JUDGMENT OF THE COURT (Fifth Chamber)

27 November 2003 *

In Joined Cases C-34/01 to C-38/01,

REFERENCE to the Court under Article 234 EC by the Corte Suprema di Cassazione (Italy) for a preliminary ruling in the proceedings pending before that court between

Enirisorse SpA

and

Ministero delle Finanze,

on the interpretation of Article 12 of the EC Treaty (now, after amendment, Article 25 EC), Article 13 of the EC Treaty (repealed by the Treaty of Amsterdam), Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC), Article 93 of the EC Treaty (now Article 88 EC) and Article 95 of the EC Treaty (now, after amendment, Article 90 EC),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: P. Jann, acting for the President of the Fifth Chamber, C.W.A. Timmermans, A. Rosas, D.A.O. Edward and S. von Bahr (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Enirisorse SpA, by G. Guarino and A. Guarino, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Aiello, avvocato dello Stato,

— the Commission of the European Communities, by V. Di Bucci and L. Pignataro-Nolin, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Enirisorse SpA, represented by L. Malvezzi Campeggi, avvocato, of the Italian Government, represented by G. Aiello, and of the Commission, represented by V. Di Bucci and L. Pignataro-Nolin, at the hearing on 5 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 7 November 2002,

gives the following

Judgment

1 By five orders of 12 July 2000, received at the Court on 25 January 2001, the Corte Suprema di Cassazione (Supreme Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 12 of the EC Treaty (now, after amendment, Article 25 EC), Article 13 of the EC Treaty (repealed by the Treaty of Amsterdam), Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC), Article 92 of the EC Treaty (now, after amendment, Article 87 EC), Article 93 of the EC Treaty (now Article 88 EC) and Article 95 of the EC Treaty (now, after amendment, Article 90 EC).

2 Those questions were raised in proceedings between Enirisorse SpA and the Ministero delle Finanze (Ministry of Finance) concerning the payment of port charges demanded by the Ministry in respect of the loading and unloading of goods in the port of Cagliari in Sardinia (Italy).

The relevant provisions of national law

3 Law No 961 of 9 October 1967 (GURI No 272 of 30 October 1967) established the Aziende dei Mezzi Meccanici e dei Magazzini (undertakings responsible for technical equipment and warehouses, together 'Aziende' or 'Azienda' in the singular) in the ports of Ancona, Cagliari, Livorno, La Spezia, Messina and Savona (Italy). That law, as amended by Law No 494 of 10 October 1974 (GURI No 274 of 21 October 1974, p. 7190), provides for the constitution of the Aziende, their sphere of activity and the resources available to them.

4 The Aziende are public economic entities under the supervision of the Ministero della Marina Mercantile (Merchant Navy Ministry). Under Law No 961/67 they are responsible for the management of mechanical loading and unloading equipment, storage areas and other property, real and personal, owned by the State and used for the movement of goods. It is also their duty to see to the purchasing, maintaining, developing and improving of the property they manage and to carry on any other activity connected to the activities mentioned above.

5 The Aziende may be authorised to supply other commercial port services, to undertake the managing of equipment and plant not owned by the State and to perform duties entrusted to them by law in other ports forming part of the geographical area of the port in which they have their registered office.

6 The financial means available to the Aziende in the performance of their duties include receipts from the property they manage, including, according to the observations of the Italian Government, income they receive in respect of their commercial activities such as the loading and unloading of goods, and the funds derived from loans or other financial transactions.

7 All the costs of operating the plant are borne by the Aziende alone. On the other hand, the cost of installing new plant is normally borne by the Merchant Navy Ministry although, if their budget allows, the Aziende may bear the cost themselves.

8 Charges on the loading and unloading of goods were introduced in all Italian harbours in 1974, pursuant to Decree-Law No 47 of 28 February 1974 (GURI No 68 of 13 March 1974, p. 1749), converted into law with amendments by Law No 117 of 16 April 1974 (GURI No 115 of 4 May 1974, p. 3213). Those charges are paid into the public exchequer. They are applicable to goods carried by sea and by air.

9 The amount of those dues, which may not exceed ITL 90 per metric tonne of goods, is calculated and altered in respect of each port by decree of the President of the Republic, taking into account the nature of the goods and the average cost of managing the services.

