

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 2 July 2009¹

I — Introduction

1. The present case is the first in which the Court has been asked by the Italian Constitutional Court, the Corte costituzionale,² to give a preliminary ruling pursuant to Article 234 EC.

3. The Italian Constitutional Court is uncertain as to whether that Sardinian tax legislation is consistent with Community law, to be precise, with the freedom to provide services (Article 49 EC) and the prohibition of State aid (Article 87 EC). Any conflict with Community law would be relevant to the constitutionality proceedings before the Constitutional Court because, under Italian constitutional law, Community law forms part of the test criterion for that purpose.

2. The main action, which takes the form of constitutional review proceedings, concerns a regional tax of the Autonomous Region of Sardinia³ which since 2006 has been charged on certain stopovers by private aircraft and recreational craft in the period from 1 June to 30 September each year. However, the tax affects only persons who do not have their tax domicile in Sardinia and, furthermore, it is not charged on stopovers by craft which are moored in Sardinia throughout the entire year.

II — Legal context

A — Community law

4. The Community law context of this case consists of, first, the provisions of the EC Treaty on the freedom to provide services and, second, those concerning State aid.

1 — Original language: German.

2 — Also 'the referring court'.

3 — Regione autonoma della Sardegna.

5. The principle of the freedom to provide services is laid down in Article 49(1) EC as follows:

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.'

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

8. Reference must also be made to Article 88(3) EC:

6. In addition, Article 50(1) EC sets out the following definition:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

'Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.'

7. The section of the EC Treaty concerning State aid is introduced by Article 87(1) EC, which reads as follows:

B — *National law*

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through

9. With regard to national law, in addition to the relevant provisions of the Italian Constitution, certain measures of national legislation on the one hand and certain measures adopted by the Autonomous Region of Sardinia on the other are of importance.

1. The Italian Constitution

10. The first paragraph of Article 117 of the Italian Constitution provides as follows:

‘Legislative power shall be exercised by the State and the Regions in accordance with the Constitution and within the limits set by Community law and international obligations.’

2. Italian national legislation

11. The first paragraph of Article 743 of the Italian Codice della navigazione⁴ defines ‘aircraft’ as follows:

‘Aircraft’ means any machine intended for the transportation by air of persons or things.’

12. Article 1(2) of the Italian Codice della nautica da diporto,⁵ instituted by Decreto legislativo⁶ No 171 of 18 July 2005 defines ‘recreational navigation’ as follows:

‘For the purposes of this Code, “recreational sailing” means sailing in maritime and inland waters for sporting or leisure purposes and without a view to profit.’

13. Article 2(1) of the Codice della nautica da diporto deals with the commercial use of recreational craft and defines it as follows:

‘(1) Recreational craft are used for commercial purposes where:

(a) they are the subject of a contract of leasing or chartering;

4 — Sea and Air Navigation Code.

5 — Recreational Sailing Code.

6 — Legislative decree.

- (b) they are used for professional training in recreational sailing; (No 4/2006'), as amended in 2007,⁸ provides as follows:

'(Regional tax on stopovers for tourist purposes by aircraft and recreational craft)

- (c) they are used by diving and sub-aqua training centres as support craft for persons practising underwater diving for sports or leisure purposes.

(1) From 2006, a regional tax on stopovers for tourist purposes by aircraft or recreational craft shall be established.

...'

(2) The pre-conditions for the tax shall be the following:

3. The regional legislation of the Autonomous Region of Sardinia

- (a) stopovers in the period between 1 June and 30 September at airfields in the territory of the region by general aviation aircraft, as referred to in Article 743 et seq. of the Codice della navigazione, used for the private transport of persons;

14. Article 4 of Law No 4 of the Region of Sardinia of 11 May 2006⁷ ('Regional Law

⁷ — Disposizioni varie in materia di entrate, riqualificazione della spesa, politiche sociali e di sviluppo (miscellaneous provisions on revenue, reclassification of costs, social policy and development measures).

⁸ — The amendments follow from Article 3(3) of Law No 2 of the Region of Sardinia of 29 May 2007, 'Disposizioni per la formazione del bilancio annuale e pluriennale della Regione — Legge finanziaria 2007' (Provisions on the annual and long-term budget of the Region — Finance Law 2007). According to the order for reference, the amendments were made 'with effect from 31 May 2007' (Article 37 of the last-mentioned Law).

- (b) stopovers in the period between 1 June and 30 September in harbours, berths and mooring places situated in the territory of the region and at rigged moorings in territorial waters along the coasts of Sardinia by recreational craft, as referred to in Legislative Decree No 171 of 18 July 2005 (Codice della nautica da diporto) or, in any event, by craft used for recreational purposes, of a length exceeding 14 metres, measured in accordance with the EN/ISO/DIS 8666 harmonised standards, as provided for in Article 3(b) of that legislative decree.
- (5) The tax shall be assessed as follows:
- (a) EUR 150 for aircraft designed to carry up to four passengers,
 - (b) EUR 400 for aircraft designed to carry from five to twelve passengers,
 - (c) EUR 1 000 for aircraft designed to carry more than twelve passengers,
 - (d) EUR 1 000 for water craft with a length of 14 to 15.99 metres inclusive,
 - (e) EUR 2 000 for water craft with a length of 16 to 19.99 metres inclusive,
- (3) The persons liable for the tax shall be the natural or legal persons who operate the aircraft for the purposes of ... or who operate the recreational craft for the purposes of ... and whose tax domicile is outside the territory of the region.
- (4) The regional tax provided for in paragraph 2(a) shall be payable in respect of each stopover, and that provided for in paragraph 2 (b) shall be payable annually.

- (f) EUR 3 000 for water craft with a length of 20 to 23.99 metres inclusive,
- (g) EUR 5 000 for vessels with a length of 24 to 29.99 metres inclusive,
- (h) EUR 10 000 for vessels with a length of 30 to 60 metres inclusive,
- (i) EUR 15 000 for vessels with a length exceeding 60 metres.
- (6) The following shall be exempt from the tax:
- (a) vessels which make a stopover in order to take part in sporting regattas, rallies of vintage and monotype boats and in sailing events, including non-competitive events, where the organisers have given the maritime authorities advance notification of the event; ...
- (b) recreational craft which are moored throughout the year at harbour installations of the region;
- (c) technical stops, limited to the time necessary for those purposes.

The tax shall be reduced by 50% for sailing boats with an auxiliary engine and for motor sailing vessels.

...

(7) The tax shall be paid:

15. It must also be mentioned that, as a consequence of the amendment in 2008 of the regional legislation cited above, persons who have their tax domicile in Sardinia were also made liable for the tax; in 2009 the disputed tax provisions were then completely repealed.⁹ The present proceedings however still concern the 2007 version of the regional tax.

(a) in the case of aircraft referred to in paragraph 2(a), at the time of landing;

III — The main proceedings

(b) within 24 hours of the arrival of recreational craft in harbours, berths and mooring places, or at rigged moorings, along the coasts of Sardinia;

16. Proceedings have been brought before the Italian Constitutional Court by the President of the Italian Council of Ministers in relation to the constitutionality of a number of legal measures adopted by the Autonomous Region of Sardinia¹⁰ with the object of determining whether they are consistent with the Italian Constitution. Those measures include Article 4 of Regional Law No 4/2006, in the amended version of 2007.

in accordance with procedures to be laid down by measure...

9 — The amendments arise from Article 2(15) of Law No 3 of the Region of Sardinia of 5 March 2008, 'Disposizioni per la formazione del bilancio annuale e pluriennale della Regione — Legge finanziaria 2008' (Provisions on the preparation of the annual and long-term budget of the Region — Budget Law 2008). The provisions were then completely repealed by Paragraph 2(15) of Law No 1 of the Region of Sardinia of 14 May 2009, 'Disposizioni per la formazione del bilancio annuale e pluriennale della Regione — Legge finanziaria 2009' (Provisions for the preparation of the annual and long-term budget of the Region — 2009 Finance Law).

10 — The proceedings arise from two constitutionality applications, No 91/2006 and No 36/2007, which were originally joined by the Constitutional Court. In the meantime it delivered its judgment No 102/2008 on 13 April 2008, which gives a decision on application No 91/2006 and part of application No 36/2007. The part of the latter which is of interest in the present case was again separated from the rest of the proceedings in the same judgment.

...

17. In the main proceedings it is claimed that the last-mentioned provision is inconsistent with the Community law commitments to which legislation in Italy is subject pursuant to Article 117(1) of the Italian Constitution. The first complaint is that that provision infringes Article 49 EC; second, that it infringes Article 81 EC in conjunction with Articles 3(1)(g) and 10 EC and, third, that it infringes Article 87 EC.

18. At the present stage of the proceedings the Italian Constitutional Court is limiting its examination to the complaints concerning Articles 49 EC and 87 EC. It states that its decision concerning the alleged infringement of Article 81 EC in conjunction with Articles 3(1)(g) and 10 EC depends on the further course of the proceedings. Therefore it has expressly refrained from including those provisions in its order for reference in these proceedings for a preliminary ruling.

IV — The reference for a preliminary ruling and the procedure before the Court of Justice

19. By order No 103/2008 of 13 February 2008,¹¹ received by the Court on 21 April

¹¹ — The full wording of the order may be found in Italian on the internet site of the Italian Constitutional Court at www.cortecostituzionale.it (last visited on 28 April 2009).

