JUDGMENT OF THE COURT (Sixth Chamber)
17 July 1997 *

In Case C-242/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Østre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

GT-Link A/S

and

De Danske Statsbaner (DSB)

on the interpretation of Articles 9 to 13, 84, 86, 90 and 95 of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray and P. J. G. Kapteyn (Rapporteur), Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

* Language of the case: Danish.

after considering the written observations submitted on behalf of:

— GT-Link A/S, by Anders Torbøl, of the Copenhagen Bar,

— De Danske Statsbaner (DSB), by Ulrik Lett and Anne Rubach-Larsen, of the Copenhagen Bar,

— the Commission of the European Communities, by Hans Peter Hartvig, Legal Adviser, Anders Christian Jessen, Enrico Traversa and Richard Lyal, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of GT-Link A/S and the Commission at the hearing on 9 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1997,

gives the following

Judgment

1 By order of 30 June 1995, received at the Court on 11 July 1995, the Østre Landsret referred to the Court for a preliminary ruling under Article 177 of the EC Treaty several questions on the interpretation of Articles 9 to 13, 84, 86, 90 and 95 of the EEC Treaty.

2 Those questions were raised in proceedings between GT-Link A/S, a Danish limited company which has operated ferry services since 1987 between Gedser (Denmark) and Travemünde (former West Germany) and since 1990 between Gedser and Rostock (former East Germany), and De Danske Statsbaner, the Danish national railway company ('DSB'), concerning the harbour duties which DSB charged GT-Link for the use of the port of Gedser, owned by DSB. In addition to rail transport, DSB, which belongs to the Danish State, operates ferry services out of its ports, including Gedser.

3 In Denmark, authorization to establish a commercial port, that is to say, a harbour used for the commercial transport of goods, vehicles and persons, is granted by the Minister for Transport. In accordance with the system of ownership and control, a distinction may be drawn between ports under local authority control, which are independent bodies answerable to the local authority, the port of Copenhagen, which has its own special legal status, the State-owned ports, operated either by the Ministry of Transport or by DSB, and private ports, which are operated by their owners in accordance with the conditions laid down in the relevant authorization.

4 Part of the ports' revenue comes from duties paid for their use by users. Thus shipping and goods duties must be paid for berthing, and for embarking and disembarking goods, vehicles or persons. Special duties are charged for the use of cranes, warehouses and storage facilities.

5 Under Law No 239 of 12 May 1976 on commercial ports (*Lovtidende* A of 1976, p. 587, 'the 1976 Law'), which applied until 31 December 1990, the competent minister, now the Minister for Transport, was responsible for setting the rate of shipping and goods duties after negotiations with the management of the commercial ports. It was ministerial practice to calculate the rates on the basis of the economic conditions obtaining in the 22 provincial ports regarded as being the most

important in terms of commercial traffic volume and to set them so as to enable the ports to cover their operating and maintenance expenditure and to ensure a reasonable degree of self-financing for necessary extensions and modernization.

6 The shipping and goods duties were set out in regulations for each port drawn up in accordance with the common regulations prepared by the competent minister for all commercial ports.

7 Under the regulations applicable at the material time, shipping duty was payable by all ships and craft and all floating installations berthing in the port or in the deep-water approach channels. It was calculated as a fixed amount according to deadweight tonnage or gross registered tonnage either each time the vessel put into port or as an amount payable monthly. Vessels of under 100 deadweight or gross registered tonnes were exempt from payment of shipping duty.

8 Goods duty was payable on all goods loaded, unloaded, or otherwise taken on board or landed within the port or in the deep-water approach channels. It represented a certain amount per tonne. There were exemptions and special rates for certain goods. In accordance with those rules, goods duty was to be paid by the vessel or its local agent before the ship's departure, but was ultimately borne by the recipient and sender respectively of the goods from whom reimbursement could be claimed.

9 During the period relevant to the case in the main proceedings, a surcharge of 40% was added to the goods duty levied on goods imported from abroad. It appears from the order for reference that that import surcharge of 40% was introduced in the context of a general adjustment to the level of port duties made in 1956 in the light of a report by the committee on rates of duty for ports and bridges set up by the Ministry of Public Works in 1954.