10 In Decree-Law No 47/74 the legislature maintained the provision introduced by Law No 82 of 9 February 1963 reviewing maritime charges and dues (GURI No 52 of 23 February 1963), which provided for the application of a charge on goods loaded or unloaded in or in transit through the ports of Genoa, Naples, Livorno, Civitavecchia, Trieste, Savona and Brindisi (Italy).

11 Law No 355 of 5 May 1976 concerning the extension to the Aziende of the ports of Ancona, Cagliari, Livorno, La Spezia and Messina of certain benefits provided for for port authorities (GURI No 147 of 5 June 1976, p. 4382), provides that goods loaded or unloaded in those ports are to be subject to the charges provided

for by Law No 82 of 9 February 1963 ('port charges'). It states that two thirds of the proceeds of those charges are to be paid to the Aziende for the performance of their duties and the other third to the State.

12 Article 1 of the Decree of the President of the Republic of 12 May 1977 calculating the dues introduced by Law No 355/76 (GURI No 270 of 4 October 1977, p. 7175) fixes the scales applicable to the amount of the port charges. Those charges vary between ITL 15 to ITL 90 per metric tonne, depending on the goods concerned.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Using its own manpower and equipment, Enirisorse has loaded and unloaded domestic and foreign goods in the harbour of Cagliari without making use of the services of the Azienda operating in that port. After receiving several orders made by the Ministry of Finance for payment of the port charges provided for by Law No 355/76, it brought an action challenging those orders, and claiming inter alia that the Decree of the President of the Republic was unlawful in light of Community law.

14 Upon the Tribunale di Cagliari's (the Cagliari Regional Court's) having dismissed those challenges, Enirisorse lodged an appeal before the Corte di Appello di Cagliari (Court of Appeal, Cagliari, Italy). That appeal was rejected by judgment of that court of 11 March 1998, whereupon Enirisorse brought an appeal in cassation.

15 Before the Corte Suprema di Cassazione Enirisorse argued that the provisions of national law led to distortion of competition inasmuch as the port charges were payable even when the trader was not making use of the services of an Azienda, in

this case the Azienda of the port of Cagliari. It claimed that the legislation was contrary to Articles 86 and 90 of the Treaty. In its view, the fact of the Aziende's receiving a large part of the port charges amounted to State aid within the meaning of Articles 92 and 93 of the Treaty.

16 In the orders for reference the Corte Suprema di Cassazione states that the legislation in question is supposed, according to the court adjudicating on the substance, to compensate the authorities for the costs and expenses involved in providing public services for the handling of goods. That court considered that actual use of the handling services provided by the public undertaking was not necessary, since users benefited generally from that body's activities.

17 The national court seeks to ascertain whether the national legislation is incompatible not only with the provisions of Community law referred to by Enirisorse but also with Articles 12, 13, 30 and 95 of the Treaty.

18 Those were the circumstances in which the Corte Suprema di Cassazione decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

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

2. Irrespective of the reply to the preceding question, does allocation to such a public undertaking of a significant proportion of the proceeds from the dues amount to abuse of a dominant position as a result of a national legislative measure and is it therefore contrary to Articles 86 and 90 of the Treaty?

3. May the allocation to such an undertaking of a significant proportion of the abovementioned dues be defined as State aid, within the meaning of Article 92 of the Treaty, and does it therefore justify, where the Commission has not been notified or has not adopted a decision finding the aid incompatible with the common market, pursuant to Article 93, the exercise by the national court of the powers conferred on it — in accordance with the case-law of the Court of Justice — to ensure disapplication of illegal and/or incompatible aid?

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

5. If the provisions of national law should be in conflict with Community law, do the grounds of unlawfulness set out above, considered individually, affect the dues as a whole or only that portion allocated to the Azienda Mezzi Meccanici?'

19 By order of the President of the Court of 23 February 2001 Cases C-34/01 to C-38/01 were joined for the purposes of the written procedures, the oral procedure and the judgment.

Preliminary remarks

20 By its fifth question the national court asks whether, if the mechanism by which the dues are levied, considered in the light of the rules referred to in each of the foregoing questions, is found to be unlawful, that unlawfulness affects only a part of that mechanism, namely, the allocation to the Azienda of two thirds of the proceeds of the charges, or rather the charging mechanism as a whole, including the allocation and collection of the total amount of those charges. Given that the fifth question refers thus to the four earlier questions, it will not be answered separately but rather as those other questions are answered.