2008, the Italian Constitutional Court stayed the constitutionality proceedings before it and referred the following four questions to the Court for a preliminary ruling:

(a) Is Article 49 EC to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of [Regional Law No 4/2006], under which the regional tax on stopovers for tourist purposes by aircraft is levied only on undertakings, operating aircraft which they use for the transport of persons in the course of “general business aviation” activities, which have their tax domicile outside the territory of the Region of Sardinia?

(b) Does Article 4 of [Regional Law No 4/2006], by providing for the imposition of the regional tax on stopovers for tourist purposes by aircraft only on undertakings, operating aircraft which they use for the transport of persons in the course of “general business aviation” activities, which have their tax domicile outside the territory of the Region of Sardinia, constitute, within the meaning

of Article 87 EC, State aid to undertakings carrying on the same activities which have their tax domicile in the Region of Sardinia?

same activities which have their tax domicile in the Region of Sardinia?’

- (c) Is Article 49 EC to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of [Regional Law 4/2006], under which the regional tax on stopovers for tourist purposes by recreational craft is levied only on undertakings, operating recreational craft, which have their tax domicile outside the territory of the Region of Sardinia and whose commercial operations involve making such craft available to third parties?

20. In the proceedings before the Court of Justice, the Autonomous Region of Sardinia, the Netherlands Government and the Commission of the European Communities submitted written observations. The Court refrained from conducting an oral procedure as the Autonomous Region of Sardinia, contrary to its original application, declined to take part and other parties to the proceedings did not wish to be heard.

V — Assessment

- (d) Does Article 4 of [Regional Law No 4/2006], by providing for the imposition of the regional tax on stopovers for tourist purposes by recreational craft only on undertakings, operating recreational craft, which have their tax domicile outside the territory of the Region of Sardinia and whose commercial operations consist in making such craft available to third parties constitute, within the meaning of Article 87 EC, State aid to undertakings carrying on the

A — *Introductory remarks*

21. The present reference for a preliminary ruling marks a turning point in the case law of the Italian Constitutional Court, which has

hitherto held that it is not of the nature of a court within the meaning of Article 234 EC.¹² Thus it has now joined the national constitutional courts which have a relationship of active cooperation with the Court of Justice.¹³

22. The present case is a particularly good illustration of the fact that, also in proceedings before national constitutional courts, questions of Community law may arise that are decisive for the outcome of the constitutional dispute in question. Thus Article 117(1) of the Italian Constitution expressly requires the legislature to take account of the commitments arising from Community law. Consequently Community law, as the Constitutional Court states,¹⁴ becomes ‘an element inherent in the criterion of constitutionality’ in a constitutional action and ‘renders oper-

ational’ the requirements which the Constitution lays down for the legislature.

23. Even without such express incorporation, Community law may be relevant to the decision in constitutional law disputes where, for example, the purported effects of a Community law measure are at issue in constitutional law proceedings or where the scope left by a Community law measure for the national legislature is open to review by a constitutional court.

24. In the final analysis, it is the latitude enjoyed by the national legislature which is of primary interest in the present case. The Italian Constitutional Court must determine whether the Autonomous Region of Sardinia exceeded the latitude it enjoys by virtue of Community law in introducing the disputed regional tax. It has to be decided whether legislation such as that of Sardinia, whereby a tax on certain stopovers of aircraft and recreational craft is charged only on non-residents, is consistent with the freedom to provide services and the law of State aid.

25. These questions have not necessarily become devoid of purpose as a result of the complete abolition in 2009 of the disputed regional tax. There can still be an interest in

- 12 — See Corte costituzionale (Italy), order 536 of 15/29 December 1995 (reproduced in *Il Foro Italiano* 1996, I, p. 783). That practice of the Italian Constitutional Court attracted some criticism; see in particular A. Tizzano, ‘Ancora sui rapporti tra Corti europee: principi comunitari e c.d. controlli costituzionali’, *Il Diritto dell’Unione Europea* 3/2007, p. 734 (742 et seq.); and by the same author, ‘Corte e Corte di giustizia’, *Il Foro Italiano* 2006, p. 348 (352).
- 13 — Already in quite a number of cases national constitutional courts have referred questions of Community law to the Court for a preliminary ruling. The judgments of 8 November 2001 in Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (*Adria-Wien Pipeline*) [2001] ECR I-8365, of 8 May 2003, in Case C-171/01 *Wählergruppe Gemeinsam* [2003] ECR I-4301 and of 20 May 2003, in Joined Cases C-465/00, C-138/01 and C-139/01 *Oesterreichischer Rundfunk and Others* [2003] ECR I-4989 were delivered at the request of the Austrian Constitutional Court. The judgment of 16 July 1998 in Case C-93/97 *Fédération belge des chambres syndicales de médecins* [1998] ECR I-4837, the order of 1 October 2004 in Case C-480/03 *Clerens*, and the judgments of 26 June 2007 in Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, of 1 April 2008 in Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683 were delivered or made at the request of the Belgian Constitutional Court; Cases C-73/08 *Bressol and Others* and C-389/08 *Base and Others* are still pending. Most recently, at the request of the Lithuanian Constitutional Court (Lietuvos Respublikos Konstitucinis Teismas), the Court of Justice delivered the judgment of 9 October 2008 in Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523.
- 14 — In that connection, the Constitutional Court refers to its case law on the basis of judgments No 7/2004, No 166/2004, No 406/2005, No 129/2006 and No 348/2007.

clarifying whether the previous legal position was compatible with Community law. That may be important not least for the outcome of legal disputes which may be pending between individual taxpayers and the tax authorities of the Region of Sardinia.

provide services only in so far as those rules relate to services within the meaning of the EC Treaty.

B — Questions relating to the freedom to provide services (first and third questions)

26. The first and third questions of the Italian Constitutional Court seek in essence to establish whether the freedom to provide services (Article 49 EC) precludes legislation of an autonomous region under which a tax on stopovers for tourist purposes by aircraft and recreational craft is imposed only on undertakings which have a tax domicile outside that region, but not on undertakings which have a tax domicile within it.

28. The concept of ‘service’ is defined in Article 50(1) EC,¹⁵ which states that the term refers to services which are normally provided for remuneration,¹⁶ in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

29. To clarify whether and, if so, to what extent such services are affected in the present case, it is necessary to distinguish between the stopovers of aircraft and those of recreational craft on which the regional tax is imposed.

1. Determining the services in question

27. Tax rules such as those laid down by Sardinia must be assessed by reference to the Community law provisions on the freedom to

15 — In order to give the referring court a helpful reply to its request for a preliminary ruling, the Court of Justice may also consider provisions of Community law to which the national court has not referred in its question (Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, and Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 42). Only where it is clear from the documents before the Court that the referring court deliberately refuses to seek from the Court a ruling on the interpretation of Community law will the Court refrain from considering the provision in question (Case 247/86 *Alsatel* [1988] ECR 5987, paragraphs 7 and 8). In the present case, however, it is not clear that the Italian Constitutional Court deliberately intended to exclude Article 50 EC from the scope of its request for a preliminary ruling. Rather, the referring court seeks, as does the applicant in the constitutionality proceedings, a comprehensive assessment of the Sardinian tax rules by reference to the criteria of the freedom to provide services. This necessitates examination not only of Article 49 EC, but also Article 50 EC, which supplements and illustrates the former provision.

16 — See also Case C-355/00 *Freskot* [2003] ECR I-5263, paragraph 54, and Case C-281/06 *Jundt* [2007] ECR I-12231, paragraph 28.

(a) Stopovers of aircraft and the connection with the freedom to provide services

30. So far as air transport is concerned, the Sardinian regional tax is imposed only on stopovers of general aviation aircraft used for the private transport of persons (Article 4(2)(a) of Regional Law No 4/2006).

31. According to the referring court,¹⁷ the fact that the tax is imposed only on general aviation and on the private transport of persons means that the Sardinian tax rules apply in particular to stopovers by aircraft used for business travel which provide transport for no remuneration and are used for an undertaking's own business activities. Moreover, the tax is also charged only on flights which are not generally open to the public.¹⁸

17 — It should be borne in mind that, in relation to the factual and legal context of the questions referred for a preliminary ruling, the Court has to proceed from the findings of the referring court. It is not for the Court of Justice, in the context of a reference for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation thereof is correct (settled case-law, see Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42, and Case C-244/06 *Dynamic Medien* [2008] ECR I-505, paragraph 19).

18 — This is emphasised by the referring court with its reference to the Community-law definition of 'business aviation' in Article 2(1) of Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), as amended by Regulation (EC) No 793/2004 (OJ 2004 L 138, p. 50, which defines 'business aviation' as 'that sector of general aviation which concerns the operation or use of aircraft by companies for the carriage of passengers or goods as an aid to the conduct of their business, where the aircraft are flown for purposes generally considered not for public hire ...' (emphasis added)).

32. To put it more generally, therefore, the Sardinian tax rules affect only stopovers of private aircraft (private jets and company jets). The transport services provided by such aircraft cannot normally be regarded as services within the meaning of Community law because the user pays no remuneration to the operator of the aircraft. In most cases the user and the operator of the aircraft will be one and the same.

33. The conventional activity of airline companies and tour operators who transport persons to and from Sardinia for remuneration on a business basis and thereby provide services is apparently not subject to the regional tax. This is indicated by the restriction of the taxable event to private transport, that is to say, transport which is not accessible to the public.

34. However, the mere fact that the actual transport service by air is not, in the present case, a service within the meaning of Community law cannot lead to the conclusion that tax rules such as those of Sardinia would have no connection at all with the freedom to provide services.

