JUDGMENT OF THE COURT (Grand Chamber)

11 December 2007 *

In Case C-438/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 23 November 2005, received at the Court on 6 December 2005, in the proceedings

International Transport Workers' Federation,

Finnish Seamen's Union,

v

Viking Line ABP,

OÜ Viking Line Eesti,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, A. Rosas, K. Lenaerts, U. Lõhmus and L. Bay Larsen, Presidents of Chambers, R. Schintgen (Rapporteur), R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, P. Kūris, E. Levits and A. Ó Caoimh, Judges,

Advocate General: M. Poiares Maduro,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 January 2007,

after considering the observations submitted on behalf of:

— International Transport Workers' Federation, by M. Brealey QC and M. Demetriou, Barrister, instructed by D. Fitzpatrick, Solicitor,

— Finnish Seamen's Union, by M. Brealey QC and M. Demetriou, Barrister, instructed by J. Tatten, Solicitor,

— Viking Line ABP and OÜ Viking Line Eesti, by M. Hoskins, Barrister, instructed by I. Ross and J. Blacker, Solicitors,

— the United Kingdom Government, by E. O'Neill, acting as Agent, and by D. Anderson QC, J. Swift and S. Lee, Barristers,

— the Belgian Government, by A. Hubert, acting as Agent,

— the Czech Government, by T. Boček, acting as Agent,

— the Danish Government, by J. Molde, acting as Agent,

— the German Government, by M. Lumma and C. Schulze-Bahr, acting as Agents,

— the Estonian Government, by L. Uibo, acting as Agent,

— the French Government, by G. de Bergues and O. Christmann, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, and by E. Fitzsimons and B. O'Moore, SC, and N. Travers, BL,

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

— the Latvian Government, by E. Balode-Buraka and K. Bārdiņa, acting as Agents,

— the Austrian Government, by C. Pesendorfer and G. Hesse, acting as Agents,

— the Polish Government, by J. Pietras and M. Korolec, acting as Agents,

— the Finnish Government, by E. Bygglin and A. Guimaraes-Purokoski, acting as Agents,

— the Swedish Government, by A. Kruse and A. Falk, acting as Agents,

— the Norwegian Government, by K. Waage, K. Fløistad and F. Sejersted, acting as Agents,

— the Commission of the European Communities, by F. Benyon, J. Enegren and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 May 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation first, of Article 43 EC, and secondly, 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).

2 The reference has been made in connection with a dispute between the International Transport Workers' Federation ('ITF') and the Finnish Seamen's Union (Suomen Merimies-Unioni ry, 'FSU'), on the one hand, and Viking Line ABP ('Viking') and its subsidiary OÜ Viking Line Eesti ('Viking Eesti'), on the other, concerning actual or threatened collective action liable to deter Viking from reflagging one of its vessels from the Finnish flag to that of another Member State.

Legal context

Community law

3 Article 1(1) of Regulation No 4055/86 provides:

'Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'

National law

4 According to the order for reference, Article 13 of the Finnish constitution, which confers on all individuals the freedom to form trade unions and freedom of association in order to safeguard other interests, has been interpreted as allowing trade unions to initiate collective action against companies in order to defend workers' interests.

5 In Finland, however, the right to strike is subject to certain limitations. Thus, according to Finland's Supreme Court, it may not be relied on, inter alia, where the strike is *contra bonos mores* or is prohibited under national law or under Community law.

The dispute in the main proceedings and questions referred

6 Viking, a company incorporated under Finnish law, is a large ferry operator. It operates seven vessels, including the *Rosella* which, under the Finnish flag, plies the route between Tallinn (Estonia) and Helsinki (Finland).

7 FSU is a Finnish union of seamen which has about 10 000 members. The crew of the *Rosella* are members of the FSU. FSU is affiliated to the ITF, which is an international federation of transport workers' unions with its headquarters in London (United Kingdom). The ITF groups together 600 unions in 140 different States.

8 According to the order for reference, one of the principal ITF policies is its 'Flag of Convenience' ('FOC') policy. The primary objectives of this policy are, on the one hand, to establish a genuine link between the flag of the ship and the nationality of the owner and, on the other, to protect and enhance the conditions of seafarers on FOC ships. ITF considers that a vessel is registered under a flag of convenience where the beneficial ownership and control of the vessel is found to lie in a State other than the State of the flag. In accordance with the ITF policy, only unions established in the State of beneficial ownership have the right to conclude collective agreements covering the vessel concerned. The FOC campaign is enforced by boycotts and other solidarity actions amongst workers.

