. [25] Since those more recent decisions were not adopted by the municipal council until 26 March 2001 and did not become applicable until 1 January 2001, it is not clear how they could have a bearing on the situation in the present case, which relates to the year 2000. [26] This is not explained any further in the order for reference.

39. Despite this deficiency relating to the implementing rules adopted by the Municipality of Genoa, however, the description of the legal context can be regarded as adequate for the purposes of these preliminary ruling proceedings. The respective municipal regulations merely serve to lay down more precise rules for a legal context the essential elements of which are already defined at national level by Decreto legislativo 507/93. Those elements are described and summarised sufficiently clearly in the order for reference. [27]

(b) Factual context

40. As far as the description of the factual context is concerned, a distinction must be drawn, in assessing the facts, between the respective requirements that apply to a reference for a preliminary ruling as a result of freedom to provide services (Article 49 EC), on the one hand, and as a result of the rules on competition in the Treaty (Articles 82 EC, 86 EC, 87 EC and 88 EC), on the other.

41. For the answer to Question 1(b), which relates to freedom to provide services, the order for reference contains a brief, but adequate description of the essential elements of the factual context. In essence, it is apparent from that description that an Italian undertaking provided bill-posting advertising services for a French undertaking in Genoa in 2000 and had to pay a municipal tax in respect of those services.

24 — See points 15 and 16 of this Opinion.

25 — Decision No 35/2001 with a Regulation on the levying of the charge for putting up advertising material (Regolamento per l'applicazione del canone per l'istallazione di mezzi pubblicitari) and Decision No 36/2001 with a Regulation on the levying of the duty and on the performance of the public bill-posting service (Regolamento per l'applicazione del diritto e per l'effettuazione del servizio delle pubbliche affissioni).

26 — Article 39 of the regulation annexed to Decision No 36/2001 of the Municipality of Genoa of 26 March 2001 sets 1 January 2001 as the date of its entry into force and provides for the repeal of the regulation of 1998 on the same date. However, legal relationships relating to the rules on duties for periods prior to 1 January 2001 are expressly unaffected by the repeal of that regulation. Similarly, Article 19 of the regulation annexed to Decision No 35/2001 of the Municipality of Genoa of 26 March 2001 sets 1 January 2001 as the date of its entry into force.

27 — See point 37 of this Opinion. The parties to the main proceedings and the Commission also provided some supplementary information in their written and oral observations.

42. However, doubts arise with regard to the rules on competition contained in the Treaty (Articles 82 EC, 86 EC, 87 EC and 88 EC). In this area in particular, the Court should not impose excessively strict requirements on the drafting of orders for reference from national courts so as not to render any reference for a preliminary ruling practically impossible for them, since the importance of judicial cooperation between national courts and the Court of Justice has tended to increase rather than diminish with the entry into force of Regulation 1/2003. [28] At the same time, however, such cooperation also requires particular caution to be exercised by the national courts when drafting their orders for reference in the area of competition law.

43. In the present case, there is a serious lack of fundamental information on the facts of the case in the order for reference, as the Court has already pointed out in Viacom I. [29]

44. For example, in order to enable the Court to give a useful answer on questions of competition law, the order for reference should contain sufficient indications to determine the materially and geographically relevant markets that form the basis for any assessment under competition law, specifically for the calculation of market shares. However, the information in the order for reference does not offer a clear picture of the circumstances in the main proceedings either materially or geographically.

45. The material definition of the relevant market is at least outlined briefly. It consists in 'bill-posting services (provision of advertising space), as provided by municipalities using municipal installations and by private individuals using public or private installations'; private services and services provided by the municipality are said to be 'fully interchangeable'. However, it is not explained in any greater detail whether the type of advertising that is disseminated through private undertakings or the municipal bill-posting service, and ultimately the respective customers, are actually comparable. If the municipal bill-posting service is available primarily for official notices and messages from associations and social institutions, [30] whilst traders such as Giotto generally use the services of private suppliers like Viacom for their advertising, this would suggest a definition of different relevant markets.

28 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

29 — Order in Case C-190/02 *Viacom I* (cited in footnote 2, paragraphs 21 and 22).

30 — This is suggested by the Commission in its written observations. In this connection, it also refers to the case-law of Italian administrative courts, in particular Judgment No 1490 of the Tribunale Amministrativo Regionale per la Lombardia (TAR Lombardia-Milano) of 17 April 2002, under which the purpose of the municipal bill-posting service is to ensure the effective exercise of the constitutionally guaranteed fundamental right of freedom of opinion.

46. With regard to the definition of the geographic market, the order for reference merely states that the 'whole of the municipal territory' is to be regarded as the geographically relevant market, because that is where the municipalities and the bill-posting undertakings compete. On the other hand, there is no information, for example, on whether — as might be expected — the legal conditions in other Italian municipalities are comparable with those in Genoa, whether service providers like Viacom that operate in the field of advertising by means of bill-posting regularly operate in more than one municipality or only in Genoa, and whether their customers' advertising campaigns generally cover only individual municipalities or are in fact regional or supra-regional. [31] For example, it certainly does not seem absurd to think that advertising like Giotto's advertising of properties on the Côte d'Azur is disseminated across regions and is not just restricted to the territory of the Municipality of Genoa.