35. In the first place, it must be borne in mind that Articles 49 EC and 50 EC guarantee not only the active provision of services. Rather, it has consistently been held that the freedom to

provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there.¹⁹ However, the latter freedom is normally involved where an aircraft operator established in another country flies his aircraft to a Sardinian airport or airfield. Normally he avails himself of a number of services there. In addition to the use of the take-off and landing runway, those services include, for example, air traffic control services, refuelling and delivery of supplies to the aircraft, as well as maintenance operations, if necessary.

36. Second, persons who travel to Sardinia on private jets or business jets from another country normally go there either to provide or receive services. This applies not only to business travellers, but also tourists.²⁰ A glance at the official title of the tax rules ('Regional tax on aircraft ... making stopovers for tourist purposes) shows that the rules are aimed not least at private aircraft bringing tourists to Sardinia.

19 — Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 10 and 16; Case C-262/02 *Commission v France* [2004] ECR I-6569, paragraph 22; Case C-429/02 *Bacardi France* [2004] ECR I-6613, paragraph 31; and Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] I-6849, paragraph 36.

20 — According to settled case-law, tourists have the freedom to go to another Member State in order to receive a service there, see *Luisi and Carbone*, cited in footnote 19, paragraph 16; Case 186/87 *Cowan* [1989] 195, paragraph 15; Case C-274/96 *Bickel and Franz* [1998] I-7637, paragraph 15 in conjunction with paragraph 4; and Case C-388/01 *Commission v Italy* [2003] I-721, paragraph 12.

37. Consequently, even if the transport of persons on board the foreign-operated private aircraft which are covered by the regional tax is not, as such, a service within the meaning of Articles 49 EC and 50 EC, nevertheless the stopover of such aircraft is a necessary condition for providing or using such services on the spot, either by the operator of the aircraft or by the persons carried in it. In that respect, therefore, tax rules such as those of Sardinia have a connection, which is not to be disregarded, with the freedom to provide transport services.²¹

(b) Stopovers of recreational craft and their connection with the freedom to provide services

38. So far as maritime traffic is concerned, the Sardinian regional tax on stopovers of recreational craft and craft used for recreational purposes is imposed if such craft are more than 14 meters long (Article 4(2)(b) of Regional Law No 4/2006). According to the referring court, the tax is also payable by undertakings, in particular those whose activity consists in hiring out to third parties recreational craft and craft used for recreational purposes.

21 — As the services in question are not transport services, Article 51(1) EC does not preclude the application of Articles 49 EC and 50 EC. In any case, the principle of freedom to provide services applies in the air transport sector (Case C-70/99 *Commission v Portugal* [2001] ECR I-4845, paragraphs 21 and 22, and Case C-92/01 *Stylianakis* [2003] ECR I-1291, paragraphs 23 to 25, both with reference to Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ 1992 L 240, p. 8).

39. Accordingly a boat hire firm may hire out recreational craft to third parties and a motor boat school or diving school may hold courses on the boats it operates for remuneration.²² No further discussion is needed to show that such activities are services within the meaning of Articles 49 EC and 50(1) EC.²³

40. However, the freedom to provide services can apply only where an undertaking established in another State provides such activities in Sardinia. Consequently there must be a cross-border connection.²⁴ The freedom to provide services cannot be applied to activities which are confined within a single Member State.²⁵

41. In the present case, under Article 4(3) of Regional Law No 4/2006 only operators of boats whose tax domicile is outside the Autonomous Region of Sardinia are subject

to the disputed regional tax. Even if that provision were aimed primarily at boat operators established in other regions of Italy, in any case it affects also boat operators established in other Member States, for example, in the nearby French island of Corsica.²⁶

42. If, for example, an undertaking established in Corsica hires out recreational craft to private persons who wish to put into harbours in Sardinia or to moor in Sardinian coastal waters, at least a part of the outcome of the service ensues in Sardinia, not in Corsica. Consequently the service in question has a cross-border connection.²⁷

43. The cross-border connection is even clearer where a tour operator established in Corsica carries out excursions from there with

22 — See, in particular, the examples of the commercial use of recreational craft set out in Article 2(1) of the Codice della nautica da diporto (reproduced in paragraph 13 of this opinion).

23 — For the classification of leasing as a service, see Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447, paragraph 33; for the classification of leasing out a vehicle as a service, Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 18; for the treatment of a sailing boat used for sport purposes as a form of transport, see Case 51/88 *Hamann* [1989] ECR 767, paragraphs 16 and 17.

24 — Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraphs 13 and 15; Case C-208/05 *ITC* [2007] I-181, paragraph 56; and Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 65.

25 — Case 52/79 *Debauxe and Others* [1980] ECR 833, paragraph 9, and Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37; see, to the same effect in relation to the freedom of movement of persons, *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 13, in particular paragraph 33.

26 — A similar situation arose in the *Gouvernement de la Communauté française and Gouvernement wallon* case (cited in footnote 13, see in particular paragraphs 41 and 42), where the legislation of a Belgian regional authority concerning the care insurance scheme distinguished between residents and non-residents.

27 — A similar situation arose in the *ITC* case (cited in footnote 24, paragraph 56 et seq.), which concerned the procurement by German agencies of employment for German clients in other countries.

his boats to Sardinia or a diving or motor boat school established in Corsica offers courses on its boats, during which landings are arranged in Sardinian harbours or boats are moored in coastal waters of the region.²⁸

44. In that connection it is immaterial from which Member States the customers of those undertakings come. Article 49 EC always applies where a service provider offers services in a Member State other than that in which he is established, wherever the recipients of those services may be established.²⁹

45. For the sake of completeness it may also be mentioned that, when boats operated by non-residents put into Sardinian harbours, they make use of the harbour installations³⁰ and that the persons carried on those boats can use the stopover in Sardinia to stay there as tourists. Where they do so, they likewise make use of services, as already mentioned.³¹

28 — See also Case C-381/93 *Commission v France* [1994] I-5145, paragraph 15: 'not only are intra-Community maritime transport services frequently supplied to recipients established in a different Member State from that of the provider of the services, but those services are also by definition offered at least in part on the territory of a Member State other than that in which the provider of the services is established.'

29 — Case C-398/95 *SETTG* [1997] I-3091, paragraph 8.

30 — The same applies to the berths, mooring places and rigged moorings referred to in Article 4(2)(b) of Regional Law No 4/2006.

31 — See what is said at paragraphs 35 and 36 above.

46. As all those examples show, tax rules such as those of Sardinia have a connection with the freedom to provide services in so far as those rules cover stopovers in Sardinia of recreational craft and craft used for recreational purposes.³²

2. Restriction on the freedom to provide services

47. Where tax rules such as those of Sardinia differentiate according to the taxpayer's tax domicile, it may at first sight be tempting to consider their compatibility with the freedom to provide services from the viewpoint of *indirect discrimination* on grounds of nationality. Such discrimination would of course presuppose that the tax rules in question may operate to the detriment of foreigners more than nationals.³³ In the present case, however, it is by no means certain that the taxpayers affected are predominantly nationals of other

32 — Where the services in question are transport services in the sector of maritime transport, the principle of freedom to provide services would also apply to them (see Articles 51(1) EC and 80(2) EC in conjunction with Article 1(1) of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ 1986, L 378, p. 1). See also *Commission v France*, cited in footnote 28, paragraph 13; Joined Cases C-430/99 and C-431/99; *Sea-Land Service and Others* [2002] ECR I-5235, paragraphs 30 to 32; Case C-435/00 *Geha Nafiliaki and Others* [2002] ECR I-10615, paragraph 20; and Judgment of 11 January 2007 in Case C-269/05 *Commission v Greece*, paragraphs 19 to 21.

33 — See, to that effect, Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 28; compare also Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 28 and 29; Case C-29/95 *Pastors and Trans-Cap* [1997] ECR I-285, paragraphs 17 and 18; Case C-224/97 *Ciola* [1999] I-2517, paragraph 14; and Case C-332/05 *Celozzi* [2007] ECR I-563, paragraph 26.

Member States. It must be borne in mind that the non-residents who stop over with their aircraft or boats in Sardinia are likely to include numerous natural and legal persons who have their tax domicile in other regions of Italy and, in most cases, those will be Italian nationals. Against that background, the existence of indirect discrimination on the basis of nationality seems rather unlikely in the present case.³⁴

48. It has consistently been held that the principle of the freedom to provide services embraces not only a prohibition of discrimination, but also a *prohibition of any restriction*. Accordingly Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services.³⁵

34 — Similarly *Commission v Portugal*, cited in footnote 21, paragraphs 26 and 27. Also in *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 13, paragraphs 45 to 54, the rules of a Belgian regional authority which differentiated according to the place of residence were not regarded as indirect discrimination on the ground of nationality, but examined from the viewpoint of the restriction of fundamental freedoms.

35 — Case C-244/04 *Commission v Germany* [2006] ECR I-885, paragraph 31; Case C-490/04 *Commission v Germany* [2007] ECR I-6095, paragraph 63; and Case C-518/06 *Commission v Italy* [2009] ECR I-3491, paragraph 62; see also Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; *Commission v France*, cited in footnote 19, paragraph 22; *Bacardi France*, cited in footnote 19, paragraph 31.

49. A national tax measure restricting the freedom to provide services may also constitute a prohibited measure under Article 49 EC, and it is irrelevant whether the tax measure in question was adopted by a local authority or by the State itself.³⁶

50. However, taxes and duties should not be regarded as restrictions on the freedom to provide services merely because they make the provision of a service more expensive.³⁷ Accordingly the Court has also made it clear that measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article 49 EC.³⁸

51. However, that is precisely not the situation in the present case.

36 — Case C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 26 and 27, and Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraph 36; similarly, Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraphs 46 and 47.