9 So long as the *Rosella* is under the Finnish flag, Viking is obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the same level as those applicable in Finland. Estonian crew wages are lower than Finnish crew wages. The *Rosella* was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it by registering it in either Estonia or Norway, in order to be able to enter into a new collective agreement with a trade union established in one of those States.

10 In accordance with Finnish law, Viking gave notice of its plans to the FSU and to the crew of the *Rosella*. During meetings between the parties, FSU made clear that it was opposed to those plans.

11 On 4 November 2003, FSU sent an email to ITF which referred to the plan to reflag the *Rosella*. The email further stated that 'the *Rosella* was beneficially owned in

Finland and that FSU therefore kept the right to negotiate with Viking'. FSU asked ITF to pass this information on to all affiliated unions and to request them not to enter into negotiations with Viking.

12 On 6 November 2003, ITF sent a circular ('the ITF circular') to its affiliates asking them to refrain from entering into negotiations with Viking or Viking Eesti. The affiliates were expected to follow this recommendation because of the principle of solidarity between trade unions and the sanctions which they could face if they failed to comply with that circular.

13 The manning agreement for the *Rosella* expired on 17 November 2003 and therefore FSU was, as from that date, no longer under an obligation of industrial peace under Finnish law. Consequently, it gave notice of a strike requiring Viking, on the one hand, to increase the manning on the *Rosella* by eight and, on the other, to give up its plans to reflag the *Rosella*.

14 Viking conceded the extra eight crew but refused to give up its plans to reflag.

15 FSU was still not prepared, however, to agree to a renewal of the manning agreement and, by letter of 18 November 2003, it indicated that it would only accept such renewal on two conditions: first, that Viking, regardless of a possible change of the *Rosella*'s flag, gave an undertaking that it would continue to follow Finnish law, the collective bargaining agreement, the general agreement and the manning agreement on the Rosella and, second, that the possible change of flag would not lead to any laying-off of employees on any Finnish flag vessel belonging to Viking, or to changes

to the terms and conditions of employment without the consent of the employees. In press statements FSU justified its position by the need to protect Finnish jobs.

16 On 17 November 2003, Viking started legal proceedings before the employment tribunal (Finland) for a declaration that, contrary to the view of the FSU, the manning agreement remained binding on the parties. On the basis of its view that the manning agreement was at an end, FSU gave notice, in accordance with Finnish law on industrial dispute mediation, that it intended to commence strike action in relation to the *Rosella* on 2 December 2003.

17 On 24 November 2003, Viking learnt of the existence of the ITF circular. The following day it brought proceedings before the Court of First Instance of Helsinki (Finland) to restrain the planned strike action. A preparatory hearing date was set for 2 December 2003.

18 According to the referring court, FSU was fully aware of the fact that its principal demand, that in the event of reflagging the crew should continue to be employed on the conditions laid down by Finnish law and the applicable collective agreement, would render reflagging pointless, since the whole purpose of such reflagging was to enable Viking to reduce its wage costs. Furthermore, a consequence of reflagging the *Rosella* to Estonia would be that Viking would, at least as regards the *Rosella*, no longer be able to claim State aid which the Finnish Government granted to Finnish flag vessels.

19 In the course of conciliation proceedings, Viking gave an undertaking, at an initial stage, that the reflagging would not involve any redundancies. Since FSU nevertheless refused to defer the strike, Viking put an end to the dispute on

2 December 2003 by accepting the trade union's demands and discontinuing judicial proceedings. Furthermore, it undertook not to commence reflagging prior to 28 February 2005.

20 On 1 May 2004, the Republic of Estonia became a member of the European Union.

21 Since the *Rosella* continued to run at a loss, Viking pursued its intention to reflag the vessel to Estonia. Because the ITF circular remained in force, on account of the fact that the ITF had never withdrawn it, the request to affiliated unions from the ITF in relation to the *Rosella* consequently remained in effect.

22 On 18 August 2004, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) (United Kingdom), requesting it to declare that the action taken by ITF and FSU was contrary to Article 43 EC, to order the withdrawal of the ITF circular and to order FSU not to infringe the rights which Viking enjoys under Community law.

23 By decision of 16 June 2005, that court granted the form of order sought by Viking, on the grounds that the actual and threatened collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to Article 43 EC and, in the alternative, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Articles 39 EC and 49 EC.

24 On 30 June 2005, ITF and FSU brought an appeal against that decision before the referring court. In support of their appeal they claimed, inter alia, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title XI of the EC Treaty and, in particular, Article 136 EC, the first paragraph of which provides that '[t]he Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'.

