EUROPEAN COMMISSION

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TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

WRITTEN OBSERVATIONS

Submitted pursuant to Article 23 of the Protocol of the Statute of the Court of Justice by the Commission of the European Communities, represented by Frank Benyon, its Principal Legal Adviser, Johan Enegren and Knut Simonsson, members of its Legal Service, acting as Agents, with an address for service at the office of Luis Escobar Guerrero, at the Centre Wagner, Kirchberg, Luxembourg,

in Case **C-438/05**

1) The International Transport Workers' Federation

2) The Finnish Seamen's Union

Appellants/Defendants

and

1) Viking Line ABP

2) OU Viking Line Eesti

Respondents/Claimants

in which the Court of Appeal has requested a preliminary ruling, pursuant to Article 234 EC, on the interpretation to be given to Article 43 EC and 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.

The Commission has the honour to submit the following written observations:

A. INTRODUCTION

1. In the present case the Court of Appeal has referred for a preliminary ruling under Article 234 EC a number of questions concerning the interpretation of Article 43 EC and 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[1].

2. Those questions have been raised in the proceedings before that court between the International Transport Workers' Federation ("ITF") and the Finnish Seamen's Union ("FSU"), of the one part, and Viking Line ABP ("Viking") and its subsidiary OU Viking Line Eesti ("Viking Eesti"), of the other, on appeal from the Commercial Court.

B. APPLICABLE COMMUNITY LAW

3. Article 43 EC provides:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital."

4. Article 1(1) of Regulation No 4055/86 reads:

> "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."

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[1] OJ 1986 L 378, p. 1.

C. THE FACTS IN THE MAIN PROCEEDINGS

5. The facts in the main proceedings can be summarised as follows.

6. Viking is a Finnish company and one of the largest passenger ferry operators in the world. It operates seven vessels, including the *Rosella*, which operates under the Finnish flag on the Tallinn-Helsinki route between Estonia and Finland.

7. The FSU is a national union representing seamen. It is based in Helsinki and has about 10.000 members. The crew of the *Rosella* are members of the FSU. The FSU is a Finnish affiliate of the ITF which is a federation of transport workers' unions, with its headquarters in London. There are 600 affiliated unions in 140 countries. One of the principal ITF policies is its "Flag Of Convenience" ("FOC") policy, now set out in a document entitled "Oslo to Delhi". According to the ITF, "the primary objectives of the FOC campaign are, first, to eliminate flags of convenience and to establish a genuine link between the flag of the ship and the nationality of the owner and, second, to protect and enhance the conditions of seafarers serving on FOC ships". The "Oslo to Delhi" definition treats the vessel as sailing under a flag of convenience "where the beneficial ownership and control of the vessel is found to lie elsewhere than in the country of the flag" and provides that "unions in the country of the beneficial ownership have the right to conclude agreements covering vessels beneficially owned in their countries". The FOC campaign is enforced by boycotts and other solidarity actions.

8. So long as the *Rosella* is under the Finnish flag, Viking is obliged by Finnish law and by the terms of a Collective Bargaining Agreement ("CBA") to pay the crew wages at Finnish level. Estonian crew wages are lower than Finnish crew wages. The *Rosella* was loss-making, being in competition with vessels on the same route which paid lower Estonian wages. As an alternative to selling the vessel, Viking sought in October 2003 to reflag it to a different registry, at that stage either Norway or Estonia, with a view to Viking entering into a CBA with an Estonian or Norwegian union and employing either an Estonian crew or a mixed Estonian/Finnish crew.

9. Viking gave notice of its proposals to the FSU and to the crew in accordance with Finnish law. A number of meetings occurred in the course of which the FSU made clear that it was opposed to the proposal.

10. On 4 November 2003, the FSU sent an e-mail ("the FSU e-mail") to the ITF referring to Viking's plan to outflag the *Rosella* and to reduce "the number of Finnish seafarers on board" and stating that the *Rosella* was "beneficially owned in Finland and effectively controlled by Finnish companies and we therefore have and keep the negotiation rights within FSU". The FSU asked the ITF to inform all affiliated unions about the matter and to request them not to negotiate with Viking.