37 — Of course, this may be different if the tax or duty is so prohibitive that, by its nature, it amounts to a prohibition on carrying out an activity; see my Opinion in *Viacom Outdoor*, cited in footnote 36, paragraph 63.

38 — Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* ('Mobistar') [2005] ECR I-7723, paragraph 31. See further my Opinion in *Viacom Outdoor*, cited in footnote 36, paragraphs 58 to 67.

52. A regional tax such as that imposed by Sardinia, which is payable only by non-residents, represents for operators of private aircraft and recreational craft whose tax domicile is outside Sardinia an additional cost factor to which their competitors whose tax domicile is in Sardinia are not subject. For non-residents it is correspondingly more expensive to stop over in Sardinia with their private aircraft and recreational craft than for residents. For the same reason, by comparison with resident operators, it is more expensive, and therefore more difficult, for non-resident boat operators to hire out recreational craft to third parties. Finally, it is also less advantageous for tourists to put into Sardinian coastal waters and harbours with a boat hired outside Sardinia.

53. Consequently tax rules such as those of Sardinia have a different effect on the provision and use of services connected with such flights and boat trips, depending on whether the operator of the aircraft or boat has his tax domicile in the Italian region of Sardinia or elsewhere.³⁹

54. From the viewpoint of Community law, there can be no objection to such rules provided that they affect only the internal provision of services between Sardinia and the

other regions of Italy because, as already mentioned, Community law does not apply to activities which are confined within a single Member State.⁴⁰

55. In so far as tax rules such as those of Sardinia affect the cross-border provision of services, for example, between Sardinia and the French island of Corsica, those rules make the provision of services between Member States more difficult than that within one Member State or a part of it, in the present case within the Italian region of Sardinia.⁴¹

56. Although such different treatment under tax law may not lead to discrimination on the ground of nationality,⁴² it nevertheless interferes with the freedom to provide services⁴³

40 — See paragraph 40 above and the cases cited in footnotes 24 and 25.

41 — For similar situations in connection with other fundamental freedoms, see *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 13, in particular paragraphs 41 and 42, and Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, in particular paragraph 26; in those cases also the Court assessed by reference to the fundamental freedoms of the internal market measures confined within a single Member State, the scope of which was limited to a part of the territory of that State.

42 — See above, paragraph 47 of this Opinion.

43 — *Mobistar*, cited in footnote 38, paragraph 30, and *Schwarz and Gootjes-Schwarz*, cited in footnote 19, paragraph 67; to the same effect, *Commission v France*, cited in footnote 28, paragraph 17; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 33; *De Coster*, cited in footnote 36, paragraph 30; Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 94; and *Centro Europa 7*, cited in footnote 24, paragraph 65.

39 — This element of the different treatment of cross-border and internal situations distinguishes the present case from, for example, *Viacom Outdoor*, cited in footnote 36, in particular paragraph 37, and *Mobistar*, cited in footnote 38, in particular paragraphs 32 and 33.

and must therefore be deemed to be a restriction on that freedom.

3. The justification for tax rules such as those of Sardinia

57. It remains to be considered whether the restriction on the freedom to provide services which has been found to exist can be justified, as the Autonomous Region of Sardinia emphatically maintains.

58. The freedom to provide services may, in the absence of Community harmonisation measures, be limited by national rules justified by the reasons mentioned in Article 46(1) EC, read together with Article 55 EC, or for overriding reasons relating to the public interest.⁴⁴

59. In the present case the Autonomous Region of Sardinia relies essentially on two grounds of justification: the protection of the environment and the protection of health.

44 — *Commission v France*, cited in footnote 19, paragraph 23, and *Bacardi France*, cited in footnote 19, paragraph 32; on justification for imperative reasons relating to the public interest, see *Säger*, cited in footnote 35, paragraph 15; *SETTG*, cited in footnote 29, paragraph 21; and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 114; to the same effect, Case 33/74 *van Binsbergen* [1974] ECR 1299, paragraph 12.

60. Whether those were the objectives pursued, and no others, in the adoption of the disputed tax rules⁴⁵ is not a question that falls to be examined by the Court, but by the referring court. In what follows I shall presume that the protection of the environment and of health were indeed the primary motives of the regional legislature.

(a) The protection of the environment

61. In the same way that the Community has an obligation to integrate environmental requirements into the definition and implementation of Community policies (see Articles 2 EC and 6 EC⁴⁶), it allows the Member States to pursue objectives of environmental policy. According to settled case-law, the protection of the environment is recognised

45 — The wording of the law has in any case only contained an express reference to the environment since its amendment in 2008 — which is not the subject of these proceedings; the official title of Paragraph 4 of the Regional law No 4/2006 was then changed to the following: 'Tassa regionale per la tutela e la sostenibilità ambientale' (Regional tax for environmental protection and sustainability; cf. Paragraph 2(15a) of the Budget Law of 2008 for the Region of Sardinia). In the media, on the other hand, the term 'luxury tax' has been coined for the disputed tax rules (see, for example, the article by Pinna, A., in *Corriere della Sera*, 2 June 2006, entitled 'Sardegna, tassa del lusso. Gates non prenota').

46 — The wording of Article 37 of the Charter of Fundamental Rights of the European Union is similar.

as a mandatory requirement relating to the public interest on the basis of which restrictions by the Member States on the fundamental freedoms guaranteed by the EC Treaty may be justified.⁴⁷

(i) The environmental policy objective of the tax rules

62. The Autonomous Region of Sardinia argues that the tax rules at issue here are motivated by environmental policy and must be seen in the context of the general efforts of that regional authority in the areas of environment and health protection, as well as the protection of its cultural assets.

63. According to the Autonomous Region, the numerous recreational craft and aircraft that stop over in Sardinia every year for tourist purposes lead to considerable pollution of the environment. Above all, the coast of Sardinia, where most of the tourist traffic is concentrated, is exposed to that pollution.

64. The contested tax, which is imposed on tourist stopovers of private aircraft and recreational craft serves, according to the Autonomous Region, to obtain revenue which enables the Region to take stronger measures to protect and to renew the environmental resources damaged by tourism, not least in the coastal areas which are particularly affected.

65. The Region adds that the tax is intended to have a steering effect. First, the aim is to reduce the overall pressure on the coastal areas. Second, the tourist streams area are to be spread more evenly over the year, which is why the tax is levied only in the main tourist season from 1 June to 30 September, but not at other times of the year which are less affected by tourism. In that way the aim is to contribute to a lasting effect on the development of tourism in the region.

66. The Region also emphasises that the contested tax rules are based on the 'polluter pays' principle.

67. If tax legislation is based on considerations of those kinds, there is no doubt that it pursues a legitimate aim of environmental policy.

47 — See, for example, Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 9; Case C-2/90 *Commission v Belgium* [1992] ECR I-4431, paragraphs 32 to 36; Case C-463/01 *Commission v Germany* ECR [2004] I-11705, paragraph 75; Case C-309/02 *Radlberger Getränkegesellschaft and Others* [2004] ECR I-11763, paragraph 75; Case C-320/03 *Commission v Austria* [2005] I-9871, paragraph 70; and Judgment of 11 December 2008 in Case C-524/07 *Commission v Austria*, paragraph 57.

(ii) The actual form of the tax legislation

68. However, whether tax legislation such as that of Sardinia is, in the final analysis, consistent with the requirements of the freedom to provide services (Article 49 EC), depends on the actual form it takes. Apart from the existence of a legitimate objective in the public interest, for any restriction on the fundamental freedoms guaranteed by the EC Treaty to be justified, the measure in question must be appropriate for ensuring the attainment of that objective and must not go beyond what is necessary to attain it.⁴⁸

69. According to the Court's case-law, national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.⁴⁹

48 — Settled case-law, see Case C-150/04 *Commission v Denmark* [2007] ECR I-1163, paragraph 46; *Gouvernement de la Communauté française and Gouvernement wallon*, cited in footnote 13, paragraph 55; and Case C-222/07 *UTECA* [2009] ECR I-1407, paragraph 25; regarding in particular the freedom to provide services, see also *Säger*, cited in footnote 35, paragraph 15; *Commission v France*, cited in footnote 19, paragraph 24; *Bacardi v France*, cited in footnote 19, paragraph 33; and *Laval un Partneri*, cited in footnote 44, paragraph 101.

49 — Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraphs 39 and 40; Case C-169/07 *Hartlauer* [2009] ECR I-1721, paragraph 55; also Case C-531/06 *Commission v Italy* [2009] ECR I-4103, paragraph 66, and Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171, paragraph 42.

70. The problem with regard to the legislation at issue is that it differentiates according to the tax domicile and makes only non-residents, but not residents, liable to the regional tax

71. The Autonomous Region of Sardinia considers that such legislation accords with the 'polluter pays' principle. Non-residents could otherwise use the environmental resources of the region without making a financial contribution to their preservation and renewal, behaving like 'free riders'.

72. This argument is correct in that, according to the 'polluter pays' principle, which is also embodied in Article 174(2) EC, the person responsible for polluting the environment should pay for rectifying it.⁵⁰ Likewise the person responsible for using environmental resources should contribute to protecting and renewing them. Consequently, from the viewpoint of the 'polluter pays' principle, there can be no objection to the

50 — On that point, see my Opinion in Case C-254/08 *Futura Immobiliare* [2009] ECR I-6995, paragraph 30.

fact that the Sardinian legislation imposes on operators of private aircraft and recreational craft, when they stop over in the region, a tax based on considerations of environmental policy.

the public, which is contrary to the 'polluter pays' principle.⁵²

73. A measure guided by the 'polluter pays' principle cannot, however, be confined to imposing an environmental tax on non-resident operators of private aircraft and recreational craft, and not on residents. In so far as environmental pollution is caused by the private aircraft and recreational craft stopping over in Sardinia, it has no connection with the provenance of those aircraft and boats and, in particular, it has no connection with the tax domicile of the operators. Aircraft and recreational craft of non-residents contribute to the pollution of environmental resources just as much as those of residents.