10 According to that committee, the increase considered necessary in the rates of duty should apply to both shipping and goods duties, but had 'to be made in such a way that its objective (increasing income for the ports) is not jeopardized through commercial traffic being totally or partially diverted from the ports with the result that goods are instead conveyed by road or rail'. The committee on rates of duty for ports and bridges therefore proposed, so far as goods duty was concerned, 'to concentrate on the turnover of foreign goods inasmuch as the greater part of the goods which are imported into Denmark are most naturally transported by sea and the danger that this business will be diverted from ports merely if the goods duty is increased can therefore to some extent be discounted'. The committee also considered that 'the most appropriate solution [was] that the extra revenue to be generated through goods duty should be derived exclusively from an increase in the duty on imported goods', since the duty on imported goods such as fertilizers and feedstuffs for agriculture and raw materials for industry was lower than duty on finished products and an increase in duty on those imports would therefore have a much more limited effect on those sectors than an increase in duty on exports. Finally, the risk of domestic traffic deserting the ports in favour of land transport led the committee on rates of duty for ports and bridges to suggest, on the one hand, exempting small craft from the proposed increase in shipping duty and, on the other, allowing vessels of up to 100 tonnes the lower rates usually allowed in respect of vessels of less than 100 tonnes.

11 The import surcharge of 40% was abolished by the Minister for Transport with effect from 1 April 1990.

12 Under Article 1(3) of the 1976 Law, the competent minister could decide to exempt certain ports from the application of the Law. That is what the minister did in respect of the ports belonging to DSB, including Gedser. However, by ministerial regulation those ports were made subject to similar rules which set harbour dues at the same level as those prevailing for the commercial ports to which the Law did apply.

13 Under the regulations applicable at the material time to the ports of Gedser and Rødby, also owned by DSB, shipping duty for ferry traffic consisted of a monthly charge on each vessel of 830 öre per deadweight or gross registered tonne, which conferred the right to unlimited docking during the month in question. Subject to two exceptions, goods duty came to 940 öre per tonne.

14 Those rules provided that in the case of goods conveyed by registered motor vehicles on ferry vessels operated by GT-Link on the Gedser-Travemünde route, goods duty was payable to DSB for the port of Gedser, on the basis of a weekly statement to be submitted by GT-Link. The regulations also provided for DSB's vessels, including hired vessels, to be exempt from payment of port duties, irrespective of whether they were used as signal vessels or otherwise. In addition, vessels belonging to Deutsche Fähregesellschaft Ostsee mbH (DFO), a subsidiary of Deutsche Bahn (DB), the German State railway, were also exempt from payment of port duties, just as DSB's vessels were exempt from paying those duties in ports belonging to DB.

15 GT-Link's right to use the port of Gedser derived from a contract it had with DSB. The contract provided that GT-Link was liable to pay shipping and goods duties to the port in accordance with the regulations in force.

16 By application lodged on 27 September 1989 at the Østre Landsret, GT-Link sought repayment from DSB of the sum of DKR 30 396 000 in respect of the total sum of port duties which it had paid between 18 February 1987 and 31 December

1989 or, in the alternative, reimbursement from DSB of the import surcharge paid over the same period, totalling DKR 6 016 000.

17 In support of its main claim, GT-Link argued that the port duties levied by DSB were contrary to Article 86 of the Treaty. It maintained that DSB, as the sole owner of the ports of Rødby and Gedser, occupied a dominant position on the relevant market, namely the supply of port services for ferries carrying road traffic between Denmark and Germany, and that DSB abused that dominant position by levying excessively high port duties, as was borne out, in GT-Link's view, by the accounts it had been obliged to reconstruct since DSB did not produce the relevant accounting documents concerning the operation of the port of Gedser. In support of its alternative claim, GT-Link submitted that the import surcharge of 40% of the goods duty was contrary either to Articles 9 to 13, or to Article 95, of the Treaty.