11. On 6 November 2003, the ITF sent a circular ("the ITF circular") to all affiliates organising seafarers, inspectors and coordinators informing them of the situation in Finland and asking them to refrain from negotiating with Viking: "Please be advised that since the vessels are still beneficially owned in Finland, our Finnish affiliates still retain negotiating rights. Please refrain from entering into negotiations with either company".

12. The effect of the FSU e-mail was that the ITF had no discretion but was as a matter of policy obliged to issue the ITF circular. Both the FSU e-mail and the ITF circular were sent consistent with, and pursuant to, the ITF's FOC policy.

13. The FSU approached the ITF because an appeal to other unions from the ITF would have greater value than an appeal from the FSU direct. Affiliated unions would be expected to comply because of the principle of solidarity. Failure to comply could lead to sanctions being taken.

14. The FSU claimed that the manning agreement for the *Rosella* expired on 17 November 2003 and that in consequence it was no longer under an obligation of industrial peace under Finnish law. It gave notice of a strike requiring the manning on the *Rosella* to be increased by eight and Viking to give up its plans to reflag the *Rosella*. Viking conceded the extra eight crew but refused to give up its plans to reflag. It disputed that the manning agreement was at an end. Although its manning demands had been met in full, the FSU would not agree to a renewal of the manning agreement unless Viking also gave up its plans to reflag. By letter of 18 November 2003, the FSU indicated that there were two conditions to its agreement to renew the manning agreement, namely that Viking committed itself to continue to follow Finnish law, the CBA, the general agreement and the manning agreement on the *Rosella*, regardless of a possible change of flag, and that the possible change of flag of the vessel must not lead to employees, on the vessel or on other Finnish flag

vessels belonging to the shipping company, being made redundant or laid off, or changes in the terms and conditions of employment being made without the consent of the employees.

15. The FSU issued press statements which referred to the need to protect Finnish jobs.

16. Viking started proceedings in the Labour Court on 17 November 2003 for a declaration that the manning agreement remained in force. The FSU, on the basis of its view that the manning agreement was at an end, gave notice in accordance with the Finnish Act on Mediation in Labour Disputes that it intended to commence industrial action in relation to the *Rosella* on 2 December 2003. Viking started proceedings in the District Court on 25 November 2003 for an injunction to restrain that strike action. However, neither court was able to hear Viking before 2 December 2003.

17. Viking was not initially aware of the sending of the ITF circular. On 24 November 2003, Viking learnt of its sending. This was important because it effectively precluded any possibility of Viking circumventing the FSU and dealing directly with a Norwegian or an Estonian union, because ITF affiliate unions would not go against the ITF circular.

18. The FSU's demands had initially required Viking to give up its reflagging plans. The modification referred to in paragraph 14 above required that in the event of any reflagging the crew must be employed subsequent to the reflagging under Finnish law and conditions. The FSU knew that this would render the reflagging pointless because, firstly, the whole purpose of the reflagging was to enable Viking to enter into a CBA with a union in Estonia (or another European country) which would enable Viking to pay cheaper crew wages than those Viking were required to pay so long as the vessel was Finnish flagged and in consequence Viking was bound by the Finnish CBA and, secondly, Viking would in fact be much worse off, because if the *Rosella* reflagged to Estonia, Viking would not be able to claim state aid payments which the Finnish government offered to Finnish flag vessels.

19. Conciliation took place under the auspices of a state-appointed conciliator. Viking undertook that the reflagging would not involve any redundancies. The FSU refused to defer the strike. On 2 December 2003, Viking settled the dispute because of the threat of strike action. In addition to agreeing the extra manning, Viking agreed not

to commence reflagging prior to 28 February 2005 and to discontinue the proceedings in both the Labour Court and the District Court.

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

21. The *Rosella* continued to make losses, and Viking continued to wish to reflag the vessel to Estonia. The ITF circular remained in force and was never withdrawn by the ITF. It followed that the request to affiliated unions from the ITF in relation to the *Rosella* remained in effect.