21 Since the provision at issue in the main proceedings relates to the allocation by the State to an undertaking of part of the proceeds of charges, it is necessary first to consider whether that measure is compatible with the rules of the Treaty on State aid and, in consequence, to answer the third question.

Concerning the third question

22 By its third question, read in the light of the fifth question, the national court is in essence asking whether the measure, by which a Member State allocates to a public undertaking a significant proportion of charges, such as the port charges at issue, does not amount to State aid within the meaning of Article 92 of the Treaty and whether, if the Commission has not been notified of that measure or has not given a decision under Article 93 of the Treaty regarding the compatibility of the aid with the common market, that court may exercise the powers conferred on it in order to ensure that aid which is unlawful and/or incompatible with the common market is disapplied. If the measure at issue should constitute aid which is unlawful or incompatible with the common market, the national court asks

whether that unlawfulness or incompatibility is confined to that part of the charges allocated to the public undertaking concerned or whether it does not extend to the collection from users of the part equivalent to the sum thus allocated, or whether it does not rather affect the charges as a whole.

23 Enirisorse and the Commission maintain that allocation of a significant proportion of the port charges to the Azienda of Cagliari amounts to State aid. In their opinion, it is a measure adopted in favour of an undertaking and affecting intra-Community trade; the aid is granted through State resources; it distorts or threatens to distort competition, since that Azienda is in competition with undertakings in other Member States, for example shipping companies, which intend to carry on those activities within the framework of a 'self-handling' system. In addition, among the competitors are private undertakings acting on behalf of others. Since the aid was not notified to the Commission it is unlawful aid which cannot, in the circumstances of the case, be justified by the derogation under Article 90(2) of the Treaty. The national court is therefore required to rule against the unlawful aid.

24 The Italian Government is of the view that the measure at issue does not affect trade between Member States, having regard to the limited volume of traffic in the ports concerned, particularly Portovesme in Sardinia (Italy), and that it does not therefore constitute State aid within the meaning of Article 92(1) of the Treaty. That Government emphasises, moreover, the social and economic purpose of the port charges, which is to ensure that the five ports in question should survive and remain in operation. It argues that if the costs of the handling service were to be borne in full by the actual users of the services the resulting prices, having regard to the high fixed costs and limited shipping traffic in those ports, would be too high for the traders. Finally, even if those charges should be considered to be State aid, the Italian Government maintains that they must be held to be compatible with the common market, in light of Article 92(3)(c) of the Treaty, since it is aid to facilitate the development of certain activity or certain economic areas within the meaning of that provision.

25 In order to answer the question referred, it is necessary to consider whether the various conditions concerning State aid set out in Article 92(1) of the Treaty are satisfied.

26 First, the aid must be granted by a Member State or through State resources. As regards port charges, that condition is fulfilled because the sums paid to the Aziende, a significant proportion of those charges, come out of the State budget and therefore constitute State resources.

27 Second, the State aid must be liable to affect trade between Member States.

28 It must be recalled that there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The 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 (see Case C-280/00 *Altmark Trans* [2003] ECR I-7747, paragraph 81). It is all the more probable that trade could be affected in the cases in the main proceedings because the port charges are allocated to an undertaking established in a port and paid by shipping companies in respect of the loading and unloading of goods, whatever their provenance.

29 Third, it must be possible to regard the aid as an advantage favouring the recipient undertaking and, fourth, that advantage must distort or threaten to distort competition.

30 It must be borne in mind that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained in normal market conditions are regarded as aid (*Altmark Trans*, cited above, paragraph 84).

31 On the other hand, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public-service obligations, so that those undertakings do not enjoy a real financial advantage and that the measure does not therefore have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty. However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (*Altmark Trans*, paragraphs 87 and 88).

32 First, the recipient undertaking must actually have public-service obligations to discharge, and the obligations must be clearly defined (*Altmark Trans*, paragraph 89).

33 The Court has earlier held that it does not follow from its case-law that the operation of any commercial port constitutes the operation of a service of general economic interest (Case C-242/95 *GT-Link* [1997] ECR I-4449, paragraph 52). Such activity does not therefore automatically involve the performance of public-service duties.

34 It is not clear from the documents forwarded to the Court by the Corte Suprema di Cassazione that public-service duties have been entrusted to the Aziende, and still less therefore that such duties have been clearly defined.