75. The discrepancy between the demands of the 'polluter pays' principle, upon which the Autonomous Region of Sardinia relies, and the actual details of the regional law at issue becomes particularly clear in relation to the tax treatment of recreational craft moored in the harbour facilities of the region for the whole year. Those craft are exempt from the regional tax⁵³ although the degree to which they contribute to environmental pollution is normally likely to be far higher than that of comparable craft which have their berth outside Sardinia and only sporadically enter Sardinian coastal waters and harbours.

74. Therefore it would be consistent with the 'polluter pays' principle to call upon all operators of aircraft and recreational craft to rectify environmental damage according to the degree to which they cause it, irrespective of their tax domicile and their other tax burdens.⁵¹ In contrast, rules such as those of Sardinia at issue in the present case leave the cost of environmental pollution caused by the aircraft and boats of residents to be borne by

76. All things considered, the Sardinian legislation arbitrarily calls upon some persons causing environmental pollution, those who are non-residents, to finance measures for the protection and renewal of environmental resources, but not other persons, those who are residents. Consequently, the environmental policy aim promulgated by the Autonomous Region of Sardinia itself is not being put into effect in a coherent and systematic manner.

51 — See, to the same effect, my Opinion in *Futura Immobiliare*, cited in footnote 50, paragraph 66, in which I observed that it would be inconsistent with the 'polluter pays' principle to exempt certain groups directly, on the ground of poverty or reduced ability to pay, from the costs incurred by the environmental pollution they cause.

52 — See my Opinion in *Future Immobiliare*, cited in footnote 50, paragraph 32, and the Opinion of Advocate General Jacobs in Case C-126/01 *GEMO* [2003] ECR I-13769, paragraph 66.

53 — Article 4(6)(b) of Regional Law No 4/2006.

77. In those circumstances, tax legislation such as that of Sardinia cannot be regarded as appropriate for attaining its environmental-policy objective. For that reason alone the legislation is not compatible with the requirements of the freedom to provide services.

78. In that connection, the argument of the Autonomous Region of Sardinia that residents and non-residents are in different situations, so that their treatment in relation to the regional tax must objectively differ, is not convincing.

79. It is true that the Court has recognised on many occasions that it may be legitimate to treat residents and non-residents differently in relation to direct taxes.⁵⁴ However, this does not mean that, generally speaking, residents and non-residents would always be in different situations. Rather, differentiation between those two categories is justified only in so far as it reflects objective differences in their situations.⁵⁵ In cases where such differ-

ences do not exist, the tax legislation of the Member States must make no distinction between residents and non-residents.⁵⁶

80. Accordingly, it is necessary in every case to ascertain whether the situations of residents and non-residents differ objectively. This must be done in the light of the subject-matter and purpose of the tax rules in question.⁵⁷

81. It is argued before the Court that tax legislation such as that of Sardinia pursues the environmental-policy objective of protecting and renewing the environmental resources which have been polluted by tourism, particularly in the coastal areas. In view of that specific aim, resident and non-resident operators of private aircraft and recreational craft find themselves in the same situation. As I have already said, the private aircraft and recreational craft stopping over in Sardinia pollute the environment irrespective of their provenance and the tax domicile of their operators.⁵⁸

54 — *Schumacker*, cited in footnote 33, paragraphs 30 to 34; *Gerritse*, cited in footnote 33, paragraphs 43 and 44; Case C-169/03 *Wallentin* [2004] ECR I-6443, paragraphs 15 and 16; Case C-346/04 *Conijn* [2006] ECR I-6137, paragraph 16; Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraphs 23 and 24; Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705, paragraphs 28 and 29; and Case C-282/07 *Truck Center* [2008] ECR I-10767, paragraphs 38 and 39.

55 — Such differences were expressly noted by the Court in, for example, *Schumacker*, cited in footnote 33, paragraphs 32 and 33, and *Truck Center*, cited in footnote 54, paragraphs 40 to 50; see also Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 39.

56 — *Gerritse*, cited in footnote 33, paragraphs 27 and 53; *Wallentin*, cited in footnote 54, paragraphs 17 to 20; *Bouanich*, cited in footnote 55, paragraphs 40 and 41; *Conijn*, cited in footnote 54, paragraphs 20 and 24; *Denkavit Internationaal and Denkavit France*, cited in footnote 54, paragraph 25; and *Lakebrink and Peters-Lakebrink*, cited in footnote 54, paragraphs 30 to 35.

57 — See, to that effect, Case 6/71 *Rheinmühlen Düsseldorf* [1971] ECR 823, paragraph 14, and Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 26.

58 — See paragraph 73 of this Opinion.

82. As, therefore, in the present case residents and non-residents are in the same situation with regard to the environmental policy aims of Sardinian tax legislation, their stopovers in Sardinia in private aircraft and recreational craft must be taxed in the same way.⁵⁹

83. The Autonomous Region of Sardinia objects that persons with a tax domicile in Sardinia already contribute to the general tax revenue in that region, in particular by means of the income tax paid by them and value added tax on local consumption.⁶⁰ In that way residents are called upon to finance measures for the protection and renewal of environmental resources. In contrast, non-residents make no contribution to the region's budget.

84. I am not persuaded by that argument either.

59 — In that respect the present case differs from, for example, *Commission v Belgium*, cited in footnote 47, paragraphs 34 to 36, in which an objective distinction was made between domestic and foreign products with regard to certain environmental policy principles recognised at Community level.

60 — The documents before the Court show that the Autonomous Region of Sardinia is entitled to most of the income tax and value added tax revenue raised there. Pursuant to Article 8 of Constitutional Law No 3 of 26 February 1948, as amended by Law No 296 of 27 December 2006, the Special Statute for the Region of Sardinia (*Statuto speciale della Regione Sardegna*), provides that seven tenths of the income tax from Sardinian taxpayers and nine tenths of the value added tax raised by consumption in the region is appropriated to the region's budget.

85. The charge to a regional tax such as that at issue here, which is demanded from all non-residents, cannot be set off against supposed advantages which may arise for non-residents in relation to other kinds of tax. The Court has consistently held that detrimental tax treatment contrary to a fundamental freedom cannot be justified by other tax advantages, even if they are assumed to exist.⁶¹

86. The situation might perhaps be different if it were established that residents must pay a comparable tax or duty with a specific environmental policy objective, for example in connection with moorage costs for their boats in Sardinian harbours. However, no submissions on that point were made before the Court. The regional tax in question was only contrasted with the general tax charge on the inhabitants of Sardinia.

87. On that point it must be observed that the contested tax on stopovers by private aircraft and recreational craft does not have the same purposes as the other taxes, namely income tax and value added tax, paid by Sardinian taxpayers. Whereas, according to the Auton-

61 — Case 270/83 *Commission v France* [1986] ECR 273, paragraph 21; Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 97; and *Lakebrink and Peters-Lakebrink*, cited in footnote 54, paragraph 24; a similar point is made in *Carbonati Apuani*, cited in footnote 41, paragraph 34.

omous Region of Sardinia itself, the former pursues specifically environment-policy objectives and is also intended to have a steering effect, the latter two taxes serve generally to cover government budgets and have no comparable steering effect.

88. Furthermore, residents make far greater use than non-residents of the infrastructure in their home region and profit from its services. Therefore it is only fair that residents contribute correspondingly more to the tax revenue of their region than non-residents.⁶² For example, the general health and educational facilities available in a Member State or a region are used mainly by residents, whereas non-residents are likely to find themselves in that situation only rarely.

89. Against that background, different treatment of residents and non-residents in relation to taxing their respective stopovers in private aircraft and recreational craft cannot be justified simply by referring to residents' contributions to the general tax revenue of the region.

62 — However, non-residents also make a certain contribution to the tax revenue of the Autonomous Region of Sardinia through the value added tax on their local consumption. This was conceded by the Autonomous Region in the proceedings before the Court.

90. In short, therefore, restrictions on the freedom to provide services, such as those brought about by the Sardinian tax rules, cannot be justified on grounds of the protection of the environment.

(b) The protection of health

91. In addition to the protection of the environment, the Autonomous Region of Sardinia relies on the protection of health as a ground justifying the contested tax rules.

92. The protection of public health is one of the overriding reasons relating to the public interest which can, by virtue of Article 46(1) EC, in conjunction with Article 55 EC, justify restrictions on the freedom to provide services.⁶³

93. However, according to the Autonomous Region of Sardinia, legislation of the kind in question pursues primarily an objective of environmental policy. It is true that threats to public health connected with deterioration of the environment may be indirectly contained

63 — *Corporación Dermoeestética*, cited in footnote 49, paragraph 37; see also *Hartlauer*, cited in footnote 49, paragraph 46.

by means of such legislation. Apart from that, however, protection of public health does not amount to an independent justification which would go beyond the aim of protecting the environment. In the present case, therefore, citing the protection of public health in justification must lead to the same result as pleading the protection of the environment,⁶⁴ which I have already considered.⁶⁵

94. In particular, the protection of public health cannot be used to justify the imposition of the disputed tax for stopovers by private aircraft and recreational craft on non-residents only, and not on residents.