22. Viking anticipated that any warning to the FSU or the ITF would precipitate actions in the Finnish courts by the unions. Viking therefore commenced an action in the Commercial Court in London on 18 August 2004, seeking declaratory and injunctive relief which required withdrawal of the ITF circular and requiring the FSU not to interfere with Viking's Community free movement rights in relation to the reflagging of the *Rosella*.

23. In December 2004, the Åland Shipowners' Association renewed the then current CBA and the *Rosella* manning agreement until 2008.

24. By order dated 16 June 2005, the Commercial Court granted Viking permanent injunctions restraining the ITF and the FSU from taking industrial action, on an undertaking by Viking not to terminate the employment of any employee by reason of a reflagging of the *Rosella*.

25. The ITF and the FSU appealed the judgment to the Court of Appeal.

26. Viking's primary case is that any industrial action aimed at preventing Viking from reflagging the *Rosella* or at persuading Viking to give up the Estonian flag and return to the Finnish flag imposes a restriction on its right to establish itself in Estonia under Article 43 EC. In the alternative, Viking's case before the Commercial Court was that the actions of the trade unions would impose a restriction on Viking providing services from Finland to Estonia in breach of Article 49 EC. In the Court of Appeal, Viking sought leave to amend. By this stage, Viking had decided that the *Rosella* was to be transferred to its Estonian subsidiary Viking Eesti. Viking wished therefore to add a claim by Viking Eesti in place of its claim based on Article 49 EC, but in the alternative to Viking's claim founded on Article

43 EC, asserting that the actions of the unions would place a restriction on services from Estonia to Finland, if Viking Eesti was compelled to pay rates of pay negotiated with the FSU as opposed to those negotiated with the Estonian trade union. The Court of Appeal gave leave to amend.

27. The ITF and the FSU's main argument appears to be that their action falls outside the scope of Articles 43 and 49 EC since it was taken in pursuance of the Community's social policy under Title XI of the Treaty.

28. The Court of Appeal found that the case raised important questions of Community law. By order dated 3 November 2005, the Court of Appeal set aside the order of the Commercial Court, stayed the proceedings and sought a preliminary ruling from the Court of Justice.

D. THE QUESTIONS REFERRED

29. The Court of Appeal referred the following ten questions to the Court of Justice:

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 of the EC Treaty and/or Regulation 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 Case C-67/96 Albany [1996] ECR I-5751, paras 52-64?

2) Do Article 43 of the EC Treaty and/or Regulation 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?

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 of the EC Treaty and/or Regulation 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 of the EC Treaty or Regulation 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 of the EC Treaty or Regulation 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?

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 4055/86 in respect of the provision of services by it from Member State B to member State A?

7) If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 of the EC Treaty 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?

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?

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 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)?

E. DISCUSSION OF THE QUESTIONS

E.1. Preliminary remarks

30. Before discussing the national court's questions, it may be useful to deal briefly with the issue of the application of the freedom of establishment and the freedom to provide services in the field of maritime transport.

31. The provisions on freedom of establishment in Article 43 EC *et seq.* are applicable in the field of maritime transport.[2]

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[2] See Case C-221/89 *Factortame and Others* [1991] ECR I-3905.

32. On the other hand, pursuant to Article 51(1) EC, the provisions on the freedom to provide services in Article 49 EC *et seq.* are not directly applicable in the field of maritime transport. Instead, the freedom to provide maritime transport services between Member States and between Member States and third countries is governed by Regulation No 4055/86. However, that Regulation renders the provisions on the freedom to provide services in the Treaty applicable in the field of maritime transport between Member States. [3] In particular, Article 1(1) of the Regulation gives effect in that field to the principle of freedom to provide services expressed in Article 49 EC.[4]

33. Against the background of those preliminary remarks, the Commission will proceed to discuss the national court's questions.

E.2. The second question

34. It is appropriate to deal first with the national court's second question.

35. By that question, the national court essentially asks whether Article 43 EC or Article 1 (1) of Regulation No 4055/86 have horizontal direct effect, so as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions in respect of collective action by that union or association of unions.

36. Put differently, the question is thus whether a trade union or an association of trade unions is bound by the provisions on the freedom of establishment or the freedom to provide services when taking collective action.