47. A precise understanding of the questions referred would also require the order for reference to contain at least intimations of the number of service providers and their position on the relevant market, in particular their rough market shares, and those of the municipalities themselves, where they are active on that market. Likewise, at least brief statements on the number and size of the customers that order advertising by means of bill-posting would be needed. Information is not given on either element in the order for reference from the Giudice di pace of Genoa-Voltri. It cannot therefore be determined with sufficient certainty whether in a situation like the one at issue in the main proceedings it can be assumed that the municipal bill-posting service holds a dominant position (Article 82 EC). [32]

48. The Giudice di pace does not give any further explanation either of the possible cause of an abuse of a dominant position held by Italian municipalities in the field of advertising by means of bill-posting. It merely states that it is 'abundantly clear that the legislative provisions at issue have placed the municipalities in a position which is bound to induce them to influence the market to their advantage in breach of Article 82 EC'.

49. Furthermore, it is not clear from the order for reference whether and to what extent the Italian rules can affect trade

31 — See, inter alia, the Commission's statements in its Decision of 14 September 2001 in merger control procedure COMP/M.2529 — JCD/RCS/Publitransport/IGP (paragraph 10).

32 — On the contrary, in its written and oral observations, the Commission, for example, refers to various decisions by competition authorities from which it can be concluded that there is effective competition in the field of advertising by means of bill-posting in Italy. These decisions are the abovementioned Commission Decision of 14 September 2001 (see footnote 31, in particular paragraph 15) and the decisions of the Italian Autorità Garante della Concorrenza e del Mercato No 7781 (C3738) of 2 December 1999, No 8019 (C3843) of 10 February 2000, No 8463 (C4047) of 6 July 2000, No 11442 (C5428) of 27 November 2002 and No 12561 (I583) of 30 October 2003.

between Member States. This information is essential in order to understand and answer the questions relating to Article 82 EC and 87 EC. In particular, it is not apparent from the descriptions given by the referring court to what extent the Italian rules impede or render less attractive activity on the Italian market, in the case of foreign service providers, or the use of the services of Italian private suppliers, in the case of foreign customers.

50. Lastly, it is likewise not clear from the order for reference how the Italian municipalities, in particular the Municipality of Genoa, organise their municipal bill-posting service in detail. [33] Is it a legally autonomous municipal business with its own legal personality or a service provided by the municipal administration without any notable autonomy? Is there a separate budget for the municipal bill-posting service or is it financed from the general municipal budget? [34] Does the revenue from the municipal advertising tax and from the charge for using the municipal bill-posting service solely benefit that bill-posting service or does it pass into the general municipal budget without being earmarked under a specific heading? It is contingent on reliable information in this regard how the questions on Articles 86 EC, 87 EC and 88 EC are to be understood and answered.

3. Intermediate conclusion

51. Because of the inadequate description of the factual context in which the questions of competition law referred for a preliminary ruling are placed, I consider Question 1(a) and Question 2 set out in the order for reference to be inadmissible. On the other hand, Question 1(b) is admissible.

B — *Substantive assessment of the questions referred*

52. Consideration will be given below primarily to the points of laws relating to freedom to provide services (Articles 49 EC and 50 EC) (Question 1(b)). In the event that the Court should also find the questions concerning the rules on competition laid down in the Treaty to be admissible, comments are also made in the alternative on Question 1(a) and Question 2.

33 — It is possible to infer from the order for reference only that the Municipality of Genoa provides its bill-posting service with inter alia 'management, technical services, manual staff, technical facilities and installations etc. It thus has at its disposal a very similar organisational structure to that available to private firms competing in the sector'. The municipal bill-posting service is said to be performed by the municipality under a specific allocation of financial and material resources, which bears no relation to its institutional functions, but to the exercise of a profit-making, commercial activity.

34 — In the view of Viacom, as expressed in its written and oral observations, it is a service without any notable autonomy and without its own budget.

1. Question 1(b): Freedom to provide services (Articles 49 and 50 EC)

53. With its Question 1(b), the referring court essentially seeks to ascertain whether freedom to provide services (Article 49 EC) precludes a national provision under which a municipal advertising tax is payable on advertising by means of bill-posting in public spaces to municipalities that themselves operate a municipal bill-posting service.

54. It must first be made clear that it makes no difference in the context of freedom to provide services which authority levies an indirect tax and for whose benefit. It is possibly relevant in the context of the rules on competition set out in the Treaty, but not in connection with freedom to provide services, that the municipal advertising tax is levied by the Italian municipalities, which at the same time also operate a municipal bill-posting service.

55. Freedom to provide services is enjoyed by both providers and recipients of services.[35] A company such as Giotto, which has advertising by means of bill-posting carried out in another Member State by an undertaking established there, like Viacom, for remuneration, uses a service within the meaning of Articles 49 EC and 50 EC.[36]

(a) The principle of non-discrimination

56. Article 49 EC contains a specific expression of the general principle of non-discrimination.[37] If, therefore, the imposition of a duty has a greater effect — without any justification — on cross-border situations than on purely domestic situations,[38] there is no doubt that on this ground alone there is a breach of the principle of freedom to provide services.