95. Under Article 46(1) EC in conjunction with Article 55 EC, and specifically in the field of the protection of public health, otherwise than in that of the protection of the environment, measures are expressly permitted which are specifically directed against foreigners. However, this presupposes that a foreigner precisely constitutes a threat to public health.⁶⁶ In the present case, in contrast, the environmental pollution in question and any associated threats to public health are unrelated to the provenance of the private aircraft or recreational craft

concerned and to the tax domicile of the operator. The pollution and health threats, if any, are caused by the aircraft and boats of non-resident operators just as much as by those of residents. Consequently, the plea of health protection does not justify measures which are directed specifically against aircraft and recreational craft operators whose tax domicile is outside Sardinia. This applies all the more in so far as Article 46(1) EC is a derogating provision which must be interpreted strictly.⁶⁷

96. Therefore restrictions, such as those brought about by the Sardinian tax legislation, on the freedom to provide services also cannot be justified on grounds of the protection of public health.

(c) Other aspects

97. For the sake of completeness, I now wish to address some other aspects that may be relevant in relation to the question of justification of the Sardinian tax legislation.

64 — Case C-524/07 *Commission v Austria*, cited in footnote 47, paragraph 56.

65 — See paragraphs 61 to 90 of this Opinion.

66 — Any such risk would have to be judged according to criteria similar to those relating to a threat to public safety or public policy, see settled case-law, as shown in *Orfanopoulos and Oliveri*, cited in footnote 17, paragraph 66.

67 — Case C-490/04 *Commission v Germany*, cited in footnote 35, paragraph 86, and *Laval un Partneri*, cited in footnote 44, paragraph 117.

(i) The cohesion of the tax system

must be examined in the light of the objective pursued by the tax legislation in question.⁷⁰

98. To justify the contested tax legislation, the Autonomous Region of Sardinia repeatedly refers to the cohesion of the tax system of which the legislation forms part. The reason why no tax is paid by residents when they stop over in private aircraft and recreational craft is said to be that residents pay other taxes, in particular income tax and value added tax, and thereby contribute to the region's budget.

100. As I have already explained,⁷¹ the disputed regional tax on stopovers of private aircraft and recreational craft does not pursue the same objectives as the general taxes to which residents are subject. For that reason alone, the advantages and disadvantages arising for taxpayers from the respective tax legislation cannot be regarded as two sides of the same coin. The advantage derived by residents from the fact that they pay no regional tax on their stopovers with private aircraft and recreational craft cannot be compared with the charges to which they are exposed by other kinds of tax such as income tax and value added tax.

99. According to settled case-law, the need to maintain the cohesion of a tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty.⁶⁸ However, this applies only where a direct link is established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy,⁶⁹ which

101. No doubt all taxes serve to obtain revenue for government budgets. However, that common factor is, on its own, too general and too indirect to justify offsetting the tax advantages for residents in relation to the regional tax at issue against the charges to

68 — Settled case-law since Case C-300/90 *Commission v Belgium* [1992] ECR I-305, paragraphs 14 to 21, and Case C-204/90 *Bachmann* [1992] ECR I-249, paragraphs 21 to 28; see, more recently, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 68; *Jundt*, cited in footnote 16, paragraph 67; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 43; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 43.

69 — Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 24; *Commission v Italy*, cited in footnote 20, paragraphs 23 and 24; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; *Commission v Denmark*, cited in footnote 48, paragraph 70; *Test Claimants in the Thin Cap Group Litigation*, cited in footnote 68, paragraph 68; and *Jundt*, cited in footnote 16, paragraph 68.

70 — *Manninen*, cited in footnote 69, paragraph 43; earlier, to the same effect, Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 67.

71 — See paragraph 88 of this Opinion.

which they are subject as a result of other kinds of tax.⁷²

of which impairs their economic and social development'. The Conference accordingly acknowledged that Community legislation must take account of those handicaps.⁷³

102. Consequently, tax legislation such as that of Sardinia cannot be justified on the ground of the cohesion of the tax system.

(ii) Sardinia's island status

103. As the order for reference shows, the Autonomous Region of Sardinia also pleaded its character as an island before the Italian Constitutional Court. It argued that it is necessary to offset the higher costs borne by undertakings established in Sardinia as a result of the special geographical and economic features connected with the region's island character by taxing undertakings which are not established in Sardinia.

105. This can be done in the framework of different Community policies such as regional policy, structural policy, economic and social cohesion policy (see also Article 158(2) EC) or transport policy. In that way positive assistance measures can be taken to balance the handicaps of island regions. It may also become necessary in island regions to take special measures against neophytes and neozoa⁷⁴ in order to preserve the ecological balance.

104. At the latest since the Intergovernmental Conference on the Treaty of Amsterdam, the Final Act of which contains a *Declaration on island regions*, it has been recognised at Community level that 'island regions suffer from structural handicaps linked to their island status, the permanence

106. On the other hand, the island status of a Member State or a region cannot be used as a pretext for (re-)establishing trade barriers or protectionist measures which conflict with the internal market principle. Not least the Declaration on island regions itself is guided

72 — For the criterion of a too general and indirect connection, see *Jundi*, cited in footnote 16, paragraph 70, and *Eurowings*, cited in footnote 23, paragraph 42; also similar is *Commission v Italy*, cited in footnote 20, paragraph 24.

73 — Declaration No 30 of the Final Act of the Treaty of Amsterdam (OJ 1997 C 340, p. 136).

74 — Neophytes and neozoa are animal and plant species which are introduced by humans, consciously or unconsciously, directly or indirectly, into areas where they do not naturally occur.

by that principle when it formulates the aim of integrating them better into the internal market.

connection with the region's island status, cannot justify the restriction on a fundamental freedom guaranteed by the Treaty.⁷⁶

107. According to the declaration, island regions are to be integrated into the internal market 'on fair conditions'. Consequently, there is scope for measures to offset disadvantages or resolve problems which are directly attributable to the island status of a region or a Member State. However, such measures are fair only if they are appropriate for remedying the disadvantage or solving the problem in question and do not go beyond what is necessary for that purpose. Furthermore, such measures must not lead to the internal market principle or the principle of the open market economy⁷⁵ being impaired in substance.

109. Generally, therefore, it cannot be concluded from Sardinia's island status that restrictions on the freedom to provide services, such as those caused by the tax legislation at issue here, could be justified.

(iii) Social policy considerations

110. In conclusion, I would point out that there also appear to be no considerations of social policy that could justify legislation such as that of Sardinia.

108. In the present case, it does not appear that precisely in Sardinia resident operators of private aircraft and recreational craft suffered from specific disadvantages or problems which were attributable to the region's island status. In any case, no submissions were made before the Court in that connection. Purely economic grounds, which have no direct

111. Differentiation between non-residents and residents may be justified where Member States or regional authorities grant social

75 — The economic policy of the Member States and the Community must be in accordance with the principle of an open market economy pursuant to Articles 4(1) EC and 98 EC; see also Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 47.

76 — See Case C-35/98 *Verkoijen* [2000] ECR I-4071, paragraph 48, and *Commission v Italy*, cited in footnote 20, paragraph 22; also, specifically in relation to the freedom to provide services, *SETTG*, cited in footnote 29, paragraph 23, and *Kohll*, cited in footnote 43, paragraph 41.

benefits. In principle it is a legitimate aim, unless Community law stipulates otherwise in harmonising or coordinating measures, to reserve such benefits for persons who have demonstrated a sufficient degree of integration into the society of the Member State or region in question, of which the place of residence may be an important indication.⁷⁷

112. However, it is difficult to imagine that there could be any social policy grounds for exempting operators of private aircraft and recreational craft more than 14 metres long, that is to say, owners of large luxury yachts, who are residents of Sardinia, from a regional tax such as that at issue in the present case.

4. Summary concerning the first and third questions referred

113. To sum up, it must be said that there appears to be no justification for restrictions

⁷⁷ — See, for example, Case C-209/03 *Bidar* [2005] ECR I-2119, paragraphs 56, 57, 59 and 60; Case C-213/05 *Geven* [2007] ECR I-6347, paragraphs 29 and 30; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161, paragraph 43, and Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraphs 37 to 39; see also my Opinion in Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraphs 60 to 63, and the Opinion of Advocate General Mazák in Case C-103/08 *Gottwald*, pending before the Court, paragraphs 58 to 72.

of the freedom to provide services such as those caused by the tax legislation at issue in the present case.

114. Of course, it should not be hastily concluded from this that Community law generally precludes all rules that impose charges specifically on tourists or on undertakings in the tourism sector, for example, measures relating to holiday homes or second homes,⁷⁸ tourist taxes or tourism-related charges on local businesses etc. The answer to the question always depends on the actual form taken by the measure, tax or levy in question. Differentiation between residents and non-residents *may* be justified if and in so far as it is appropriate and necessary with a view to a legitimate aim.

115. So far as the present case is concerned, it must however be observed that:

Article 49 EC precludes legislation of an autonomous region under which a tax, based principally on environmental policy, on stop-overs for tourist purposes by aircraft and recreational craft is imposed only on undertakings which have their tax domicile outside that region, but not on undertakings which have their tax domicile within that region.

⁷⁸ — For restrictions on the construction of second homes, see Case C-213/04 *Burtscher* [2005] ECR I-10309, in particular paragraph 46.

C — *The questions concerning the definition of aid (second and fourth questions)*

116. The second and fourth questions referred by the Italian Constitutional Court seek information on the definition of State aid within the meaning of Article 87(1) EC. In essence, the referring court would like to know whether regional legislation of an autonomous region which imposes a tax on stopovers for tourist purposes by aircraft and recreational craft only on undertakings which have a tax domicile outside that region constitutes State aid to undertakings carrying on the same business within that region.

117. The general provisions of the EC Treaty, including competition law, apply to sea and air transport.⁷⁹ Consequently tax legislation such as that of Sardinia, which relates specifically to stopovers by aircraft and recreational craft of operators whose tax domicile is outside Sardinia, must be assessed by reference to Article 87 EC.

79 — Case 167/73 *Commission v France* [1974] ECR 359, paragraphs 24 to 32, and Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraphs 44 and 45.

1. Preliminary observation on the demarcation of competences between the Commission and the national courts in State aid law

118. Before giving a substantive opinion on the interpretation of Article 87 EC, it is necessary to clarify the position with regard to the demarcation of competences between the Commission and the national courts concerning that provision.

119. It has been held consistently that it falls within the exclusive competence of the Commission, subject to review by the Community judicature, to assess the *compatibility of a State aid measure* with the common market.⁸⁰ However, national courts may, in the area of State aid, have cause to interpret and apply the *concept of aid* contained in Article 87(1) EC.⁸¹

120. No doubt such proceedings are normally commenced by individuals who put forward a plea that State aid may not be granted before it is approved by the Commission (third sentence of Article 88(3) EC). However, it

80 — Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 9; Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon ('Salmon')* [1991] ECR I-5505, paragraph 14; Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 38; Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraphs 51, 52 and 62; and Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraph 94, last half-sentence, and paragraph 125.

81 — *Steinike & Weinlig*, paragraph 14, *Salmon*, paragraph 10, and *Lucchini*, paragraph 50, all cited in footnote 80.

does not follow that the power of national courts to interpret and apply Article 87(1) EC would be confined to proceedings for obtaining individual legal protection.⁸²

121. Aid measures within the meaning of Article 87(1) EC which are put into effect in infringement of the obligations arising from Article 88(3) EC are to be regarded generally as unlawful.⁸³ Any national court, including a constitutional court, is then required by Article 10 EC to do everything within its power to give effect to the prohibition of aid under Article 87(1) EC and to the duty of notification and the obligation not to put measures into effect under Article 88(3) EC. At the same time, national courts must abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty.

122. The national courts must therefore ensure that all appropriate conclusions are drawn from an infringement of the obligation not to put measures into effect (third sentence

of Article 88(3) EC), in accordance with their national law, including a determination that legal measures giving effect to the aid are invalid.⁸⁴ Such conclusions may also be drawn in constitutional review proceedings, namely where the unlawful State aid measures were introduced by legislation.

2. The concept of aid

123. The categorisation of a measure as aid within the meaning of the EC Treaty requires that all four of the conditions set out in Article 87(1) EC be satisfied.⁸⁵ First, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition.⁸⁶

82 — Consequently the Court frankly describes the jurisdiction of national courts and, in *Lucchini*, cited in footnote 80, paragraph 50, first sentence, uses the words 'in particular'.

83 — *Salmon*, cited in footnote 80, paragraph 17; Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, *Distribution Casino France and Others* [2005] ECR I-9481, paragraph 30; Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paragraph 29, and *Transalpine Ölleitung in Österreich*, cited in footnote 80, paragraph 40; see also the definition of unlawful aid in Article 1(f) of **Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty** (OJ 1999 L 83, p. 1).

84 — Case C-199/06 *Centre d'exportation du livre français* [2008] I-469, paragraphs 40 and 41.

85 — Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* ('*Altmark Trans*') [2003] ECR I-7747, paragraph 74; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 38; *UTECA*, cited in footnote 48, paragraph 42; and Case C-431/07 P *Bouygues and Others v Commission* [2009] ECR I-2665, paragraph 101; see, to the same effect, Case C-142/87 *Belgium v Commission* ('*Tubemeuse*') [1990] I-959, paragraph 25.

86 — *Altmark Trans*, cited in footnote 85, paragraph 75; *Enirisorse*, cited in footnote 85, paragraph 39; *UTECA*, cited in footnote 48, paragraph 42; and *Bouygues and Others v Commission*, cited in footnote 85, paragraph 102; see, to the same effect but formulated slightly differently, Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] I-5293, paragraph 28.

124. Tax rules also fall within the definition of aid if they satisfy those four conditions.⁸⁷ Consequently, it is necessary now to determine whether tax rules such as those adopted by Sardinia must be regarded as aid within the meaning of Article 87(1) EC.

(a) Conferment of an advantage, including selectivity

125. In the present case, the third condition merits particular attention. The question is whether an advantage is conferred upon resident undertakings when the disputed regional tax is imposed only on non-residents when they stop over in Sardinia.

126. The concept of aid embraces not only positive benefits, such as subsidies, loans or the taking of shares in undertakings, but also action which, in various forms, mitigates the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning

of the word, are similar in character and have the same effect.⁸⁸

127. It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, constitutes State aid within the meaning of Article 87(1) EC.⁸⁹

128. In that connection, it is immaterial what legal mechanism is used.⁹⁰ The tax benefit may be based on the fact that the legislature has expressly exempted some undertakings from the tax in question, to which they would otherwise be subject.⁹¹ Likewise the tax benefit may arise from the fact that a tax law

87 — Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 28, makes it clear that a measure does not fall outside the scope of Article 87 EC (formerly Article 92 EEC) merely because it is possibly of the nature of a tax provision; see also Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 26; Case C-172/03 *Heiser* [2005] ECR I-1627, paragraphs 27 to 58; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 86; and Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505, paragraph 92.

88 — *Germany v Commission*, cited in footnote 87, paragraph 25; *Belgium and Forum 187 v Commission*, cited in footnote 87, paragraph 86; and Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paragraphs 33 to 35; see, to the same effect, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13.

89 — *Banco Exterior de España*, cited in footnote 88, paragraph 14, and *Belgium and Forum 187 v Commission*, cited in footnote 87, paragraph 87; see, to the same effect, *Germany v Commission*, cited in footnote 87, paragraph 26.

90 — *British Aggregates v Commission*, cited in footnote 87, paragraph 89, last sentence.

91 — *Banco Exterior de España*, cited in footnote 88, paragraph 14; Case C-6/97 *Italy v Commission* [1999] ECR I-2981, paragraph 16; Case C-75/97 *Belgium v Commission* ('*Maribel*') [1999] ECR I-3671, paragraphs 23 and 24; and *Belgium and Forum 187 v Commission*, cited in footnote 87, paragraph 87.

is asymmetrically formulated in relation to its factual elements or its scope,⁹² so that some undertakings are caught as taxpayers while others are not. The latter case applies here: the Sardinian legislation is worded in such a way that non-residents are subject to the tax on stopovers by private aircraft and recreational craft, but residents are not.

129. As resident undertakings are not subject to the regional tax at issue, they enjoy a cost advantage compared to their competitors resident outside Sardinia. This is also pointed out by the Italian Constitutional Court.

130. However, an advantage of that kind is caught by Article 87(1) EC only where it '[favours] certain undertakings or the production of certain goods', that is to say *aid which is selective*.⁹³

131. This selectivity may also be of a regional nature.

132. It is true that regional selectivity cannot be presumed merely because the measure in question was adopted by a regional authority such as Sardinia and therefore applies to only a part of the territory of a Member State. If that regional authority has sufficient autonomy in relation to the State to which it belongs, the area in which the regional authority exercises its powers constitutes the only relevant context for assessing whether the aid is selective.⁹⁴ Conversely however, it equally cannot be presumed that advantages conferred by a regional authority upon certain undertakings within the area in which it exercises its powers are not selective and therefore cannot be categorised as aid.⁹⁵

133. With regard to determining whether a measure is selective, it is always necessary to ascertain in any particular case whether certain undertakings are favoured in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.⁹⁶ A differentiation

92 — Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 20; *Laboratoires Boiron*, cited in footnote 88, paragraph 34; and *British Aggregates v Commission*, cited in footnote 87, paragraph 89.

93 — Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 94; Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 52; and *British Aggregates v Commission*, cited in footnote 87, paragraph 82.

94 — *Portugal v Commission*, cited in foot-note 93, paragraphs 57, 58, 60 and 61, and Case C-428/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 47 and 48.

95 — *Portugal v Commission*, cited in footnote 93, paragraphs 55, 60 and 62; see, to the same effect, Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 17.

96 — *Adria-Wien Pipeline*, cited in footnote 13, paragraph 41; *Portugal v Commission*, cited in footnote 93, paragraph 54; *UGT-Rioja and Others*, cited in footnote 94, paragraph 46; and *British Aggregates v Commission*, cited in footnote 87, paragraph 82.

between undertakings in the context of a system of taxation or charges can also be justified not least by reference to the nature or overall structure of that system.⁹⁷

and renew environmental resources polluted by tourism, particularly in coastal areas.⁹⁸

134. In the last resort, therefore, the same questions arise with regard to the law of State aid as with regard to the fundamental freedoms, and there is no reason why the reply in relation to the latter should differ from the reply regarding the former. Rather, to avoid conflicting assessments as between the law of State aid and the law of fundamental freedoms, the same criteria must be applied in both cases.

137. In relation to that specific aim, resident and non-resident operators of private aircraft and recreational craft find themselves in the same situation because the private aircraft and recreational craft stopping over in Sardinia pollute the environment irrespective of their provenance and the tax domicile of their operators.⁹⁹

135. Accordingly the following observations will be closely aligned with those concerning the freedom to provide services in the context of the first and third questions referred to the Court.

138. The differentiation made by the Sardinian regional legislature between resident and non-resident undertakings with regard to the tax liability on stopovers by private aircraft and recreational craft cannot therefore be justified on grounds of environment policy.¹⁰⁰ Nor is it justified, as I have already mentioned, by the nature or the overall structure of the tax system.¹⁰¹

136. As I have already explained, according to the Autonomous Region of Sardinia itself, the tax legislation at issue pursues an environmental policy objective, which is to protect

139. Consequently tax rules such as those adopted by Sardinia satisfy the condition of

97 — *Portugal v Commission*, cited in footnote 93, paragraph 52; see, to the same effect, settled case-law since *Italy v Commission*, cited in footnote 87, paragraph 33, for example, *Adria-Wien Pipeline*, cited in footnote 13, paragraph 42; *Ferring*, cited in footnote 92, paragraph 17; Joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861, paragraph 39; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 51 and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 137 and 138.

98 — See paragraphs 62 to 67 above.

99 — See paragraphs 73 and 81 above.

100 — See paragraphs 71 to 77 above and, to the same effect, *Adria-Wien Pipeline*, cited in footnote 13, paragraph 52.

101 — See above, in particular paragraphs 78 to 90 and 98 to 102.

a — selective — advantage for the purposes of Article 87(1) EC.

the exclusive competence of the Commission, subject to review by the Community judicature.¹⁰⁶

140. The fact that objectives of environmental or regional policy are pursued by that tax legislation does not exclude it from classification as aid for the purposes of Article 87(1) EC and does not prevent it from the outset from being reviewed for compliance with the aid requirements of the EC Treaty.¹⁰² Article 87(1) EC does not make a distinction according to the causes or aims of measures of State intervention but defines them according to their effects.¹⁰³

(b) The other criteria underlying the concept of aid within the meaning of Article 87(1) EC

142. I wish to add some brief observations concerning the other criteria underlying the concept of aid within the meaning of Article 87(1) EC.

141. Environmental or regional policy aspects may, if necessary, be taken into account in relation to Article 87(3) EC when considering whether tax rules such as those of Sardinia are compatible with the common market,¹⁰⁴ and here again consistency with other legal areas, in particular the fundamental principles of the EC Treaty such as the freedom to provide services, must be borne in mind.¹⁰⁵ That question, of course, falls within

(i) Intervention by a Member State or through State resources

102 — *British Aggregates v Commission*, cited in footnote 87, paragraphs 84 and 86; see also, to the same effect in relation to measures based on social policy, Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 21; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 23; and *Maribel*, cited in footnote 91, paragraph 25.

103 — Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79; *France v Commission*, cited in footnote 102, paragraph 20; *Maribel*, cited in footnote 91, paragraph 25; and *British Aggregates v Commission*, cited in footnote 87, paragraph 85, 87 and 89.

104 — *British Aggregates v Commission*, cited in footnote 87, paragraph 92.

105 — See my Opinion in *Régie Networks*, cited in footnote 80, paragraphs 97 and 117.

143. Intervention by a Member State or through State resources is not necessarily effected by the central State authority of the

106 — See the cases cited in footnote 80.

respective Member State; it may equally be effected by an authority situated below the national level. Intervention by regional and local bodies may also constitute aid within the meaning of Article 87(1) EC.¹⁰⁷

by confining the tax liability to non-residents is sufficient for the presumption that finance is provided by the State or through State resources for the purposes of Article 87(1) EC.¹¹⁰

144. As already mentioned, those favoured by such intervention — in the present case, the undertakings which have their tax domicile in Sardinia — need not necessarily receive a monetary payment from State or regional authority resources.¹⁰⁸ An additional financial burden of any kind for the State or regional body to which the measure is attributable is sufficient for a presumption that it is financed by the State or through State resources.¹⁰⁹

(ii) Likelihood of affecting trade between Member States

145. In imposing the tax at issue on non-residents, but not on residents, the Autonomous Region of Sardinia is indirectly renouncing tax revenue. Its revenue from the tax would necessarily be higher if the region taxed all stopovers by private aircraft and recreational craft. The renunciation of tax revenue

146. In addition, a measure falls within the scope of Article 87(1) EC only if it is likely to affect trade between Member States. In that connection, it is not necessary to establish that there is a real effect on trade between Member States, but only to examine whether that aid is liable to affect such trade.¹¹¹ Even a relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected.¹¹²

107 — *Germany v Commission*, cited in footnote 95, paragraph 17, and *Portugal v Commission*, cited in footnote 93, paragraph 55.

108 — See paragraph 126 above and the cases cited in footnote 88.

109 — Joined Cases C-72/91 and C-73/91 *Slovan Neptun* [1993] ECR I-887, paragraph 21; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 35; Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 35; and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 36.

110 — For the renunciation of tax revenue as financing through State resources, see *Germany v Commission*, cited in footnote 87, paragraphs 26 and 28; see similarly *Banco Exterior de España*, cited in footnote 88, paragraph 14; *Italy v Commission*, cited in footnote 91, footnote 16; and *Belgium and Forum 187 v Commission*, cited in footnote 87, paragraph 87).

111 — *Italy v Commission*, cited in footnote 93, paragraph 111; *Cassa di Risparmio di Firenze*, cited in footnote 97, paragraph 140; and Case C-494/06 P *Commission v Italy and WAM* [2009] ECR I-3639, paragraph 50.

112 — *Tubemeuse*, cited in footnote 85, paragraph 43; *Altmark Trans*, cited in footnote 85, paragraph 81; *Heiser*, cited in footnote 87, paragraphs 32 and 33; and *Air Liquide Industries Belgium*, cited in footnote 86, paragraph 36.

147. With regard to tax legislation, it is always to be presumed that trade between Member State is affected where those favoured by such legislation perform an economic activity in the field of cross-border trade or where it is conceivable that they are in competition with operators established in other Member States.¹¹³

148. In connection with the first and third questions referred, I have already explained that tax rules such as those of Sardinia have the effect of restricting the freedom to provide services (Article 49 EC), not least with regard to undertakings established in the nearby French island of Corsica.¹¹⁴ Consequently such rules are also likely to affect trade between Member States for the purpose of Article 87(1) EC.

(iii) Risk of distortion of competition

149. Finally, a measure falls within the scope of Article 87(1) EC only if it distorts or

threatens to distort competition. For that purpose, it is unnecessary to prove actual distortion of competition, but only to examine whether the measure is liable to distort competition.¹¹⁵

150. In principle, aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition.¹¹⁶ It is not necessary to carry out an economic analysis of the actual situation on the relevant market or to show the real effect of the aid at issue on prices.¹¹⁷

151. Tax legislation such as that of Sardinia spares resident undertakings from the tax on

113 — *Commission v Italy and WAM*, cited in footnote 111, paragraph 51; see, to the same effect, *Heiser*, cited in footnote 87, paragraph 35, and *Portugal v Commission*, cited in footnote 93, paragraph 91.

114 — See paragraphs 48 to 53 above, and — specifically in a cross-border context — paragraphs 40 to 45 above.

115 — See the cases cited in footnote 111 above.

116 — *Germany v Commission*, cited in footnote 87, paragraph 30; *Heiser*, cited in footnote 87, paragraph 55; and *Commission v Italy and WAM*, cited in footnote 111, paragraph 54.

117 — *Commission v Italy and WAM*, cited in footnote 111, paragraph 58.

stopovers for tourist purposes by private aircraft and recreational craft. Therefore undertakings established in Sardinia do not have to bear, in the course of their normal business activities, a cost to which all other undertakings which have their tax domicile outside Sardinia are subject when their private aircraft and recreational craft stop over in Sardinia.

be said to be irrelevant, even taking into account their general tax burden.¹²⁰

152. In view of the amount of the regional tax, which may be up to EUR 1 000 per stopover for aircraft and up to EUR 15 000 per year for boats,¹¹⁸ the cost benefit for resident, compared with non-resident, undertakings is not exactly trivial. For non-residents it is correspondingly more difficult than for residents to use their private aircraft and recreational craft in order to provide or receive services in Sardinia.¹¹⁹

154. Overall, therefore, tax provisions such as those adopted by Sardinia are likely to lead to the distortion of competition for the purpose of Article 87(1) EC.

3. Summary concerning the second and fourth questions referred

155. To sum up, therefore, it must be stated that:

153. As I have already said in relation to the first and third questions referred, that cost advantage for resident undertakings cannot

Regional legislation such as that of the Autonomous Region of Sardinia, which imposes a tax on stopovers for tourist purposes by aircraft and recreational craft only on undertakings which have their tax domicile outside that region constitutes aid within the meaning of Article 87(1) EC in favour of undertakings carrying out the same activity and having their tax domicile within that region.

¹¹⁸ — For the detailed provisions, see Article 4(5) in conjunction with (4) of Regional Law No 4/2006, set out in paragraph 14 above.

¹¹⁹ — See also paragraphs 52 and 53 above.

¹²⁰ — See paragraphs 83 to 89 and 98 to 102 above.

VI — Conclusion

156. Against the background of the foregoing observations, I propose that the Court should reply to the questions referred to it by the Italian Constitutional Court as follows:

- (1) Article 49 EC precludes legislation of an autonomous region under which a tax, based principally on environmental policy, on stopovers for tourist purposes by aircraft and recreational craft is imposed only on undertakings which have their tax domicile outside that region, but not on undertakings which have their tax domicile within that region.

- (2) Regional legislation such as that of the Autonomous Region of Sardinia, which imposes a tax on stopovers for tourist purposes by aircraft and recreational craft only on undertakings which have their tax domicile outside that region constitutes aid within the meaning of Article 87(1) EC in favour of undertakings carrying out the same activity and having their tax domicile within that region.