35 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid its conferring an economic advantage which may favour the recipient undertaking over competing undertakings (*Altmark Trans*, paragraph 90).

36 On that point the Italian Government states that the allocation of a major part of the port charges to the Aziende, together with the rates charged by the latter, is essential in order to maintain those rates at a level which the traders can bear. Furthermore, such allocation makes it possible for the ports concerned to continue to operate.

37 Those statements are not, however, sufficient to satisfy the abovementioned condition. In particular, they do not show of what exactly the supposed public service consists, or whether it concerns only loading and unloading in the ports in question, or whether services such as docking safety are also covered. Nor, moreover, do the Italian Government's observations give details of the cost of those services or of the assessment of the compensation which it is claimed is necessary.

38 On the other hand, the order for reference in this case, and the observations put before the Court by Enirisorse and the Commission, make it clear that the amount of the proceeds of the port charges paid to the Aziende does not reflect the costs actually incurred by the latter for the purposes of supplying their loading

and unloading services, since that amount is linked to the volume of goods transported by all users and shipped to the ports in question. In that way the amount paid varies with the level of activity in the port(s) concerned.

39 Such a system does not satisfy the requirement that compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations (see *Altmark Trans*, paragraph 92).

40 From the foregoing it follows that, if a measure concerning the allocation by a Member State of a significant proportion of charges, such as port charges, to a public undertaking is not linked to clearly defined public-service duties and/or if other conditions, such as those laid down in *Altmark Trans* and set out in paragraphs 32 to 35 above, are not complied with, that measure must be classified as State aid within the meaning of Article 92(1) of the Treaty in so far as it affects trade between Member States.

41 Additionally, the national court seeks to ascertain whether, in such circumstances, it is only the allocation of a proportion of the port charges to the undertaking concerned which must be disallowed or whether it is not the charging mechanism as a whole, including the levying from users of the part corresponding to amount so allocated which must be declared incompatible with the requirements of Article 92 of the Treaty.

42 According to the Court's settled case-law, as a result of the direct effect which the last sentence of Article 93(3) of the Treaty has been held to have the immediate enforceability of the prohibition on implementation referred to in that article extends to all aid which has been implemented without being notified (Case C-354/90 *Fédération nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs de Saumon* [1991]

ECR I-5505, paragraph 11). It is for the national courts to uphold the rights of the persons concerned in the event of a possible breach by the national authorities of the prohibition on putting aid into effect, taking all the consequential measures under national law as regards both the validity of decisions giving effect to aid measures and the recovery of the financial support granted (Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 30).

43 The Court has held that the concept of State aid includes not only certain parafiscal charges, depending on the use to which the revenue from those charges is put (see, inter alia, *Lornoy and Others*, paragraph 28), but also the collection of a contribution constituting a parafiscal charge (see Case C-72/92 *Scharbatke* [1993] ECR I-5509, paragraph 20).

44 One of the Court's recent decisions also makes it clear that where the method by which aid is financed, particularly by means of compulsory contributions, forms an integral part of the aid measure, consideration of the latter by the Commission must necessarily also take into account that method of financing the aid (Joined Cases C-261/01 and Case C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 49).

45 It follows that it is not only the allocation of a proportion of the port charges to the undertaking concerned that may constitute State aid incompatible with the common market but also the collection from users of the proportion corresponding to the sum so allocated and that, if that aid has not been notified, it is for the national court to take all measures necessary, under national law, to prevent both the allocation of a proportion of the charges to the recipient undertakings and the collection of that proportion of the charges.

46 However, even if the collection and allocation of a proportion of the charges — namely, the part paid to the Azienda — are unlawful, the remaining proportion of the charges paid into the Exchequer is not affected.

47 The answer to be given to the third question, read in conjunction with the fifth, must therefore be that:

— a measure by which a Member State allocates to a public undertaking a significant proportion of charges, such as the port charges at issue in the main proceedings, must be classified as State aid within the meaning of Article 92(1) of the Treaty, in so far as it affects trade between Member States, if:

— the allocation of the charges is not linked to clearly defined public-service duties, and/or

— the compensation allegedly necessary in order for those duties to be performed has not been calculated on the basis of parameters established in advance in an objective and transparent manner, so as to prevent that compensation from conferring an economic advantage which might favour the recipient undertaking over competing undertakings;

— not only the allocation of a proportion of the charges to a public undertaking, but also the collection from users of the proportion corresponding to the amount so allocated, may constitute State aid incompatible with the common market. If the aid has not been notified, it is for the national court to take all measures necessary, under its national law, to prevent both the allocation of

a proportion of the charges to the recipient undertakings and the collection of that proportion of the charges;

— the fact that the collection and allocation of a proportion of the charges may be unlawful concerns only that proportion of the charges paid to the public undertaking in question and does not affect the charges as a whole.

Concerning the first and second questions

48 By its first and second questions, which must be dealt with together, the national court seeks in substance to ascertain whether the allocation to a public undertaking of a significant proportion of charges, such as the port charges at issue in the main proceedings, constitutes a measure, within the meaning of Article 90(1) of the Treaty liable to give rise to abuse of a dominant position contrary to Article 86 thereof and falling outside the derogation provided for by Article 90(2) of the Treaty.

49 The national court also questions whether a charging mechanism such as that at issue in the main proceedings is compatible, not only with the competition rules applicable to State aid, which form the subject-matter of the third question considered above, but also with those applicable to undertakings, contained in Articles 86 and 90 of the Treaty.

50 Although the fact that allocation by the State to a public undertaking of a significant proportion of certain charges constitutes State aid does not preclude that allocation from also giving rise to abuse of a dominant position by that

undertaking, contrary to Articles 86 and 90 of the Treaty, the fact remains that the only grounds of challenge set out in the cases in the main proceedings relate to the effects on competition caused by the levying and allocation by the State of the port charges.

51 No other effect on competition has been put forward; in particular no interference with competition as a result of any action by the public undertaking itself has been alleged.

52 That being so, there is no need to give an answer to the first and second questions concerning the application of the competition rules laid down in Articles 86 and 90 of the Treaty.

Concerning the fourth question

53 By its fourth question, read in conjunction with the fifth, the national court seeks in substance to ascertain whether a measure by which a Member State provides for the collection of charges, such as the port charges at issue in the main proceedings, and allocation to a public undertaking of a significant proportion of the proceeds of those charges, where such payment does not correspond to a service actually rendered by that undertaking, constitute a charge having an effect equivalent to a customs duty on imports contrary to Article 12 of the Treaty, or discriminatory internal taxation contrary to Article 95 of the Treaty, or a barrier to imports prohibited by Article 30 of the Treaty, and whether infringement of Community law affects the charges in their entirety.

54 The national court considers that the collection of a significant proportion of the port charges when the sum thus collected does not correspond to any service actually performed by the public undertaking that receives that sum might constitute a barrier to imports contrary to Article 30 of the Treaty.

55 The national court states that it is not unaware of the fact that Article 30 of the Treaty does not apply to parafiscal charges in so far as other provisions of the Treaty are applicable, that is to say, Article 12, concerning charges having effect equivalent to customs duties or Article 95, concerning internal taxation. Nonetheless, it points out that the Court's judgments in this field have dealt with cases in which the parafiscal charges at issue entailed, at least in practice, inequality of treatment between domestic and imported goods, which is not the case in the disputes in the main proceedings. The national court asks whether, that being so, Article 30 of the Treaty can possibly be applicable.

56 It ought to be borne in mind that, in accordance with the Court's settled case-law, the scope of Article 30 does not include provisions of the Treaty relating to charges having effect equivalent to customs duties (Article 12 of the Treaty and Article 16 of the EC Treaty, repealed by the Treaty of Amsterdam) or relating to discriminatory internal taxation (Article 95 of the Treaty) (see inter alia, to this effect, Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraph 9; Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847), paragraph 20, and *Lornoy and Others*, paragraph 14).

57 The Court stated that it must first be considered whether a measure such as those described in the cases giving rise to the judgments in *Compagnie Commerciale de l'Ouest and Others* and *Lornoy and Others* falls within the scope of Article 12 or Article 95 of the Treaty, and only if the answer is in the negative need it be considered whether the measure under examination falls within the scope of Article 30 of the Treaty (see *Compagnie Commerciale de l'Ouest and Others*, paragraph 21, and *Lornoy and Others*, paragraph 15).

58 There is no need to draw a distinction between this case and those previously considered by the Court. If it seems that the port charges fall within the scope of Article 12 or Article 95 of the Treaty, it is one or other of those provisions that will apply and not Article 30 of the Treaty. If those charges should prove not to constitute an impediment prohibited by Article 12 or 95, the result would not, contrary to the national court's premiss, be that those charges automatically fell within the ambit of Article 30.