57. In the present case, however, it is not clear whether the municipal advertising tax could lead to — even only indirect — discrimination against cross-border services. The municipal advertising tax is incurred for advertising by means of bill-posting that is

35 — Case C-262/02 *Commission* v *France* [2004] ECR I-6569, paragraph 22, and Case C-429/02 *Bacardi France* [2004] ECR I-6613, paragraph 31.

36 — Similarly, for example, see Case 15/78 *Koestler* [1978] ECR 1971, paragraph 3, in relation to banking services.

37 — See Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraphs 16 and 17, and Case C-289/02 *AMOK* [2003] ECR I-1505, paragraphs 25 and 26.

38 — This is the situation, for example, in Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 7, Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraphs 17 to 21, Case C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 30 to 35, and Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraphs 65 to 69.

carried out for domestic and foreign customers and by domestic and foreign suppliers. Furthermore, it is levied not only on services provided by private individuals, but also, at the same rate, on any services provided by the municipalities themselves through their municipal bill-posting services. [39] The municipal advertising tax therefore appears to form part of a general system of domestic duties which is subject to objective, non-discriminatory criteria and also does not discriminate between domestic and cross-border activities. [40]

(b) The prohibition on imposing restrictions

58. In addition, by its very wording, Article 49 EC requires the elimination of any restriction on the freedom to provide services, even if it applies to national providers of services and to those of other Member States alike, when it is liable to prohibit, impede or render less attractive the provision or receipt of cross-border services. [41]

59. If a duty is imposed on a provider or a recipient of a service, this is undoubtedly a restriction on freedom to provide services, at least where this charge arises in the context of specific measures which are mandatory for the provider or recipient of the service (e.g. government checks that are liable to a charge, licence procedures that are liable to a charge, and also the obligation to use (and pay for) certain facilities or services, for example in ports). [42] Such a duty reinforces the effects of measures which, for their part, are liable to prohibit, impede or render less attractive the provision or receipt of services.

60. On the other hand, the question whether the imposition of an indiscriminately applicable duty, for example an indirect tax, can lead to a restriction even in itself has not been clearly answered in the existing case-law. [43] There are two conceivable solutions:

39 — Under Article 19(1) of Decreto legislativo 507/93, if the municipal bill-posting service is used, 'a duty is payable ... *inclusive of advertising tax*, to the municipality which performs the service' (emphasis added).

40 — With regard to the related problem of taxation of goods (Article 90 EC), see Case 193/85 *Co-Frutta* [1987] ECR 2085, paragraph 10 et seq., and Case C-72/03 *Carbonati Apuani* [2004] not yet published in the ECR paragraph 17. See also Case C-387/01 *Weigel* [2004] ECR I-3751, end of paragraph 55.

41 — See also Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 56, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21, and Joined Cases C-430/99 and C-431/99 *Sea-Land Service* [2002] ECR I-5235, paragraph 32. Similarly, Case C-262/02 *Commission* v *France* (paragraph 22) and Case C-429/02 *Bacardi France* (paragraph 31), both cited in footnote 35.

42 — See, inter alia, Case C-266/96 *Corsica Ferries France* (paragraphs 3, 4 and 60) and Joined Cases C-430/99 and C-431/99 *Sea-Land Service* (paragraphs 38 and 42), cited in footnote 41, and point 25 of my Opinion of 22 June 2004 in Case C-189/03 *Commission* v *Netherlands* [2004] ECR I-9289.

43 — The judgments cited in footnote 38 all concern discriminatory duties.

(i) The justification solution: A non-discriminatory domestic duty may constitute a restriction and its justification must be examined.

61. It cannot be disputed that even the simple imposition of a duty may make an economic activity more expensive and therefore less attractive. In any case the judgment in *De Coster* can also be interpreted as requiring a domestic duty to undergo an examination as is normally the case for *restrictions.* [44]

62. If this approach is adopted and national duties are seen as restrictions of fundamental freedoms, then, in the final analysis, all duties, no matter what kind, would have to be examined against Community law; the Member States would then potentially be required in each individual case to show that their duties were justified for compelling reasons in the general interest, i.e. reasonable, necessary and proportionate with the aims pursued. However, it would then have to be borne in mind that the provision of budget funds is an essential requirement for State action, that it therefore constitutes a legitimate aim in principle and that the levying of taxes — also for that reason — is more or less required by many provisions of the EC Treaty (see, for example, Articles 90, 93 and 175(2), first indent, EC). Member States would have to be accorded a broad margin of discretion with regard to their general budgetary decisions [45] and the nature and composition of the duties to be levied. It could not be the task of the Court to second-guess Member States' budgetary decisions.

63. However, an unlawful restriction of freedom to provide services stemming from a non-discriminatory duty would still have to be considered if that duty had a prohibitive effect, that is to say if, by its nature, it amounted to a prohibition on carrying on activity.

(ii) The definition-based solution: A non-discriminatory domestic duty is excluded from the scope of the fundamental freedom from the outset.