37. In a line of judgments, the Court has held that provisions adopted in a collective manner can be caught by Articles 39 and 49 EC and be subjected to the same standards applicable to State measures.[5]

38. In its judgment in *Bosman* the Court held that:

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[3] See Case C-381/93 *Commission v. France* [1994] ECR I-5145, paragraph 13.

[4] See Case C-18/93 *Corsica Ferries Italia* [1994] ECR I-1783, paragraph 37.

[5] See Case 36/74 *Walrave* [1974] ECR 1405, Case 13/76 *Dona* [1976] ECR 1333, Case C-415/93 *Bosman* [1995] ECR I-4921 and Case C-309/99 *Wouters* [2002] ECR I-1577.

> " ... Article 48 [now Article 39 EC] not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.
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> The Court has held that the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law [...].
>
> It has further observed that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article 48 of the Treaty were confined to acts of a public authority there would be a risk of creating inequality in its application".[6]

39. In its judgment in *Wouters* the Court held:

> "It should be observed at the outset that compliance with Articles 52 and 59 of the Treaty [now Articles 43 and 49 EC] is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law".[7]

40. It appears to follow from this line of judgments that Articles 43 and 49 EC apply to regulatory measures adopted by quasi-public bodies, such as sporting associations and professional bodies that are effectively self-regulating and which possess quasi-legislative powers.

41. However, that is not the situation in the present case.

42. The FSU and the ITF cannot be considered as regulatory bodies. Neither the threat to strike by the FSU nor the sending of the ITF circular by the ITF can be regarded as a regulatory measure.

43. It appears that the ITF was as a matter of policy obliged to issue the ITF circular and that affiliated unions were expected to comply with the circular, and that failure to

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[6] Paragraphs 82 – 84.

[7] Paragraph 120.

comply could lead to sanctions being taken.[8] However, whatever the precise nature of those obligations and expectations, they cannot in the Commission's view be regarded as rules designed to regulate, collectively, establishment or the provision of services. Instead, they merely form part of a policy of one of the two parties of the labour market, namely the employees.

44. Consequently, in the Commission's opinion, the above-mentioned line of judgments does not support the view that a trade union or an association of trade unions would be bound by the provisions on the freedom of establishment or the freedom to provide services when taking collective action.

45. In its judgment in *Angonese*[9] the Court held that Article 39 EC is to be regarded as binding on private persons with regard to the conclusion of an employment contract, although no measures of a collective character were involved.

46. The Court held in *Angonese*:

> "29. Under [Article 39 EC], freedom of movement for workers within the Community entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
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> 30. It should be noted at the outset that the principle of non-discrimination set out in Article 48 [now Article 39 EC] is drafted in general terms and is not specifically addressed to the Member States.
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> 31. Thus, the Court has held that the prohibition of discrimination based on nationality applies not only to the actions of public authorities but also to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services [...].
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> 32. The Court has held that the abolition, as between Member States, of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law [...].
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> 33. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, limiting

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[8] See paragraphs 11-13 above.

[9] Case C-281/98 [2000] ECR I-4139.

application of the prohibition of discrimination based on nationality to acts of a public authority risks creating inequality in its application [...].

34. The Court has also ruled 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 [...]. The Court accordingly held, in relation to a provision of the Treaty which was mandatory in nature, that the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals [...].

35. Such considerations must, *a fortiori*, be applicable to Article 48 of the Treaty, which lays down a fundamental freedom and which constitutes a specific application of the general prohibition of discrimination contained in Article 6 of the EC Treaty (now, after amendment, Article 12 EC). In that respect, like Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), it is designed to ensure that there is no discrimination on the labour market.

36. Consequently, the prohibition of discrimination on grounds of nationality laid down in Article 48 of the Treaty must be regarded as applying to private persons as well."

47. Does the judgment in *Angonese* mean that also Article 43 EC and Article 1 (1) of Regulation No 4055/86 apply to non-regulatory measures adopted by private persons, at least insofar as those measures are discriminatory[10]?