59 It must furthermore be borne in mind that, according to established case-law, the provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that the same charge cannot, under the system established by the Treaty, belong to both those categories at the same time (see, in particular, Case C-234/99 *Nygård* [2002] ECR I-3657, paragraph 17, and the case-law quoted there, and Case C-101/00 *Tulliasiamies and Siilin* [2002] ECR I-7487, paragraph 115).

60 In the present case, since the port charges are not collected on, or because of, the import of goods and since they are not intended exclusively to support activities which benefit domestic goods, they do not fall within the ambit of Article 12 of the Treaty (see *Lornoy*, paragraphs 17 and 18). On the other hand, in so far as they apply to all goods loaded or unloaded in the port concerned, the port charges are such as to constitute internal taxation within the meaning of Article 95 of the Treaty. Inasmuch as those charges, as the order for reference makes clear, entail no inequality of treatment unfavourable to imported goods, it follows that neither those charges themselves, nor their collection and allocation, are contrary to Article 95.

61 The judgment in Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni and Others* [1993] ECR I-6621, referred to by the national court, does not contradict the reasoning above, for in the case giving rise to that judgment the Court had not been asked whether any impediment fell within the scope of Article 12 or 95 of the Treaty or of Article 30 thereof, and it had no need to consider such a question. The point at issue in that case was a prohibition imposed on an importer of fresh meat from using its own means to transport and

deliver its goods within the territory of a municipality, unless it paid a local undertaking, which held an exclusive concession for the handling of goods in the municipal slaughterhouse and their transport and delivery, the amount corresponding to the services provided (see *Ligur Carni and Others*, paragraph 33). The contested sums were thus paid directly to an undertaking and did not, unlike the sums at issue here in the main proceedings, constitute charges paid to the State.

62 In light of the foregoing considerations, the answer to be given to the fourth question must be that charges, such as the port charges at issue in the main proceedings, constitute internal taxation within the meaning of Article 95 of the Treaty not falling within the ambit of Article 12 or Article 30 of the Treaty. In the absence of any unequal treatment discriminating against goods from other Member States, the measure by virtue of which a Member State provides for the collection of those charges and the allocation of a significant proportion thereof to a public undertaking, when the sum so allocated corresponds to a service actually provided by that undertaking, does not infringe Article 95.

63 There is accordingly, in the context of the fourth question, no need to reply to the fifth.

Costs

64 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Corte Suprema di Cassazione by orders of 12 July 2000, hereby rules:

1. A measure by which a Member State allocates to a public undertaking a significant proportion of charges, such as the port charges at issue in the main proceedings, must be classified as State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), in so far as it affects trade between Member States, if:

— the allocation of the charges is not linked to clearly defined public-service duties, and/or

— the compensation allegedly necessary in order for those duties to be performed has not been calculated on the basis of parameters established in advance in an objective and transparent manner, so as to prevent that compensation from conferring an economic advantage which might favour the recipient undertaking over competing undertakings.

Not only the allocation of a proportion of the charges to a public undertaking, but also the collection from users of the proportion cor-

responding to the amount so allocated, may constitute State aid incompatible with the common market. If the aid has not been notified, it is for the national court to take all measures necessary, under its national law, to prevent both the allocation of a proportion of the charges to the recipient undertakings and the collection of that proportion of the charges;

The fact that the collection and allocation of a proportion of the charges may be unlawful concerns only that proportion of the charges paid to the public undertaking in question and does not affect the charges as a whole.

2. Charges, such as the port charges at issue in the main proceedings, constitute internal taxation within the meaning of Article 95 of the EC Treaty (now, after amendment, Article 90 EC) not falling within the ambit of Article 12 or Article 30 of the EC Treaty (now, after amendment, Articles 25 EC and 28 EC). In the absence of any unequal treatment discriminating against goods from other Member States, the measure by virtue of which a Member State provides for the collection of those charges and the allocation of a significant proportion thereof to a public undertaking, when the sum so allocated corresponds to a service actually provided by that undertaking, does not infringe Article 95.

Jann Timmermans Rosas

Edward von Bahr

Delivered in open court in Luxembourg on 27 November 2003.

R. Grass V. Skouris

Registrar President