64. On the other hand, the Court adopted a different approach only recently in a case in connection with freedom of movement for workers (Article 39 EC). The imposition of a *non-discriminatory* domestic duty was not subject to an examination of its justification on the basis of compelling reasons in the general interest, as would be customary in

44 — Case C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 26, 29, 37 and 38. However, the duty in that case was also discriminatory (see paragraphs 31 to 35 of the judgment).

45 — Naturally this applies only subject to the limits that follow from Title VII of the EC Treaty on economic and monetary policy.

the case of restrictions; instead, the approach taken in *Weigel* [46] suggests that the imposition of such a duty should be excluded entirely from the scope of the fundamental freedom:

'However, the Treaty offers no guarantee to a worker that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation. Given the disparities in the legislation of the Member States in this area, such a transfer may be to the worker's advantage in terms of indirect taxation or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation in which the worker pursued his activities prior to the transfer, is not contrary to Article 39 EC ...' [47]

65. This approach is supported by the fact that restrictions of fundamental freedoms, as conventionally construed, are characteristically prohibited in principle and may be justified only in exceptional cases — for example for compelling reasons in the general interest. On the other hand, as has already been mentioned, in a series of provisions, the EC Treaty more or less presupposes that the Member States should levy indirect taxes on the basis of their fiscal sovereignty (see, for example, Articles 90, 93 and 175(2), first indent, EC), and certainly not only in narrowly construed exceptional cases. Those provisions are therefore based on the common assumption that the levying of taxes which form part of a general system of domestic duties, are subject to objective, non-discriminatory criteria and also do not discriminate between domestic and cross-border activities is not prohibited, but is permitted in principle and does not have to be justified in each individual case; differences between the Member States in terms of indirect taxation are accepted and may be eliminated, if necessary, through harmonisation to the extent that this is necessary, for example, for the functioning of the internal market (Article 93 EC).

(iii) Application to the present case: The municipal advertising tax

66. So far as concerns the municipal advertising tax under Italian law that is at issue in the present case, both solutions lead to the same conclusion:

If the *definition-based solution* is adopted, an indirect tax which forms part of a general system of domestic duties, is subject to objective, non-discriminatory criteria and also does not discriminate between domestic

46 — Judgment cited in footnote 40.

47 — Case C-387/01 *Weigel* (cited in footnote 40, paragraph 55; the non-discriminatory character of the duty is in any case clarified in paragraph 53 of the judgment); see also point 36 of the Opinion of Advocate General Tizzano of 3 July 2003 in the same case.

and cross-border activities does not fall within the scope of Article 49 EC. According to the available information, the municipal advertising tax satisfies those criteria. [48]

If, on the other hand, the *justification solution* is adopted, the municipal advertising tax would indeed be a restriction of freedom to provide services, but it could at the same time be justified without difficulty. According to all the available information, this — low — tax does not have a prohibitive effect and it is not clear to what extent the national and the local legislator might have exceeded their broad margin of discretion in budget policy in setting the tax. [49]

67. In summary, it must therefore be stated that if the levying of an indirect tax such as the municipal advertising tax in Italy appears to form part of a general system of domestic duties, if it is subject to objective, non-discriminatory criteria and if it also does not discriminate between domestic and cross-border activities, it is not precluded by Article 49 EC.

48 — With regard to the absence of discrimination see also point 57 of this Opinion.

49 — With reference to the case-law of the Italian administrative courts (Tribunale Amministrativo Regionale per la Toscana — TAR Toscana-Firenze, Judgment No 456 of 11 March 2002), the Commission states in its written observations that this tax was of no great consequence ('di ammontare molto modesto').

2. Prohibition of abuse of a dominant position (Article 82 in conjunction with Article 86 EC)

68. With regard to Article 82 EC in conjunction with Article 86 EC, the referring court asks two questions, which are answered below in the alternative. [50] Question 1(a) concerns the power of the municipality *toset and levy* municipal duties, whilst Question 2(a) concerns *the payment of the income* from those duties to the municipality. Both questions essentially focus on the possible existence of a distortion of competition in favour of the municipal bill-posting service and at the expense of private suppliers.

(a) Question 1(a): The combination of regulatory powers with activity as an undertaking (Article 82 EC in conjunction with Article 86 EC)

69. With its Question 1(a), the referring court essentially seeks to ascertain whether Article 82 EC in conjunction with Article 86 EC precludes a national provision under which municipalities that themselves operate a municipal bill-posting service are at the same time entrusted with the setting

50 — See points 51 and 52 of this Opinion.

and levying ('management') of duties such as the municipal advertising tax and the charge for the municipal bill-posting service.

70. If, first of all, only this power held by municipalities to set and levy certain municipal duties is assessed on the basis of the rules of European competition law, the following conclusions can be drawn:

71. A basic requirement for the application of Article 82 EC (possibly in conjunction with Article 86(1) EC and Article 10 EC) would be that a municipal agency can be regarded as an *undertaking* in connection with the setting and levying of such duties. The term "undertaking" in competition law should be construed functionally and covers any entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed. [51]

72. An economic activity ('as an undertaking') consists in offering goods and services on the market; this should be distinguished from activity as a public authority 'exercising public powers'. The crucial factor in making the distinction is the nature of the activity exercised. In this connection, it is necessary to consider the activities exercised in each individual case in order to determine the category to which they belong. [52]

73. The setting and levying of *taxes* is, by nature, not an economic activity, but an act by a public authority. Taxes like the municipal advertising tax are certainly not a consideration for using specific, normal services, but serve broadly to finance local and regional authorities; [53] a possible subsidiary purpose of the tax may be to compensate for the use of public space for advertising by private individuals, [54] but such a subsidiary purpose does not in any way alter its status as a tax and does not, for example, make this income the consideration

51 — Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2004] ECR I-2493, paragraph 46, Case C-218/00 *Cisal* [2002] ECR I-691, paragraph 22, and Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

52 — Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, and Case C-343/95 *Calì* [1997] ECR I-1547, paragraphs 16 and 18. A similar distinction between municipalities' activity as undertakings and as public authorities is also suggested in the Case 30/87 *Bodson* [1988] ECR 2479, paragraph 18.

53 — Unlike in Case C-340/99 *TNT Traco* [2001] ECR I-4109 (see in particular paragraph 47), the municipal advertising tax is not remuneration payable to the municipality for services which it has not itself supplied.

54 — As the Commission states in its written observations, with reference to the case-law of the Italian administrative courts (Tribunale Amministrativo Regionale per la Toscana — TAR Toscana-Firenze, Judgments No 456 and 457 of 11 March 2002).

for a service. The public nature of the levying of taxes means that *in this respect* the rules on competition do not apply to the municipalities in question. [55]

74. As far as the *charge* for using the municipal bill-posting service is concerned, a distinction must be made between its two components.

On the one hand, this charge has a *tax element*, because it *includes* the municipal advertising tax (Article 19(1) of Decreto legislativo 507/93); *in this respect*, the municipal advertising tax is merely replaced by the charge and the same must therefore apply to the setting and levying of this charge as to the setting and levying of the tax: the municipalities are acting as public authorities, not economically.

On the other hand, this charge also includes a component which goes beyond the municipal advertising tax and serves as reimbursement of expenses for the municipal bill-posting service *(remuneration element)*; *in this respect*, the municipalities set the consideration for a service provided by their municipal bill-posting service [56] and therefore act in the same way as undertakings operating on the market, i.e. economically. [57]

75. Consequently, a municipality or a municipal agency acts economically and may possibly be regarded as an undertaking within the meaning of European competition law only in so far as it sets the *remuneration element of the charge* under Article 19(1) of Decreto legislativo 507/93, the component of the charge which compensates for the services provided by its municipal bill-posting service.

76. There could possibly now be abuse within the meaning of Article 82 EC in conjunction with Article 86(1) EC where — assuming that its municipal bill-posting service holds a dominant position — a

55 — Case C-343/95 *Cali* (cited in footnote 52, paragraphs 16, 18 and 23).

56 — The word 'service' (Italian: 'servizio') is even expressly used in Article 19(1) of Decreto legislativo 507/93.

57 — As is clear from the observations submitted to the Court of Justice, the municipal bill-posting service is also available not least to associations and social institutions for their public notices. It therefore seems reasonable to suggest that the activity of the municipal bill-posting service constitutes — at least in part — services of general economic interest. However, this does not affect the economic character of this activity under the rules on competition and thus acceptance as an undertaking. The nature of the services may possibly be relevant in a second step under Articles 16 EC and 86(2) EC.

municipality sets the remuneration element of the charge excessively high or excessively low under Article 19(1) of Decreto legislativo 507/93 in violation of competition law. [58] However, in the present case there are not sufficient grounds to suggest such abuse, the ascertainment of which would require a comprehensive assessment of all the circumstances of the specific case. [59]

77. However, the simple competence to *set and levy the municipal advertising tax* — irrespective of the fact, as already discussed, that the municipality is not an undertaking — does not automatically give any cause for concern that the municipality might act abusively within the meaning of Article 82 EC in conjunction with Article 86 (1) EC. This tax is *neutral from the point of view of competition*, irrespective of its composition and level, since it is levied both for the use of services provided by private suppliers and for the use of the municipal bill-posting service (in the latter case, as we know, the tax is *included* in the charge under Article 19(1) of Decreto legislativo 507/93). [60]

78. Viacom and Giotto complain that, in addition to setting and levying duties, the Italian municipalities also exercise other public powers, using which they were able to regulate the dissemination of advertising material in their territory and thereby influence the market in favour of their own municipal bill-posting services, for example by determining the location and size of the available bill-posting spaces and by introducing certain restrictions on advertising for reasons in the general interest. [61] It is essentially contended that the municipalities are operating as undertakings (through their municipal bill-posting service) on a market for which they themselves lay down the rules (exercising their abovementioned powers as public authorities). [62] In their view, this conflict of interests alone indicates a prohibited abuse of a dominant position. [63]

79. In this respect, however, the statements already made regarding the municipal adver-

58 — Both an excessively high charge and an excessively low charge could possibly have a detrimental effect on customers. In the first case, customers would have to pay excessively high prices to the municipality, whilst in the second case competition could be distorted and private suppliers could be foreclosed from the market, resulting, ultimately, in too little choice for customers.

59 — The order for reference does not contain any information on the level of the charge for using the municipal bill-posting service in the Municipality of Genoa. The parties have not supplied any supplementary information in this respect either, even though the Court has expressly requested them to do so.

60 — In this respect the present case differs from Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraphs 14 and 41, which focused, amongst other things, on the exemption of public undertakings from duties that others were required to pay.

61 — Viacom and Giotto also made similar claims with regard to freedom to provide services (Article 49 EC).

62 — The parties are ultimately drawing a parallel with the situation in Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941, paragraphs 25 and 26.

63 — In the hearing before the Court, Viacom's representative also made reference to the situations in Case C-340/99 *TNT Traco* (cited in footnote 53) and Case C-260/89 *ERT* [1991] ECR I-2925.

tising tax apply by analogy. Where a municipality regulates the dissemination of advertising material by, for example, prohibiting or restricting certain forms of advertising for reasons in the general interest and also determines the bill-posting spaces that may be used for advertising, it is not acting as an undertaking, but is performing the functions of a public authority. Competition law is not applicable to it *a priori* in this respect.

80. It is also in the legitimate general interest for municipalities to regulate the dissemination of advertising material. For example, it may be necessary in the interests of urban planning to prohibit advertising in certain places in the municipality's territory, to restrict the available bill-posting spaces or to ban certain forms of advertising. Similarly, interests of environmental protection or traffic safety may justify restrictions. Furthermore, in defining and implementing their urban planning objectives and other general interests, the municipalities must be allowed a sufficient margin of discretion.

81. However, an infringement of Article 86 (1) EC in conjunction with Article 82 EC, and possibly in conjunction with Article 10 EC, is a possibility where a municipality goes beyond the limits of the margin of discretion conferred on it and, in the exercise of its powers as a public authority, distorts competition in favour of its own municipal undertaking, i.e. where, in the performance of its functions as a public authority, the municipality favours its own municipal bill-posting service — assuming it holds a dominant position — over private suppliers operating on the same market. [64] This would be the case, for example, if it allocated to it the lion's share of the available bill-posting space or if it made the activity of private suppliers subject to more stringent restrictions, on grounds of the general interest, than the activity of its own municipal bill-posting service.

82. However, to assess whether all this was true in the present case would require a comprehensive appraisal of all the circumstances of the specific case. In particular, it cannot be sufficient to consider the identified bill-posting spaces in purely quantitative terms [65] and merely to count how much of that space is reserved for private suppliers and how much for the municipal bill-posting service. As the Commission rightly argued in the oral procedure, the crucial factor is the quality and the location of the bill-posting spaces in question. It should also be taken into consideration whether and to what extent any restrictions imposed by the

64 — Case C-96/94 *Centro Servizi Spediporto Srl* [1995] ECR I-2883, paragraph 20, Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305, paragraph 16, Case 229/83 *Leclerc* v *Thouars* [1985] ECR 1, paragraph 14, and Case C-41/90 *Höfner and Elser* (cited in footnote 51, paragraphs 26 to 29).

65 — In the proceedings before the Court, Viacom and Giotto claimed that the Municipality of Genoa had earmarked around 17 000 m2 of bill-posting space for private suppliers, but around 24 000 m2 for its own bill-posting service. However, as Viacom's representative himself acknowledged in the hearing, some of the space allocated to the municipal bill-posting service is reserved for official notices and notices in the public interest.

municipality also apply to the use of private spaces. On the basis of the information available to the Court, there are not sufficient grounds in any case to conclude that the Municipality of Genoa accords preferential treatment to the municipal bill-posting service.

83. In circumstances such as those that are known in the main proceedings, Articles 82 EC and 86(1) EC do not therefore preclude a national provision under which a municipal advertising tax or a charge is paid for advertising by means of bill-posting in public spaces to municipalities that at the same time themselves operate a municipal bill-posting service.

(b) Question 2(a): Payment of income from the advertising tax to the bill-posting service (Article 82 EC in conjunction with Article 86 EC)

84. With its Question 2(a), the referring court essentially seeks to ascertain whether Article 82 EC in conjunction with Article 86 EC precludes a national provision under which municipalities that themselves operate a municipal bill-posting service are paid the revenue from duties like the municipal advertising tax and the charge for the municipal bill-posting service.

85. Article 86(1) EC prohibits municipalities, as state bodies with public powers, from causing public undertakings to take action that would infringe Article 82 EC. [66] If, therefore, the municipality were to make revenue from the municipal advertising tax available to its municipal bill-posting service, it could not be ruled out that this would result in a distortion of competition to the detriment of private suppliers and in favour of the municipal bill-posting service. [67]

86. However, the municipal bill-posting service is part of the municipality and there is no reason to suggest that it has any notable organisational autonomy, in particular its own budget or separate accounts. Quite the opposite, it must be assumed that the municipal bill-posting service is financed directly from the municipal budget and that

66 — Case 229/83 *Leclerc* v *Thouars* (cited in footnote 64, paragraph 14), Case 231/83 *Cullet v Leclerc* (cited in footnote 64, paragraph 16) and Case C-41/90 *Höfner and Elser* (cited in footnote 51, paragraphs 26 to 29).

67 — Joined Cases C-34/01 to C-38/01 *Enirisorse and Others* [2003] ECR I-14243, paragraphs 48 to 52, and points 72 to 84 of the Opinion delivered by Advocate General Stix-Hackl on 7 November 2002 in the same case (I-14247).

income and expenditure for that service is entered in the municipal books under the relevant headings. [68] Without a minimum of organisational separation and transparency, [69] however, it is not really possible to understand whether and to what extent the municipal bill-posting service benefits from tax revenue, in particular revenue from the municipal advertising tax.

87. Nevertheless, even if it were *assumed* that the municipal bill-posting service had sufficient organisational autonomy, it certainly cannot be established with any certainty, on the basis of the available information, that the Municipality of Genoa has caused abuse in violation of the rules on competition.

88. Up to now, as far as can be seen, the Court has considered the creation of a situation which gives an undertaking cause to abuse its dominant position only where the State had also granted that undertaking special rights — as a rule a monopoly position — and the nature of the grant of the rights or subsequent State conduct at least 'suggested' that the undertaking abuse its position. [70] In each case, it was necessary to establish a specific link between the rights granted, the situation created and the abuse of the undertaking's dominant position.

89. However, since Article 86(1) EC prohibits Member States from taking measures not only in the case of *undertakings that have been granted special rights*, but also in the case of *public undertakings*, it seems reasonable to suggest that similar conclusions may be drawn in this area. [71] A public undertaking may be placed in a position which suggests that it will abuse its — assumed — dominant position not only through the grant of special rights or monopolies, but also through the provision of funds. [72]

90. Against this background, it should be examined, by means of an assessment of all

68 — Viacom's representative himself made a statement to that effect at the hearing.

69 — There might be an obligation to ensure that financial relations between the municipality and its municipal bill-posting service are transparent under Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, p. 35, last amended by Commission Directive 2000/52/EC of 26 July 2000, OJ L 193, p. 75), albeit subject to the exceptions laid down in Article 4(1) of that directive.

70 — Case C-260/89 ERT (cited in footnote 63, paragraphs 35 to 37), Case C-41/90 *Höfner and Elser* (cited in footnote 51, paragraphs 27 to 31), Case C-242/95 *GT-Link* (cited in footnote 60, paragraphs 33 to 35), Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraphs 17 to 19, Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraphs 28 to 31, Case C-163/96 *Raso and Others* [1998] ECR I-533, paragraphs 27 to 31, Case C-203/96 *Dusseldorp and Others* [1998] ECR I-4075, paragraphs 61 and 62, Joined Cases C-180/98 to C-184/98 *Pavel Pavlov and Others* [2000] ECR I-6451, paragraphs 127 and 128, Case C-340/99 *TNT Traco* (cited in footnote 53, paragraph 44), Case C-475/99 *Ambulanz Glöckner* (cited in footnote 14, paragraphs 39 and 40) and Case C-462/99 *Connect Austria* [2003] ECR I-197, paragraphs 80 to 84.

71 — See also Advocate General Stix-Hackl in points 72 to 84 of her Opinion in Joined Cases C-34/01 to C-38/01 *Enirisorse* (cited in footnote 67).

72 — See also Joined Cases C-34/01 to C-38/01 *Enirisorse and Others* (cited in footnote 67, paragraphs 48 to 52) and the Opinion of Advocate General Stix-Hackl in that case (cited in footnote 67, points 72 to 84).

the circumstances of the individual case, whether the nature and extent of any allocation of revenue from the municipal advertising tax to the municipal bill-posting service are liable to cause it to take anti-competitive action. However, there are no specific grounds to suggest such an allocation of funds in the present case.

91. In circumstances such as those that are known in the main proceedings, Articles 82 EC and 86(1) EC do not therefore preclude a national provision under which a municipal advertising tax or a charge is paid for advertising by means of bill-posting in public spaces to municipalities that at the same time themselves operate a municipal bill-posting service.

3. Question 2(b): Prohibition of State aid (Articles 87 and 88 EC)

92. With its Question 2(b), which is answered below in the alternative,[73] the referring court essentially seeks to ascertain whether there exists (possibly prohibited) State aid within the meaning of Article 87 EC, which is also covered by the obligation to inform the Commission and the prohibition on putting measures into effect under Article 88(3) EC, if the revenue from duties like the municipal advertising tax and the charge for the municipal bill-posting service is paid to municipalities that themselves operate municipal bill-posting services.

93. Viacom and Giotto, but also the referring court, regard the allocation of the income from the municipal advertising tax and the charges for the municipal bill-posting service to the municipality as unlawful State aid. Since they consider that the municipal advertising tax therefore infringes Community law, they take the view that there is no obligation to pay it. The object of the claims made by the parties in the main proceedings and the heart of the question referred for a preliminary ruling is therefore both the use and the actual levying of the municipal advertising tax and the charge for using the municipal bill-posting service.

(a) The municipal advertising tax

94. As far as the municipal advertising tax is concerned, on the basis of the information available to the Court, various grounds militate against the application of the provisions of the EC Treaty on State aid.

73 — See points 51 and 52 of this Opinion.

95. Even if it were *assumed*, along with the referring court and the parties in the main proceedings, that the municipality should be regarded all in all as an undertaking, this would not mean that the provisions on State aid were applicable. Based on such an assumption, the criterion of the *State origin* of the funds would not be satisfied; in this case the municipal advertising tax should be regarded as payment by a private undertaking (the advertising supplier, e.g. Viacom) to another undertaking (the municipality). In the absence of a transfer of *State* funds, there would consequently be no aid; this could not be altered by the fact that the obligation to pay the municipal advertising is based on mandatory provisions. [74]

96. Therefore, the only situation where there can be any question of the status of the municipal advertising tax under State aid law is a triangular relationship in which the municipality levies the tax, as a sovereign authority, and then aid is paid, from the income from that tax, to a sufficiently autonomous municipal bill-posting service. However, as has already been explained, neither the order for reference nor the explanations given by the parties contain sufficient information to show that the municipal bill-posting service has sufficient organisational autonomy, in particular with regard to its budget and accounts. [75] Nevertheless, if there is no 'external relationship' which would make it possible to accept a special payment of tax revenue, there is no autonomous beneficiary of aid. A municipality cannot subsidise itself.

97. However, even *assuming* the necessary organisational autonomy of the municipal bill-posting service, *the actual levying* of the municipal advertising tax would not be automatically be covered by the prohibition on aid laid down in Article 87 EC and by the obligation to inform the Commission and the prohibition on putting measures into effect under Article 88(3) EC. Additional requirements would have to be satisfied to that end; [76] in particular, there would have to be a direct and inseparable link between the levying of the municipal advertising tax and a specific payment, financed by that tax, made by the municipality to its municipal bill-posting service. [77] Only if there is such a direct link can the possible unlawfulness of

74 — Case C-379/98 *PreussenElektra* (cited in footnote 11, paragraphs 58, 59 and 61).

75 — See also point 86 and footnote 69 of this Opinion.

76 — See in particular the judgment of 21 October 2003 in Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, paragraph 49, and Joined Cases C-34/01 to C-38/01 *Enirisorse and Others* (cited in footnote 67, paragraphs 43 to 45). There is a comprehensive reappraisal of the problem in point 32 et seq. of the Opinion delivered by Advocate General Geelhoed on 4 March 2004 in Joined Cases C-174/02 and C-175/02 *Streekgewest Westelijk Noord-Brabant and Others* [2004] ECR I-85 and I-127. See I-88.

77 — See also point 34 et seq. of the Opinion delivered by Advocate General Geelhoed in Joined Cases C-174/02 and C-175/02 *Streekgewest Westelijk Noord-Brabant and Others* (cited in footnote 76).

aid extend to the levying of duties and can the rules on aid cover the levying of the tax.

98. In the present case there are no grounds for assuming either (unlawful) aid, the existence of which would in any case be a requirement, or the necessary direct and inseparable link between the aid and the levying of the tax. In particular, it must be assumed on the basis of the available information that the municipal advertising tax is allocated *to the municipal budget for general use* and is not, through a special fund for example, earmarked specifically for the financing of the municipal bill-posting service.

(b) The charge for using the municipal bill-posting service

99. As has already been mentioned, the charge for using the municipality bill-posting service is composed of a tax element and a remuneration element for the service provided by the bill-posting service. [78]

78 — See point 74 of this Opinion.

100. With regard to the *tax element*, the statements made above apply by analogy. [79]

101. As regards the *remuneration element*, it cannot constitute State aid from the outset. It is not paid from State funds, but from the private funds of customers of the municipal bill-posting service, [80] and is the consideration for its services; this is not an economic advantage, for example, that the municipal bill-posting service could not have obtained under normal market conditions. [81]

(c) Intermediate conclusion

102. In circumstances such as those that are known in the main proceedings, Articles 87 and 88 EC do not therefore preclude a national provision under which a municipal advertising tax or a charge is paid for advertising by means of bill-posting in public spaces to municipalities that at the same time themselves operate a municipal bill-posting service.

79 — See points 94 to 98 of this Opinion.

80 — See Case C-379/98 *PreussenElektra* (cited in footnote 11, paragraphs 58, 59 and 61).

81 — The judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 84 et seq.) essentially rejects the existence of aid — albeit in a somewhat different situation — where there is an appropriate consideration for a service provided.

VI — Conclusion

103. In the light of the foregoing considerations, I therefore propose that the Court should give the following answers to the questions referred to it for a preliminary ruling:

(1) If the levying of an indirect tax such as the municipal advertising tax in Italy appears to form part of a general system of domestic duties, if it is subject to objective, non-discriminatory criteria and if it also does not discriminate between domestic and cross-border activities, it is not precluded by Article 49 EC.

(2) In all other respects the reference for a preliminary ruling is inadmissible.

In the alternative, I propose that the Court give the following answer to Question 1(a) and Question 2:

In circumstances such as those that are known in the main proceedings, neither Article 82 EC nor Articles 87 and 88 EC, possibly in conjunction with Article 86 (1) EC, preclude a national provision under which a municipal advertising tax or a charge is paid to municipalities for advertising by means of bill-posting in public spaces and those municipalities, which also themselves operate a municipal bill-posting service, are at the same time entrusted with setting and levying that tax.