18 DSB denied that the port duties it levied were incompatible with Article 86 of the Treaty. First, it claimed not to occupy any dominant position on the market relevant for the main proceedings, which is the operation of transport terminals for sea, land and air travel between Germany, on the one hand, and Denmark and Sweden, on the other. It also maintained that GT-Link had not succeeded in demonstrating that the port duties were unreasonably high in relation to the services supplied, since the accounts it reconstructed were based on inaccuracies and in particular ignored the fact that levying port duties enables the owner of the port to secure sufficient revenue not only to cover the operating costs of the port, but also to finance renovation and renewal of port installations. Last, DSB argued that the port of Gedser was an undertaking covered by Article 90(2) of the Treaty and the port duties levied were necessary for performing the particular tasks assigned to it. With regard to GT-Link's alternative claim, DSB submitted that Articles 9 to 13 and 95 of the Treaty were not relevant, since port duties should be assessed in the light of the Title of the Treaty dealing with transport. In the alternative, it denied that the port duties in dispute were incompatible with Articles 9 to 13 or 95 of the Treaty.

19 Those were the circumstances in which the Østre Landsret decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is a special surcharge of 40% of a goods duty which, as described in this order for reference, is ordinarily levied for the use of ports authorized by the Danish Minister for Transport to operate as commercial ports to be regarded as coming under the EEC Treaty rules on the Customs Union, including Articles 9 to 13, or under Article 95 of that Treaty?

2. Are the EEC Treaty rules on the Customs Union, including Articles 9 to 13, or Article 95, to be understood as meaning that it is incompatible with those provisions to impose a special surcharge of 40% of the goods duty ordinarily levied if that surcharge is imposed exclusively on goods imported from outside Denmark?

3. If Question 2 is answered in the affirmative: under what conditions can such a duty be justified on the ground that it represents consideration for a service provided or on grounds of transport policy pursuant to the Title in the EEC Treaty dealing with transport?

4. If the special surcharge is held to be incompatible with the EEC Treaty, does that finding apply to the whole of that surcharge levied since the Member State's accession to the EEC Treaty or does it apply only to the increase in the surcharge which came into effect after that date?

5. Does Community law impose special requirements with regard to national rules on the burden of proving that the conditions of application of Article 86 of the EEC Treaty have been satisfied?

6. Where a public undertaking which owns and operates a commercial port occupies a dominant position, is the levying by the commercial port of the duties described above and laid down by the Minister for Transport for the use of public and private commercial ports capable of constituting an abuse of that position, contrary to Article 86 of the Treaty?

7. If Question 6 is answered in the affirmative: do the persons or undertakings on whom the duty was imposed have any right under Community law to seek reimbursement or compensation?

8. Where a public undertaking which owns and operates a commercial port occupies a dominant position, does the fact that the commercial port does not impose the port duties described in this order for reference on its own ferry route or on that of its cooperation partner constitute an abuse of that position?

9. If the answers to Questions 1, 2, 4, 6 and/or 8 are in the affirmative: are the particular duties and tasks assigned to the defendant capable of justifying its conduct in accordance with Article 90(2) of the Treaty?'

The first four questions

20 In its judgment of today in Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085 the Court ruled, in answer to questions identical to the first four questions referred by the same national court, that it is contrary to Article 95 of the Treaty for a Member State to impose a 40% import surcharge on a general duty levied on goods loaded, unloaded, or otherwise taken on board or landed within its ports or in the

deep-water approach channels to its ports where goods are imported by ship from another Member State.

21 The same answer must accordingly be given to the first four questions in this case.

Question 5

22 By this question, the national court seeks to ascertain whether Community law imposes specific obligations with regard to national rules concerning the burden of proving that the conditions for application of Article 86 of the Treaty have been satisfied.

23 The application of Article 86 of the Treaty by the national authorities is, in principle, governed by national procedural rules (Case C-60/92 *Otto* v *Postbank* [1993] ECR I-5683, paragraph 14).