48. The Commission does not think so, for the following reasons.

49. Firstly, the judgment in *Angonese* obviously only concerned Article 39 EC.

50. Secondly, the case concerned a requirement imposed by a private banking undertaking for admission to a recruitment competition. By the references to its earlier case law in *Walrave, Bosman* and *Defrenne v Sabena*[11], the Court did not dispense with the need for the existence of a binding agreement or other act. The present case concerns collective action, and not a binding agreement or requirement.

51. Thirdly, the Court emphasised in the judgment in *Angonese* that the principle of non-discrimination set out in Article 39 EC is drafted in general terms and is not

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[10] It seems that the Court's reasoning in *Angonese* only concerned discriminatory acts. See, in particular, paragraphs 34-36 of the judgment.

[11] Case 43/75 [1976] ECR 455.

specifically addressed to the Member States.[12] There are differences, however, as regards Article 43 EC and Regulation No 4055/86. The first paragraph of Article 39 EC states that freedom of movement for workers shall be secured within the Community. Article 43 EC, by way of contrast, does not contain such an independent statement of principle. The wording of Article 43 EC could indicate that it is addressed to the Member States and to the abolition of regulatory obstacles to the freedom of establishment, rather than to obstacles that might result from the activities of a private person. In particular, the second paragraph refers to the "right to take up and pursue activities as self-employed persons ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected".[13] Indeed, Article 43 EC appears more analogous to Articles 28 and 29 EC, than to Article 39 EC.[14] In principle, the same considerations apply to Regulation No 4055/86. A reading of that Regulation suggests that it is in effect addressed to the Member States and seeks to address regulatory measures which restrict the freedom to provide maritime transport services.

52. Fourthly, there are good reasons for holding that the prohibition of discrimination on grounds of nationality in Article 39 EC must apply to private persons even where no measures of a collective character are involved. Discrimination may be perpetrated by a private employer against an employee. The prohibition of discrimination would be ineffective if it did not apply to the private employer. However, those reasons do not apply in the context of the freedom of establishment or the freedom to provide services. The self-employed *ex hypothesi* have no employer. The restrictions they may encounter will result from legislation or other regulatory action by the State.

53. And, lastly, Article 39 EC deals with workers who by definition can only be natural persons, which persons have a Part of the Treaty devoted to them, namely Part II on Citizenship of the Union. Article 43 EC is not restricted to natural persons, nor is

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[12] See paragraph 30.

[13] The Commission's underlining.

[14] The Court has taken the view that Articles 28 and 29 EC are addressed only to measures taken by the Member States and not by private persons. See Joined Cases 177 and 178/82 *van de Haar* [1984] ECR 1787, paragraphs 11 and 12, Case C-311/85 *Vlaamse Reisbureaus* [1987] ECR 3801, paragraph 30, and Case 65/86, *Bayer v Süllhofer* [1988] ECR 5249, paragraph 11.

Regulation No 4055/86, where, rather, one is predominantly concerned with shipping companies.

54. It follows from the above that, in the Commission's opinion, the Court's case law does not support the view that a trade union or an association of trade unions would be bound by the provisions on the freedom of establishment or the freedom to provide services when taking collective action.

55. Accordingly, the Commission considers that the answer to the national court's second question should be that Article 43 EC and Article 1 (1) of Regulation No 4055/86 do not have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against a trade union or an association of trade unions in respect of collective action by that union or association of unions.

E.3. The other questions

56. The national court's first question essentially serves the same purpose as the second question, namely to ascertain whether the freedom of establishment or the freedom to provide services applies to collective action taken by a trade union or an association of trade unions. As the Commission, in its discussion of the second question, has taken the view that that is not the case, it is not necessary to deal with the first question.

57. The national court's remaining questions all presuppose that the freedom of establishment or the freedom to provide services applies to collective action taken by a trade union or an association of trade unions. Given the Commission's view on the second question, it is not necessary to deal with those questions either.

F. CONCLUSION

58. For the reasons set out above, the Commission would propose to answer the questions referred by the national court as follows:

> Article 43 EC and Article 1 (1) of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries do not have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against a trade union or an

association of trade unions in respect of collective action by that union or association of unions.

Frank Benyon Johan Enegren Knut Simonsson

Agents of the Commission