25 It was argued that the reference to the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers incorporated a reference to the right to strike recognised by those legal instruments. Consequently, the trade unions had the right to take collective action against an employer established in a Member State to seek to persuade him not to move part or all of his undertaking to another Member State.

26 The question therefore arises whether the Treaty intends to prohibit trade union action where it is aimed at preventing an employer from exercising his right of establishment for economic reasons. By analogy with the Court's rulings regarding Title VI of the Treaty (Case C-67/96 *Albany* [1999] ECR I-5751; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451; and Case C-222/98 *Van der Woude* [2000] ECR I-7111), it is argued that Title III of the Treaty and the articles relating to free movement of persons and of services do not apply to 'genuine trade union activities'.

27 In those circumstances, since it considered that the outcome of the case before it depended on the interpretation of Community law, the Court of Appeal (England and Wales) (Civil Division) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'*Scope of the free movement provisions*

(1) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action fall outside the scope of Article 43 EC and/or Regulation No 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in ... *Albany* (paragraphs 52 to 64)?

Horizontal direct effect

(2) Do Article 43 EC and/or Regulation No 4055/86 have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against another private party and, in particular, a trade union or association of trade unions in respect of collective action by that union or association of unions?

Existence of restrictions on free movement

(3) Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 EC and/or Regulation No 4055/86?

(4) Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86?

(5) In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 EC or Regulation No 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?

Establishment/services

(6) Where a parent company is established in Member State A and intends to undertake an act of establishment by reflagging a vessel to Member State B to be operated by an existing wholly owned subsidiary in Member State B which is subject to the direction and control of the parent company:

(a) is threatened or actual collective action by a trade union or association of trade unions which would seek to render the above a pointless exercise capable of constituting a restriction on the parent company's right of establishment under Article 43, and

(b) after reflagging of the vessel, is the subsidiary entitled to rely on Regulation No 4055/86 in respect of the provision of services by it from Member State B to Member State A?

Justification

Direct discrimination

(7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 EC or Regulation No 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 EC on the basis that:

(a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or

(b) the protection of workers?

The policy of [ITF]: objective justification

(8) Does the application of a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services, and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

FSU's actions: objective justification

(9) Where:

— a parent company in Member State A owns a vessel flagged in Member State A and provides ferry services between Member State A and Member State B using that vessel;

— the parent company wishes to re-flag the vessel to Member State B to apply terms and conditions of employment which are lower than in Member State A;

— the parent company in Member State A wholly owns a subsidiary in Member State B and that subsidiary is subject to its direction and control;

— it is intended that the subsidiary will operate the vessel once it has been re-flagged in Member State B with a crew recruited in Member State B covered by a collective bargaining agreement negotiated with an ITF affiliated trade union in Member State B;

— the vessel will remain beneficially owned by the parent company and be bareboat chartered to the subsidiary;

— the vessel will continue to provide ferry services between Member State A and Member State B on a daily basis;

— a trade union established in Member State A takes collective action so as to require the parent and/or subsidiary to enter into a collective bargaining agreement with it which will apply terms and conditions acceptable to the union in Member State A to the crew of the vessel even after reflagging and which has the effect of making it pointless for the parent to re-flag the vessel to Member State B,

does that collective action strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition?

(10) Would it make any difference to the answer to [Question] 9 if the parent company provided an undertaking to a court on behalf of itself and all the companies within the same group that they will not by reason of the reflagging terminate the employment of any person employed by them (which undertaking did not require the renewal of short term employment contracts or prevent the redeployment of any employee on equivalent terms and conditions)?'

The questions referred

Preliminary observations

28 It must be borne in mind that, in accordance with settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 234 EC, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. However, the Court has regarded itself as not having jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious, inter alia, that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical (see Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 43).

29 In the present case, the reference for a preliminary ruling concerns the interpretation, first, of provisions of the Treaty on freedom of establishment, and secondly, of Regulation No 4055/86 applying the principle of freedom to provide services to maritime transport.

30 However, since the question on freedom to provide services can arise only after the reflagging of the *Rosella* envisaged by Viking, and since, on the date on which the questions were referred to the Court, the vessel had not yet been re-flagged, the reference for a preliminary ruling is hypothetical and thus inadmissible in so far as it relates to the interpretation of Regulation No 4055/86.

31 In those circumstances, the questions referred by the national court can be answered only in so far as they concern the interpretation of Article 43 EC.

The first question

32 By its first question, the national court is essentially asking whether Article 43 EC must be interpreted as meaning that collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, falls outside the scope of that article.

33 In this regard, it must be borne in mind that, according to settled case-law, Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public

authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services (see Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17; Case 13/76 *Donà* [1976] ECR 1333, paragraph 17; *Bosman*, paragraph 82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraph 47; Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 31; and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 120).

34 Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application (see, by analogy, *Walrave and Koch*, paragraph 19; *Bosman*, paragraph 84; and *Angonese*, paragraph 33).

35 In the present case, it must be stated, first, that the organisation of collective action by trade unions must be regarded as covered by the legal autonomy which those organisations, which are not public law entities, enjoy pursuant to the trade union rights accorded to them, inter alia, by national law.

36 Secondly, as FSU and ITF submit, collective action such as that at issue in the main proceedings, which may be the trade unions' last resort to ensure the success of their claim to regulate the work of Viking's employees collectively, must be considered to be inextricably linked to the collective agreement the conclusion of which FSU is seeking.

37 It follows that collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article 43 EC.

38 This view is not called into question by the various arguments put forward by FSU, ITF and certain Member States which submitted observations to the Court to support the position contrary to that set out in the previous paragraph.

39 First of all, the Danish Government submits that the right of association, the right to strike and the right to impose lock-outs fall outside the scope of the fundamental freedom laid down in Article 43 EC since, in accordance with Article 137(5) EC, as amended by the Treaty of Nice, the Community does not have competence to regulate those rights.

40 In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law (see, by analogy, in relation to social security, Case C-120/95 *Decker* [1998] ECR I-1831, paragraphs 22 and 23, and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 18 and 19; in relation to direct taxation, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21, and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29).

41 Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC.

42 Next, according to the observations of the Danish and Swedish Governments, the right to take collective action, including the right to strike, constitutes a fundamental right which, as such, falls outside the scope of Article 43 EC.

43 In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the Member States have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 — to which, moreover, express reference is made in Article 136 EC — and Convention No 87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation — and by instruments developed by those Member States at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

44 Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is *contra bonos mores* or is prohibited under national law or Community law.

45 In that regard, the Court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see Case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).

46 However, in *Schmidberger* and *Omega*, the Court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

47 It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings.

48 Finally, FSU and ITF submit that the Court's reasoning in *Albany* must be applied by analogy to the case in the main proceedings, since certain restrictions on freedom of establishment and freedom to provide services are inherent in collective action taken in the context of collective negotiations.

49 In that regard, it should be noted that in paragraph 59 of *Albany*, having found that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers, the Court nevertheless held that

the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the EC Treaty (now, Article 81(1) EC) when seeking jointly to adopt measures to improve conditions of work and employment.

50 The Court inferred from this, in paragraph 60 of *Albany*, that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) of the Treaty.

51 The Court must point out, however, that that reasoning cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty.

52 Contrary to the claims of FSU and ITF, it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree.

53 Furthermore, the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances (see, to that effect, Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991).

54 Finally, the Court has held that the terms of collective agreements are not excluded from the scope of the Treaty provisions on freedom of movement for persons (Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47; Case C-35/97 *Commission* v *France* [1998] ECR I-5325; and Case C-400/02 *Merida* [2004] ECR I-8471).

55 In the light of the foregoing, the answer to the first question must be that Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.

The second question

56 By that question, the referring court is asking in essence whether Article 43 EC is such as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

57 In order to answer that question, the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy (*Walrave and Koch*, paragraph 18; *Bosman*, paragraph 83; *Deliège*, paragraph 47; *Angonese*, paragraph 32; and *Wouters and Others*, paragraph 120).

58 Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively (see, to that effect, Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 31 and 39).

59 Such considerations must also apply to Article 43 EC which lays down a fundamental freedom.

60 In the present case, it must be borne in mind that, as is apparent from paragraphs 35 and 36 of the present judgment, the collective action taken by FSU and ITF is aimed at the conclusion of an agreement which is meant to regulate the work of Viking's employees collectively, and, that those two trade unions are organisations which are not public law entities but exercise the legal autonomy conferred on them, inter alia, by national law.

61 It follows that Article 43 EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, it may be relied on by a private undertaking against a trade union or an association of trade unions.

62 This interpretation is also supported by the case-law on the Treaty provisions on the free movement of goods, from which it is apparent that restrictions may be the

result of actions by individuals or groups of such individuals rather than caused by the State (see Case C-265/95 *Commission* v *France* [1997] ECR I-6959, paragraph 30, and *Schmidberger*, paragraphs 57 and 62).

63 The interpretation set out in paragraph 61 of the present judgment is also not called into question by the fact that the restriction at issue in the proceedings before the national court stems from the exercise of a right conferred by Finnish national law, such as, in this case, the right to take collective action, including the right to strike.

64 It must be added that, contrary to the claims, in particular, of ITF, it does not follow from the case-law of the Court referred to in paragraph 57 of the present judgment that that interpretation applies only to quasi-public organisations or to associations exercising a regulatory task and having quasi-legislative powers.

65 There is no indication in that case-law that could validly support the view that it applies only to associations or to organisations exercising a regulatory task or having quasi-legislative powers. Furthermore, it must be pointed out that, in exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements seeking to regulate paid work collectively.

66 In the light of those considerations, the answer to the second question must be that Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.

The third to tenth questions

67 By those questions, which can be examined together, the national court is essentially asking the Court of Justice whether collective action such as that at issue in the main proceedings constitutes a restriction within the meaning of Article 43 EC and, if so, to what extent such a restriction may be justified.

The existence of restrictions

68 The Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period. Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies or firms referred to in Article 48 EC (Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraph 15).

69 Furthermore, the Court has considered that, even though the provisions of the Treaty concerning freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which also comes within the definition contained in Article 48 EC. The rights guaranteed by Articles 43 EC to 48 EC would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State (*Daily Mail and General Trust*, paragraph 16).

70 Secondly, according to the settled case-law of the Court, the definition of establishment within the meaning of those articles of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes fixed establishment in the State of registration (Case C-221/89 *Factortame and Others* [1991] ECR I-3905, paragraphs 20 to 22).

71 The Court concluded from this that the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Articles 43 EC to 48 EC (*Factortame and Others*, paragraph 23).

72 In the present case, first, it cannot be disputed that collective action such as that envisaged by FSU has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.

73 Secondly, collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks, primarily, as is apparent from ITF's observations, to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

74 It follows that collective action such as that at issue in the main proceedings constitutes a restriction on freedom of establishment within the meaning of Article 43 EC.

Justification of the restrictions

75 It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Bosman*, paragraph 104).

76 ITF, supported, in particular, by the German Government, Ireland and the Finnish Government, maintains that the restrictions at issue in the main proceedings are justified since they are necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest.

77 In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, *Schmidberger*, paragraph 74) and that the protection of workers is one of the

overriding reasons of public interest recognised by the Court (see, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33).

78 It must be added that, according to Article 3(1)(c) and (j) EC, the activities of the Community are to include not only an 'internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', but also 'a policy in the social sphere'. Article 2 EC states that the Community is to have as its task, inter alia, the promotion of 'a harmonious, balanced and sustainable development of economic activities' and 'a high level of employment and of social protection'.

79 Since the Community has thus not only an economic but also a social purpose, the rights under the provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

80 In the present case, it is for the national court to ascertain whether the objectives pursued by FSU and ITF by means of the collective action which they initiated concerned the protection of workers.

81 First, as regards the collective action taken by FSU, even if that action — aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the *Rosella* — could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.

82 This would be the case, in particular, if it transpired that the undertaking referred to by the national court in its 10th question was, from a legal point of view, as binding as the terms of a collective agreement and if it was of such a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained.

83 In so far as the exact legal scope to be attributed to an undertaking such as that referred to in the 10th question is not clear from the order for reference, it is for the national court to determine whether the jobs or conditions of employment of that trade union's members who are liable to be affected by the reflagging of the *Rosella* were jeopardised or under serious threat.

84 If, following that examination, the national court came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU's members liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

85 In that regard, it must be pointed out that, even if it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it.

86 As regards the appropriateness of the action taken by FSU for attaining the objectives pursued in the case in the main proceedings, it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members (European Court of Human Rights, *Syndicat national de la police belge* v *Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others* v *United Kingdom* of 2 July 2002, 2002-V, § 44).

87 As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the objective pursued, it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action.

88 Secondly, in relation to the collective action seeking to ensure the implementation of the policy in question pursued by ITF, it must be emphasised that, to the extent that that policy results in shipowners being prevented from registering their vessels in a

State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified. Nevertheless, as the national court points out, the objective of that policy is also to protect and improve seafarers' terms and conditions of employment.

89 However, as is apparent from the file submitted to the Court, in the context of its policy of combating the use of flags of convenience, ITF is required, when asked by one of its members, to initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a higher level of social protection than they would enjoy in the first State.

90 In the light of those considerations, the answer to the third to tenth questions must be that Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

Costs

91 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.**

2. **Article 43 EC is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade unions.**

3. **Article 43 EC is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given Member State to enter**

into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that article.

That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

[Signatures]