24 In the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions or render virtually impossible or excessively difficult the exercise of rights conferred by Community law (see, in particular, Case C-312/93 *Peterbroeck* v *Belgian State* [1995] ECR I-4599, paragraph 12, and the cases cited).

25 In accordance with those principles, the Court has previously held, in connection with repayment of charges levied by a Member State in breach of Community law, that any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure that repayment is incompatible with Community law (Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, paragraph 14).

26 The same principles apply where it is necessary to prove breach of a provision of Community law which, like Article 86 of the Treaty, is capable of having direct effect.

27 Consequently, the reply to the fifth question must be that it is for the domestic legal order of each Member State to lay down the detailed procedural rules, including those relating to the burden of proof, governing actions for safeguarding rights which individuals derive from the direct effect of Article 86 of the Treaty, provided that such rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

Questions 6 and 8

28 By these two questions, which it is appropriate to consider together, the national court is asking in substance whether the fact that a public undertaking occupying a dominant position, and which owns and operates a commercial port, levies port duties such as those at issue in the main proceedings, or waives those charges on its own ferry services and reciprocally on those of some of its commercial partners, is capable of constituting an abuse of that dominant position contrary to Article 86 of the Treaty.

29 In order to answer those questions, it should first be noted that the order for reference states that DSB is a public undertaking responsible to the Danish Ministry of Transport and whose budget is governed by the Budget Law. Furthermore, DSB owns a number of commercial ports, including Gedser, from which its own ferries ply.

30 In addition, although the ports belonging to DSB are in principle exempt from application of the 1976 Law, pursuant to a decision of the Minister for Transport, it was by virtue of a ministerial regulation adopted by that same minister that the port duties in dispute were applied to the port of Gedser and that DSB's own ferry services and those of some of its trading partners were exempted from payment of those duties.

31 Finally, in their observations before both the Court of Justice and the national court, as summarized in the order for reference, the parties in the main proceedings discussed whether or not the level of port duties, as set by the Ministry of Transport, was reasonable.

32 Accordingly, in order to give a useful answer to the national court, it is necessary to consider whether the practices mentioned in the sixth and eighth questions are also compatible with Article 90(1) of the Treaty, which lays down the requirements to be observed by the Member States in enacting measures or maintaining them in force, especially as regards public undertakings.

33 The Court has previously had occasion to rule that any measure adopted by a Member State which maintains in force a statutory provision that creates a situation in which a public undertaking cannot avoid infringing Article 86 of the Treaty is incompatible with the rules of the Treaty (see, to that effect, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 27).

34 In particular, a Member State infringes the prohibitions laid down in Article 90(1) and Article 86 of the Treaty if, by adopting rules governing the port duties to be paid for the use of ports belonging to a public undertaking, it induces that undertaking to abuse the dominant position it occupies within the common market or a substantial part of it (see, to that effect, Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 43).

35 In that context it should be noted, first, that the Court has held that an undertaking which has a legal monopoly in a substantial part of the common market may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty (*Corsica Ferries*, paragraph 40, and the case-law referred to therein). Such is also the case where a public undertaking is the owner of a commercial port and on that ground has the sole right to levy in that port the duties payable for the use of port facilities.

36 Nevertheless, when considering the possibly dominant position of an undertaking within the common market or in a substantial part of it, the definition of the market is of fundamental significance, as the Court has emphasized on many occasions (see in particular Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775, paragraph 25), as is the delimitation of the substantial part of the common market in which the undertaking may be able to engage in abuses which hinder effective competition (see, *inter alia*, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 44).

37 As held in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, paragraph 15, regard must be had in that context to the volume of traffic in the port in question and its importance in relation to maritime import and export operations as a whole in the Member State concerned.

38 Second, it should be noted that, according to Article 86(a) and (c), an abuse of a dominant position may consist of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

39 The Court has ruled that 'unfair prices', for the purposes of Article 86(a), means prices which are excessive because they have no reasonable relation to the economic value of the service supplied (see, to that effect, *United Brands*, paragraph 250).

40 It is for the national court to establish whether that is true of the level of port duties in dispute in the main proceedings.

41 The fact that a public undertaking which owns and operates a commercial port waives those duties on its own ferry services and reciprocally on those of some of its trading partners is likewise capable of constituting an abuse, in so far as with regard to the public undertaking's other trading partners it involves application of dissimilar conditions to equivalent transactions, within the meaning of Article 86(c).

42 That would be the case as regards exemption of its own ferry services from payment of duties, if it appeared that in its accounts the public undertaking did not allocate a sum equivalent to the total sum of port duties ordinarily payable to that part of its activity concerned with operating ferry services. In the absence of transparent accounts, the fact that the prices charged for its ferry services are unusually low compared with those charged by competitor ferry companies could constitute evidence that there was no such allocation.

43 Reciprocal exemption of some of the public undertaking's trading partners from payment of the duties could constitute breach of Article 86(c) if it was clear that the total amount of the duties ordinarily payable by those partners for the use of the public undertaking's port facilities for a given period was higher than the amount ordinarily payable by that undertaking for the port services which were supplied to it over the same period in its trading partners' ports.

44 Third, Member States are liable under Articles 86 and 90(1) of the Treaty only if the abuse on the part of the public undertaking concerned was liable to affect trade between Member States. That does not mean that the abuse must actually have affected such trade: it is sufficient to establish that the conduct is capable of having such an effect (see *Höfner and Elser*, paragraph 32).

45 The Court has already held that abusive practices which, like those at issue in the main proceedings, affect undertakings providing transport by sea between two Member States, may affect trade between Member States (*Corsica Ferries*, paragraph 44).

46 In the light of those considerations, the reply to the sixth and eighth questions must be that where a public undertaking which owns and operates a commercial port occupies a dominant position in a substantial part of the common market, it is contrary to Article 90(1) in conjunction with Article 86 of the Treaty for that undertaking to levy port duties of an unreasonable amount pursuant to regulations adopted by the Member State to which it is answerable or for it to exempt from payment of those duties its own ferry services and, reciprocally, some of its trading partners' ferry services, in so far as such exemptions entail the application of

dissimilar conditions to equivalent services. It is for the national court to determine whether, having regard to the level of the duties and the economic value of the services supplied, the amount of duty is actually unfair. It is also for the national court to determine whether exempting its own ferry services, and reciprocally those of some of its trading partners, from payment of duties in fact amounts to the application of dissimilar conditions to equivalent services.

Question 9

47 By this question the national court is essentially asking whether Article 90(2) of the Treaty permits a public undertaking which owns and operates a commercial port to levy for the use of port facilities port duties which are contrary to Community law.

48 Article 90(2) provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules of the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance in law or in fact of the particular tasks assigned to them, subject however to the condition that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

49 Accordingly, for the derogation from the Treaty rules provided for in Article 90(2) to apply, it must first be established whether the undertaking in question has actually been entrusted with the operation of a service of general economic interest and, if so, whether application of the Treaty rules obstructs the performance of the particular task assigned to it.

50 Since Article 90(2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, there must be a strict definition of those undertakings which can take advantage of it (Case 127/73 *BRT* v *SABAM and NV Fonior* [1974] ECR 313, paragraph 19).

51 In Case 10/71 *Muller and Others* [1971] ECR 723, paragraph 11, the Court held that an undertaking which enjoys certain privileges for the accomplishment of the tasks entrusted to it by law, maintaining for this purpose close links with the public authorities, and which is responsible for ensuring the navigability of the State's most important waterway, may fall within the definition of an 'undertaking entrusted with the operation of services of general economic interest'.

52 It does not follow, however, that the operation of any commercial port constitutes the operation of a service of general economic interest or, in particular, that all the services provided in such a port amount to such a task.

53 In *Merci Convenzionali Porto di Genova*, paragraph 27, the Court held that dock work consisting of loading, unloading, transhipment, storage and general movement of goods or material of any kind is not necessarily of general economic interest exhibiting special characteristics compared with that of other economic activities.

54 Finally, even if it were possible to classify the mere provision of the port infrastructure as being of general economic interest within the meaning of Article 90(2),

the fact remains that there is no evidence in the order for reference or the observations submitted to the Court to suggest that application of Article 86 of the Treaty to the levying of port duties by DSB would be liable to obstruct the performance of such a task.

55 The answer to the ninth question is therefore that Article 90(2) of the Treaty does not permit a public undertaking which owns and operates a commercial port to levy for the use of port facilities duties which are contrary to Community law and which are not necessary to the performance of the particular task assigned to it.

Question 7

56 By this question the national court asks whether, if the duties at issue in the main proceedings are held to be incompatible with Article 90(1), read in conjunction with Article 86, Community law confers on persons or undertakings who have been required to pay such charges the right to claim reimbursement or compensation.

57 The first point to note in that context is that even within the framework of Article 90, Article 86 has direct effect and confers on individuals rights which the national courts must protect (Case 155/73 *Sacchi* [1974] ECR 409, paragraph 18, and *Merci Convenzionali Porto di Genova*, paragraph 23).

58 Second, the Court has consistently held (see, most recently, Joined Cases C-192/95 to C-218/95 *Comateb and Others* v *Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165, paragraph 20) that entitlement to repayment of charges levied by a Member State in breach of the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges. The Member State is therefore in principle required to repay charges levied in breach of Community law, except where it is established that the person required to pay such charges has actually passed them on to other persons (*Comateb*, paragraph 21, and cases cited therein).

59 The same reasoning applies in any event where duties are levied by a public undertaking which is responsible to the Danish Ministry of Transport and whose budget is governed by the Budget Law (see paragraph 29 of this judgment).

60 It should be emphasized, however, that traders may not be prevented from applying to the courts having jurisdiction, in accordance with the appropriate procedures of national law, and subject to the conditions laid down in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on (*Comateb*, paragraph 34).

61 In the light of those considerations the answer to the seventh question must be that persons or undertakings on whom duties incompatible with Article 90(1) in conjunction with Article 86 of the Treaty have been imposed by a public undertaking which is responsible to a national ministry and whose budget is governed by the Budget Law are in principle entitled to repayment of the duty unduly paid.

Costs

62 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to questions referred to it by the Østre Landsret by order of 30 June 1995, hereby rules:

1. **It is contrary to Article 95 of the EEC Treaty for a Member State to impose a 40% import surcharge on a general duty levied on goods loaded, unloaded, or otherwise taken on board or landed within its ports or in the deep-water approach channels to its ports where goods are imported by ship from another Member State.**

2. **It is for the domestic legal order of each Member State to lay down the detailed procedural rules, including those relating to the burden of proof, governing actions for safeguarding rights which individuals derive from the direct effect of Article 86 of the EEC Treaty, provided that such rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.**

3. **Where a public undertaking which owns and operates a commercial port occupies a dominant position in a substantial part of the common market, it is contrary to Article 90(1) in conjunction with Article 86 of the EEC Treaty for that undertaking to levy port duties of an unreasonable amount pursuant to regulations adopted by the Member State to which it is answerable or for it to exempt from payment of those duties its own ferry services and, reciprocally, some of its trading partners' ferry services, in so far as such exemptions entail the application of dissimilar conditions to equivalent services. It is for the national court to determine whether, having regard to the level of the duties and the economic value of the services supplied, the amount of duty is actually unfair. It is also for the national court to determine whether exempting its own ferry services, and reciprocally those of some of its trading partners, from payment of duties in fact amounts to the application of dissimilar conditions to equivalent services.**

4. **Article 90(2) of the Treaty does not permit a public undertaking which owns and operates a commercial port to levy for the use of port facilities duties which are contrary to Community law and which are not necessary to the performance of the particular task assigned to it.**

5. **Persons or undertakings on whom duties incompatible with Article 90(1) in conjunction with Article 86 of the Treaty have been imposed by a public undertaking which is responsible to a national ministry and whose budget is governed by the Budget Law are in principle entitled to repayment of the duty unduly paid.**

Mancini Murray Kapteyn

Delivered in open court in Luxembourg on 17 July 1997.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber