OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 23 May 2007 [1]

1. The Court of Appeal (England and Wales) (Civil Division), in proceedings on appeal from the High Court of Justice (Commercial Court), has referred a series of questions that require this Court to grapple with an issue that is, at the same time, of high legal complexity and great socio-political sensitivity. Sometimes, when the questions are complicated, the answers are simple. This is not one of those occasions. In a nutshell, the situation that gave rise to the present case is as follows. A Finnish operator of ferry services between Helsinki and Tallin wished to change its place of establishment to Estonia in order to benefit from lower wage levels and provide its services from there. A Finnish trade union, supported by an international association of trade unions, sought to prevent this from happening and threatened strike action and boycotts if the company were to move without maintaining its current wage levels. The legal problems raised by this stand-off touch on the horizontal effect of the Treaty provisions on freedom of movement, and on the relationship between social rights and the rights to freedom of movement.

I — Facts and reference for a preliminary ruling

The parties

2. Viking Line ABP ('Viking Line') is a Finnish passenger ferry operator. OÜ Viking Line Eesti is its Estonian subsidiary. Viking Line owns the *Rosella*, a vessel which operates under the Finnish flag on the Tallinn-Helsinki route between Estonia and Finland. The crew of the *Rosella* are members of the Finnish Seamen's Union ('the FSU').

3. The FSU, which is based in Helsinki, is a national union representing seafarers. It has about 10 000 members, including the crew members of the *Rosella*. The FSU is the Finnish affiliate of the International Transport Workers' Federation ('the ITF').

1 — Original language: Portuguese.

4. The ITF is a federation of 600 transport workers' unions in 140 countries, which is based in London. One of the principal policies of the ITF is its 'flag of convenience' ('FOC') policy. At the trial before the Commercial Court, the president of the ITF explained that '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'. According to the document that sets out the FOC policy, a vessel is considered 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'. The same document provides that 'unions in the country of 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.

The facts

5. The *Rosella* has been operating at a loss, being in competition with Estonian-flagged vessels on the same route between Tallinn and Helsinki. Estonian crew wages are lower than Finnish crew wages. Since the *Rosella* sails under the Finnish flag, Viking Line is obliged by Finnish law and by the terms of a collective bargaining agreement to pay the crew at Finnish wage levels.

6. In October 2003, Viking Line sought to reflag the *Rosella* and register the vessel in Estonia, with a view to entering into a collective bargaining agreement with an Estonian union. It gave notice of its proposal to the crew and to the FSU. The FSU made it clear to Viking Line that it was opposed to the proposal to reflag the *Rosella*.

7. By email of 4 November 2003, the FSU asked the ITF to inform all affiliated unions about the matter and to request them not to negotiate with Viking Line. On 6 November 2003, the ITF did as requested and sent out a circular, pursuant to the FOC policy. The circular stated that the *Rosella* was still beneficially owned in Finland and therefore that the FSU retained the negotiating rights. It called upon the affiliated unions not to enter into negotiations with Viking. Affiliated unions would not go against the circular

because of the principle of solidarity. Failure to comply could lead to sanctions being taken — in the worst case exclusion from the ITF.[2] The circular therefore effectively precluded any possibility of Viking Line circumventing the FSU and dealing directly with an Estonian union.

8. Furthermore, 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. The FSU gave notice that it intended to start industrial action in relation to the *Rosella* on 2 December 2003. It demanded that the crew be increased by eight and that Viking Line either give up its reflagging plans or that, in the event of reflagging, the crew should be employed under Finnish labour conditions. Viking Line initiated judicial proceedings in the Helsinki Labour Court for a declaration that the manning agreement remained in force and in the Helsinki District Court for an injunction to restrain the strike action. However, neither court was able to hear Viking Line in time.

9. On 2 December, Viking Line settled the dispute because of the threat of strike action. Viking Line conceded the extra crew and agreed not to commence reflagging before 28 February 2005. It also agreed to discontinue the proceedings before the Labour Court and the District Court.

10. ITF never withdrew its circular and the call on affiliated unions not to enter into negotiations with Viking Line therefore remained in effect. Meanwhile, the *Rosella* continued to make losses. Viking Line, still wishing to reflag the vessel to Estonia, planned to do so after the expiry of the new manning agreement on 28 February 2005.

11. Anticipating that a new attempt to reflag the *Rosella* would precipitate collective action from the ITF and the FSU once more, Viking Line brought an action in the Commercial Court in London on 18 August 2004, seeking declaratory and injunctive relief which required ITF to withdraw the circular and FSU not to interfere with Viking Line's rights to freedom of movement in relation to the reflagging of the *Rosella*. While the action was pending, the manning agreement for the *Rosella* was renewed until February 2008. As a consequence, the date of 28 February 2005 ceased to be of critical importance, but the *Rosella* continued to operate at a loss, as a result of working conditions that were less favourable for

2 — Rule III of the Constitution of the ITF as amended by the 40th Congress, Vancouver, Canada, 14 August — 21 August 2002.

Viking Line than Estonian working conditions. It remained important, therefore, that the position be resolved. By judgment of 16 June 2005, the Commercial Court granted final injunctions upon an undertaking being given by Viking Line not to make any employees redundant as a result of the reflagging.

12. On 30 June 2005, the ITF and the FSU filed an appeal against that judgment before the Court of Appeal (Civil Division). By order of 3 November 2005, the Court of Appeal referred an extensive series of meticulously worded questions to the Court of Justice for a preliminary ruling. [3] I hope not to oversimplify matters when, for the sake of brevity, I condense these questions into what seem to be the three key issues.

13. The first issue is whether, by analogy with the ruling in *Albany*, [4] collective action such as that under consideration falls outside the scope of Article 43 EC and Article 1(1) of Council Regulation (EEC) No 4055/86 [5] by virtue of the Community's social policy.

14. Secondly, the referring court raises the question whether those same provisions 'have horizontal direct effect so as to confer rights on a private undertaking which may be relied on against ... a trade union or association of trade unions in respect of collective action by that union or association of unions'.

15. Finally, the referring court asks whether, in the circumstances at issue, actions such as those under consideration constitute a restriction on freedom of movement, and, if so, whether they are objectively justified, appropriate and proportionate, and 'strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services'. In this connection, the referring court also asks if the actions under consideration must be deemed directly discriminatory, indirectly discriminatory or non-discriminatory, and to what extent that would influence their assessment under the relevant rules on freedom of movement.

3 — OJ 2006 C 60, p. 16.

4 — Case C-67/96 [1999] ECR I-5751.

5 — Regulation 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).

II — Assessment

A — *Preliminary remarks*

16. The questions referred by the national court relate to Article 1(1) of Regulation No 4055/86 and to Article 43 EC.

17. Regulation No 4055/86 governs the freedom to provide maritime services between Member States and between Member States and third countries. That regulation renders 'the totality of the Treaty rules governing the freedom to provide services' applicable to the sphere of maritime transport between Member States. [6] Article 1(1) of the regulation provides that 'freedom to provide maritime transport services between Member States ... 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'. Essentially, that provision gives expression, in the field of maritime transport, to the principle of freedom to provide services, as guaranteed by Article 49 EC. [7]

18. However, the present case primarily concerns freedom of establishment, as guaranteed by Article 43 EC. The reflagging of the *Rosella* by Viking Line would amount to an exercise of the right to freedom of establishment. As the Court held in *Factortame and Others*, the registration of a vessel that is used 'for pursuing an economic activity which involves a fixed establishment in the Member State concerned' constitutes an act of establishment for the purposes of Article 43 EC. [8]

19. Thus, Viking Line intends, first, to exercise its right to freedom of establishment in order, subsequently, to exercise its right to freedom to provide services. Conversely, the ITF and the FSU seek to impose certain conditions on Viking Line's exercise of its right to freedom of establishment and have threatened to boycott the provision of passenger ferry services by Viking Line should it decide to reflag the *Rosella* without meeting their conditions.

B — *The applicability of the provisions on freedom of movement to industrial action*

20. The FSU and the ITF are of the view that collective action taken by a trade union or

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

7 — Case C-18/93 *Corsica Ferries* [1994] ECR I-1783.

8 — Case C-221/89 [1991] ECR I-3905, paragraph 22.

association of trade unions which promotes the objectives of the Community's social policy, falls outside the scope of Article 43 EC and Regulation No 4055/86. They argue that application of the provisions on freedom of movement would undermine the right of workers to bargain collectively and to strike with a view to achieving a collective agreement. In this regard, they point out that the right of association and the right to strike are protected as a fundamental right in various international instruments. Moreover, respect for the right to strike in the context of collective bargaining is a constitutional tradition common to the Member States and therefore represents a general principle of Community law. Relying, by analogy, on the Court's reasoning in *Albany*,[9] the FSU and the ITF submit that the social provisions in Title XI of the Treaty effectively exclude the application of Article 43 EC and Regulation No 4055/86 in the field of labour disputes such as the dispute under consideration.

21. With its first question, the national court essentially asks whether this view is correct. In my opinion, the reply must be in the negative.

22. The FSU and the ITF in effect assume that the application of the provisions on freedom of movement in the context of collective action taken by a trade union or an association of trade unions would undermine the Community's social policy objectives and would deny the fundamental character of the right to association and the right to strike. However, this assumption is incorrect.

23. The provisions on establishment and the freedom to provide services are by no means irreconcilable with the protection of fundamental rights or with the attainment of the Community's social policy objectives. Neither the Treaty rules on freedom of movement, nor the right to associate and the right to strike are absolute. Moreover, nothing in the Treaty suggests that the Community's social policy objectives must always take precedence over the objective of having a properly functioning common market. On the contrary, the inclusion of both policy objectives in the Treaty signifies the aim of the Community to bring these policies together. Therefore, the fact that a restriction on freedom of movement arises out of the exercise of a fundamental right or of conduct falling within the ambit of the social policy provisions does not render the provisions on freedom of movement inapplicable.

24. This conclusion is vindicated by the case-law. In *Schmidberger*, the Austrian Government allowed a demonstration that restricted the free movement of goods; it considered that a prohibition of that demonstration would have violated the right to freedom of expression and the right to

9 — Cited in footnote 4.

freedom of assembly. [10] In *Omega*, the Court was confronted with a measure that aimed to protect human dignity, but which also restricted the freedom to provide services. [11] In both cases, the Court recognised that fundamental rights were at issue, which had to be respected as general principles of Community law. [12] Yet, in neither case did the Court hold that, as a consequence, the restrictions under consideration were exempt from the rules on freedom of movement. Instead, the Court found that, although those rules applied, the restrictions on freedom of movement did not go beyond what could legitimately be considered as necessary in order to protect the fundamental right at issue. [13]

25. Likewise, the Court has consistently recognised that public interests relating to social policy may justify certain restrictions on freedom of movement, as long as these restrictions do not go beyond what is necessary. [14] The Court has never accepted, however, that such restrictions would fall outside the scope of the provisions on freedom of movement altogether. In fact, to take only a few examples from the case-law, measures for the protection of the environment, [15] consumers, [16] press diversity [17] and public health, [18] have all been held to fall within the scope of the provisions on freedom of movement. It would surely be odd to conclude that measures taken in the interest of social policy should, by contrast, be impervious to scrutiny under the rules on freedom of movement.

26. Lastly, I am not convinced by the purported analogy with the ruling in *Albany*. [19] *Albany* concerned a collective agreement between organisations representing employers and workers setting up a sectoral pension fund to which affiliation was made compulsory. The Court held that the agreement at issue, by virtue of its nature and purpose, fell outside the scope of Article 81 EC. However, the fact that an agreement or activity is excluded from the scope of the competition rules does not necessarily mean that it is also excluded from the scope of the

10 — Case C-112/00 *Schmidberger* [2003] ECR I-5659.

11 — Case C-36/02 *Omega* [2004] ECR I-9609.

12 — *Schmidberger*, cited in footnote 10, paragraphs 71 to 72 and 76; *Omega*, cited in footnote 11, paragraph 34. On the protection of human dignity as a fundamental right under Community law, see the Opinion of Advocate General Stix-Hackl in *Omega*, at points 82 to 91.

13 — *Schmidberger*, cited in footnote 10, paragraph 93, *Omega*, cited in footnote 11, paragraphs 38 to 40.

14 — See, for instance, Case C-164/99 *Portugaia Construções* [2002] ECR I-787, paragraph 22, 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, paragraphs 33 and 49.

15 — Case C-302/86 *Commission* v *Denmark* [1988] ECR 4607.

16 — Case 27/80 *Fietje* [1980] ECR 3839.

17 — Case C-368/95 *Familiapress* [1997] ECR I-3689.

18 — Case C-41/02 *Commission* v *Netherlands* [2004] ECR I-11375, paragraph 42.

19 — Cited in footnote 4. See also Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025 and Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121.

rules on freedom of movement. On the contrary, the rulings in *Wouters* [20] and *Meca-Medina* [21] demonstrate that an agreement or activity may fall under one set of rules while, at the same time, being excluded from the other. [22]

27. Moreover, the underlying concern in *Albany* appears to have been to avoid a possible contradiction in the Treaty. The Treaty encourages social dialogue leading to the conclusion of collective agreements on working conditions and wages. However, this objective would be seriously undermined if the Treaty were, at the same time, to prohibit such agreements by reason of their inherent effects on competition. [23] Accordingly, collective agreements must enjoy a 'limited antitrust immunity'. [24] By contrast, the Treaty provisions on freedom of movement present no such risk of contradiction, since, as I pointed out above, these provisions can be reconciled with social policy objectives. [25]

28. Therefore, I suggest that the Court give the following reply to the first question referred by the national court: 'Collective action taken by a trade union or association of trade unions which seeks to promote the objectives of the Community's social policy, is not, for that reason alone, exempted from the application of Article 43 EC and Regulation No 4055/86.'

C — *The horizontal application of the provisions on freedom of movement*

29. The second question referred by the national court pertains to the horizontal effect of Articles 43 EC and 49 EC. [26] The FSU and the ITF argue that these provisions do not impose obligations on them, since they aim to address public measures. They point out that both the FSU and the ITF are private legal persons without any regulatory powers. Viking, on the other hand, submits that it must be allowed to rely upon the provisions at issue, in particular in view of the capacity of trade unions to interfere with the rights to freedom of movement.

30. I shall examine the matter in four stages. First, as my point of departure, I shall explain that the provisions at issue are capable of

20 — Case C-309/99 *Wouters and Others* [2002] ECR I-1577.

21 — Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991.

22 — See also my Opinion in Case C-205/03 P *FENIN* v *Commission* [2006] ECR I-6295, at point 51.

23 — *Albany*, cited in footnote 4, paragraph 59.

24 — Opinion of Advocate General Jacobs in *Albany*, points 179 and 183. See also Case C-222/98 *Van der Woude* [2000] ECR I-7111, paragraphs 23 to 27, and the judgment of the EFTA Court of 22 March 2002 in Case E-8/00 *Landsorganisasjonen i Norge* [2002] EFTA Court Report 114, paragraphs 35 and 36.

25 — See points 23 and 25 above.

26 — As I explained above at point 17, Article 1(1) of Regulation No 4055/86 can be equated with Article 49 EC for the purposes of the present analysis.

creating obligations for private actors. Secondly, I shall attempt to clarify to what sort of private action the rules on freedom of movement apply. Thirdly, I shall address an oft-ignored and yet important problem: how can the horizontal effect of the provisions on freedom of movement be reconciled with respect for the way in which domestic law chooses to protect private autonomy and resolve conflicts between private actors? Finally, after these observations of a more general nature, I shall propose an answer to the question whether an undertaking can rely on Article 43 EC and Article 1(1) of Regulation No 4055/86 in judicial proceedings against a trade union or an association of trade unions.

Do the provisions on freedom of movement create obligations for private actors?

31. The Treaty does not expressly resolve the issue of the horizontal effect of Articles 43 and 49 EC. It is therefore necessary to have regard to the place and function of these provisions in the scheme of the Treaty.

32. Together with the provisions on competition, the provisions on freedom of movement are part of a coherent set of rules, the purpose of which is described in Article 3 EC.[27] This purpose is to ensure, as between Member States, the free movement of goods, services, persons and capital under conditions of fair competition.[28]

33. The rules on freedom of movement and the rules on competition achieve this purpose principally by granting rights to market participants. Essentially, they protect market participants by empowering them to challenge certain impediments to the opportunity to compete on equal terms in the common market.[29] The existence of that opportunity is the crucial element in the pursuit of allocative efficiency in the Community as a whole. Without the rules on freedom of movement and competition, it would be impossible to achieve the Community's fundamental aim of having a functioning common market.

34. Member State authorities are generally in a position that enables them to intervene in the functioning of the common market by restricting the activities of market participants. The same can be said for certain

27 — Case 229/83 *Leclerc* [1985] ECR 1, paragraph 9.

28 — See Articles 3(a), (c) and (g) EC and, for instance: Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389 and Opinion of Advocate General Van Gerven in Case C-145/88 *B & Q* [1989] ECR 3851, at point 22.

29 — See my Opinion in Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, points 37 to 40.

undertakings acting in collusion or holding a dominant position in a substantial part of the common market. Not surprisingly, therefore, the Treaty bestows rights upon market participants that can be invoked against Member State authorities and against such undertakings. As regards the latter, the rules on competition play the primary role; as regards Member State authorities, that role is played by the provisions on freedom of movement. [30] Hence, in order effectively to ensure the rights of market participants, the rules on competition have horizontal effect, [31] while the rules on freedom of movement have vertical effect. [32]

35. However, this does not validate the argument *a contrario* that the Treaty precludes horizontal effect of the provisions on freedom of movement. On the contrary, such horizontal effect would follow logically from the Treaty where it would be necessary in order to enable market participants throughout the Community to have equal opportunities to gain access to any part of the common market.

36. Thus, at the heart of the matter lies the following question: does the Treaty imply that, in order to ensure the proper functioning of the common market, the provisions on freedom of movement protect the rights of market participants, not just by limiting the powers of the authorities of the Member States, but also by limiting the autonomy of others?

37. Some commentators have proposed to answer that question firmly in the negative — their main argument being that the competition rules suffice to tackle interferences with the proper functioning of the common market by non-State actors. [33] Others, however, have pointed out that private action — that is to say, action that does not ultimately emanate from the State and to which the competition rules do not apply — may very well obstruct the proper functioning of the common market, and that it would therefore be wrong to exclude such action categorically from the application of the rules on freedom of movement. [34]

30 — Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraphs 11 to 12, and Case 65/86 *Bayer* [1988] ECR 5249, paragraph 11.

31 — Case 127/73 *BRT* [1974] ECR 313. See also, for instance, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

32 — See, for instance: Case 74/76 *Ianelli e Volpi* [1977] ECR 557, paragraph 13; Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 4 to 8; Case 118/75 *Watson* [1976] ECR 1185, paragraph 12; and Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 41.

33 — Marenco, G., 'Competition between national economies and competition between businesses — a response to Judge Pescatore', *Fordham International Law Journal*, Vol. 10 (1987) 420. The same view appears to have motivated the *obiter dicta* in paragraph 30 of the judgment in Case 311/85 *Vlaamse Reisbureaus* [1987] ECR 3801 and in paragraph 74 of the judgment in Case C-159/00 *Sapod Audic* [2002] ECR I-5031.

34 — Pescatore, P., 'Public and Private Aspects of European Community Law', *Fordham International Law Journal*, Vol. 10 (1987) 373, at 378-379; Baquero Cruz, J., 'Free movement and private autonomy', *European Law Review*, 1999, pp. 603-620; Waelbroeck, M., 'Les rapports entre les règles sur la libre circulation des marchandises et les règles de concurrence applicables aux entreprises dans la CEE', *Du droit international au droit de l'intégration*, Nomos, Baden-Baden, 1987, pp. 781-803.

38. I believe the latter view to be more realistic. It is also endorsed by the case-law. The Court has acknowledged that the rules on freedom of movement can limit the autonomy of individuals, notably in its rulings in *Commission* v *France* [35] and *Schmidberger*. [36] Both cases rely fundamentally on the reasoning that private action can jeopardise the objectives of the provisions on freedom of movement. As a consequence, the Court held that private individuals must not be allowed to act without appropriate concern for the rights that other private individuals draw from the rules on freedom of movement. In *Commission* v *France*, the upshot of the violent acts of protest by French farmers was to deny to others the freedom to sell or import fruit and vegetables from other Member States. In *Schmidberger*, the obstruction to the free movement of goods was not nearly as serious. Crucially, however, the Court weighed the right to freedom of expression of a group of demonstrators against the right of a transport company freely to transport goods from one Member State to another and, in that way, applied the fundamental principle of the free movement of goods horizontally.

39. One might note that *Schmidberger* concerned an action brought by a private party against the State. Such a procedure is common in many, if not all, national legal systems, where a constitutional provision cannot be relied upon as an independent cause of action in civil proceedings. It is an alternative way of inducing the horizontal effect of constitutional rights, namely by deriving from those rights an obligation for the State to intervene in situations where one private party's constitutional rights are under threat from the actions of another. [37] A corollary and equally common way of giving constitutional rights normative force in horizontal relations is to consider them as binding on the judiciary when adjudicating a case between private parties. Whether it interprets a contractual clause, rules on an action for damages, or decides upon a request for an injunction, the court must, as an organ of the State, hand down a decision that respects the constitutional rights of the parties. [38] The demarcation of individual rights in these ways is known as 'mittelbare Drittwirkung', or *indirect* hori-

35 — Case C-265/95 *Commission* v *France* [1997] ECR I-6959.

36 — Cited in footnote 10.

37 — See, for instance, ECtHR 10 April 2007, *Evans v. United Kingdom*, § 75, and ECtHR 26 March 1985, *X & Y v. Netherlands*, §§ 23-27. On the horizontal effect of provisions of the European Convention of Human Rights, see Spielmann, D., *L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privées*, Bruylant, Brussels, 1995; Besson, S., 'Comment humaniser le droit privé sans commodifier les droits de l'homme', *Droit civil et Convention européenne des droits de l'homme*, Zürich, Schulthess, 2006, pp. 1-51.

38 — An example of a judgment in which the Court construed horizontal effect in this manner is Case 43/75 *Defrenne* [1976] ECR 455, paragraphs 35 to 37 and 40. See also Case 58/80 *Dansk Supermarked* v *Imerco* [1981] ECR 181, paragraph 12. National case-law abounds with examples, of which I shall name only a random few. United Kingdom: *Campbell* v *Mirror Group Newspapers* [2005] 1 WLR 3394, paragraphs 17-18 (per Lord Nicholls); *A* v *B* [2003] QB 195. Germany: BverfG 7, 198 (*Lüth*); BverfG 81, 242 (*commercial agent*); BverfG 89, 214 (*guarantee*); BverfG, 1 BvR 12/92 of 6.2.2001 (*marital agreement*). The Netherlands: Hoge Raad, 15 April 1994, *Valkenhorst*, NJ 1994, 608. Czech Republic: I. ÚS 326/99 (see: Bulletin of Constitutional Case-Law, 2000, p. 240). Cyprus: *The Ship 'Panayia Myrtidiotissa' v. Sidiropoulou a.o.* (1993) 1. J.S.C 991. Two classic examples from the United States are USSC *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) and USSC *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

zontal effect. The result is that constitutional rules that are addressed to the State translate into legal rules applying between private parties, illustrating that 'the government is the third party to every private suit and is so in the very form of the law and the judge who administers it'. [39]

40. With regard to the demarcation of the respective spheres of rights, indirect horizontal effect may differ from direct horizontal effect in form; however, there is no difference in substance. [40] This explains why the ruling in *Defrenne* is considered as having recognised the 'direct horizontal effect' of Article 141 EC, even though the Court construed the horizontal effect of that provision as a duty on the national courts. [41] It also explains why the Commission's argument at the hearing, that the Court should reject direct horizontal effect, because the provisions on freedom of movement and their derogations were not tailored to apply to private parties, is already refuted by the case-law. If *Schmidberger* were to have been decided as a private suit between the transport company and the demonstrators, the Court would still have had to weigh the right to freedom of movement of the former against the right to demonstrate of the latter. [42] Indeed, the present case could theoretically have come to the Court in the framework of proceedings against the Finnish authorities for failing to curtail collective action against Viking Line. It would not have affected the substance of the problem: how to reconcile Viking Line's rights to freedom of movement with the rights to associate and to strike of the FSU and the ITF? [43]

To what sort of private action do the rules on freedom of movement apply?

41. Nevertheless, this does not mean that the rules on freedom of movement can always be brought into play in proceedings against a private individual. The normative and socio-economic power inherent in State authorities entails that these authorities have, by definition, significant potential to thwart the proper functioning of the common market. This is exacerbated by the fact that, regardless of whether they are, formally speaking, of a general nature, the actions of State authorities never truly stand on their

39 — Shapiro, M., and Stone Sweet, A., *On Law, Politics & Judicialization*, Oxford University Press, Oxford, 2002, p. 35. See also Sunstein, C., 'State Action is Always Present', 3 *Chicago Journal of International Law* 465 (2002). See also *Defrenne*, cited in footnote 38, paragraph 35.

40 — Alexy, R., *A theory of constitutional rights*, Oxford University Press, Oxford, 2002, p. 363; Kumm, M., 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', *German Law Journal*, Vol. 7, No. 4 (2006), pp. 341-369, at p. 352; Tushnet, M., 'The issue of state action/horizontal effect in comparative constitutional law', *International Journal of Constitutional Law*, Vol. 1, No. 1 (2003), pp. 79-98, at p. 98; Sunstein, cited in footnote 39, at pp. 467-468.

41 — *Defrenne*, cited in footnote 38, paragraphs 35 to 37 and 40.

42 — To the same effect: Kumm, M., and Ferreres Comella, V., 'What is so special about constitutional rights in private litigation? A comparative analysis of the function of state action requirements and indirect horizontal effect', *The Constitution in Private Relations*, Eleven International Publishing, Utrecht, 2005, pp. 241-286, at p. 253.

43 — Hence the observation 'that horizontal effect will, in the final analysis, always be direct' (Leisner, W., *Grundrechte und Privatrecht*, Beck, Munich,1960, p. 378).

own. They denote broader policy choices and therefore have an impact on anyone who wishes to exercise his rights to freedom of movement within their jurisdiction. Moreover, State authorities are less likely than private economic operators to adapt their conduct in response to the commercial incentives that ensure the normal operation of the market. [44] Therefore, the scope of the rules on freedom of movement extends to any State action or inaction that is liable to impede or make less attractive the exercise of the rights to freedom of movement. [45]

42. By contrast, in many circumstances private actors simply do not wield enough influence successfully to prevent others from enjoying their rights to freedom of movement. The case of an individual shopkeeper who refuses to purchase goods from other Member States would not be liable to obstruct the functioning of the common market. The reason is that suppliers from other Member States would still have the opportunity to market their goods through alternative channels. Moreover, the shopkeeper would in all likelihood suffer from competition from retailers who had fewer qualms about buying foreign goods and who, as a result, might be able to offer lower prices and a larger choice to consumers. That prospect alone would probably be adequate to deter behaviour of this kind. Thus, the market will 'take care of it'. In those circumstances, there is no ground for Community law to intervene.

43. The implication is that the rules on freedom of movement apply directly to any private action that is capable of effectively restricting others from exercising their right to freedom of movement. But how should one determine whether that is the situation? There seems to be no simple answer to that question. The Court, in its case-law, has proceeded carefully by recognising the direct horizontal application of the rules on freedom of movement in specific cases.

44. A number of these cases have concerned the exercise of intellectual property rights. [46] The holders of such rights have a legitimate business interest in exercising their rights in the manner they choose. [47] None the less, these interests must be weighed against the

44 — For a more detailed discussion of this topic, see point 25 of my Opinion in Joined Cases C-463/04 and C-464/04 *Federconsumatori and Others*, currently pending before the Court.

45 — See also my Opinion in *Marks & Spencer*, cited in footnote 29, points 37 to 40.

46 — See, for instance: Case 15/74 *Centrafarm* [1974] ECR 1147, paragraphs 11 and 12; Case 16/74 *Centrafarm* [1974] ECR 1183, paragraphs 11 and 12; and Case 119/75 *Terrapin* [1976] ECR 1039.

47 — See, for example, *Centrafarm*, cited in footnote 46, paragraph 9 (in each case); Case C-10/89 *HAG II* [1990] ECR I-3711, paragraphs 13 to 14; and Case 158/86 *Warner Brothers and Metronome Video* [1988] ECR 2605.

principle of the free movement of goods. [48] Otherwise, holders of intellectual property rights 'would be able to partition off national markets and thereby restrict trade between Member States'. [49]

45. Similarly, the Court has applied the rules on freedom of movement to national and international professional sporting associations. [50] It is easy to see why. The associations in question have a commanding influence over the organisation of professional sports as a cross-border economic activity. They can draw up regulations that are effectively binding for nearly everyone who wishes to exercise that activity. As the Court noted in *Deliège*, '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, by associations or organisations not governed by public law, of their legal autonomy'. [51]

46. The application of the provisions on freedom of movement to private action carries particular significance in the area of working conditions and access to employment. [52] The Court recognised this in its judgment in *Angonese*, when it applied Article 39 EC to a private bank in Bolzano. [53] Mr Angonese wished to take part in a competition for a post with that bank. Yet, access to the competition was conditional on the possession of a certificate of bilingualism that was issued by the authorities of, and could only be obtained within, the province of Bolzano. The condition replicated a requirement that previously existed for access to the public service and in that sense prolonged an established practice. As the Court noted in its judgment, residents of Bolzano usually obtained the certificate as a matter of course for employment purposes and viewed it almost as a 'compulsory step as part of normal training'. [54] Although Mr Angonese was not in possession of the certificate, he was perfectly bilingual and had other diplomas bearing witness to that. He was nevertheless refused access to the competition.

47. Workers cannot change their professional qualifications or obtain alternative employment as easily as traders can alter their products or find alternative ways of

48 — See, for example, the ruling in *HAG II*, cited in footnote 47, paragraphs 15 to 20, and in Case C-9/93 *IHT Internationale Heiztechnik* [1994] ECR I-2789, paragraphs 41 to 60.

49 — Case 15/74 *Centrafarm*, cited in footnote 46, paragraph 12.

50 — Case 36/74 *Walrave* [1974] ECR 1405; Case 13/76 *Donà* v *Mantero* [1976] ECR 1333; Case C-415/93 *Bosman* [1995] ECR I-4921; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549; *Meca-Medina and Majcen* v *Commission*, cited in footnote 21; and Case C-176/96 *Lehtonen and Castors Braine* [2000] ECR I-2681.

51 — *Deliège*, cited in footnote 50, paragraph 47; *Meca-Medina and Majcen* v *Commission*, cited in footnote 21, paragraph 24; and *Lehtonen and Castors Braine*, cited in footnote 50, paragraph 35.

52 — Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, paragraph 32, confirmed in Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraph 33.

53 — Case C-281/98 *Angonese* [2000] ECR I-4139. See Ragnemalm, H., 'Fundamental freedoms and private action: a new horizon for EU citizens?', *EG-domstolen inifrån*, Jure Förlag AB, 2006, p. 177.

54 — Paragraph 7 of the judgment in *Angonese*.

marketing them. Recruitment conditions such as the one at issue in *Angonese* are therefore harmful to the functioning of the common market even when imposed by a private bank as part of an established regional practice. The possibility that, in the long run, economic incentives will undercut such discriminatory recruitment practices is of little comfort to the individual who seeks employment today. Perhaps more than in any other field, the saying that 'the market can stay irrational longer than you can stay solvent' [55] rings true in the field of free movement for workers.

48. It follows from the foregoing that the provisions on freedom of movement apply to private action that, by virtue of its general effect on the holders of rights to freedom of movement, is capable of restricting them from exercising those rights, by raising an obstacle that they cannot reasonably circumvent.

The horizontal effect of the provisions on freedom of movement and respect for private autonomy as protected under domestic law

49. Of course, the finding that certain private actors are subject to the rules on freedom of movement does not spell the end of their private autonomy. Nor does it necessarily mean that they must be held to exactly the same standards as State authorities. The Court may apply different levels of scrutiny, depending on the source and seriousness of the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy. In other words, private actors may often still do things that public authorities may not. [56]

50. The Court has also recognised that Member States enjoy a margin of discretion when it comes to the prevention of obstacles to freedom of movement arising from the conduct of private actors. [57] In this regard, the Court has stated that it is 'not for the Community institutions to act in place of the Member States and to prescribe for them the measures which they must adopt and effectively apply in order to safeguard' the exercise of the right to freedom of movement. [58] Hence, the provisions on freedom of movement do not always provide a specific solution for each case, but merely set certain boundaries within which a conflict between two private parties may be resolved. [59]

55 — Attributed to John Maynard Keynes.

56 — Kumm, cited in footnote 40, at p. 352 and pp. 362-364. See also, to the same effect: Sunstein, cited in footnote 39.

57 — *Schmidberger*, cited in footnote 10, paragraphs 82, 89 and 93.

58 — *Commission* v *France*, cited in footnote 35, paragraph 34.

59 — There are situations, though, in which Community law leaves little or no leeway, as in *Angonese* (which concerned manifest discrimination without the slightest hint of a reasonable cause).

51. This has an important consequence: even in cases that fall within their scope, the provisions on freedom of movement do not replace domestic law as the relevant normative framework for the assessment of conflicts between private actors. Instead, Member States are free to regulate private conduct as long as they respect the boundaries set by Community law.

52. That degree of freedom for the Member States has procedural implications. Although the rules of civil procedure vary among national legal systems, it is a common feature that the parties to the proceedings have the primary responsibility for framing the contents and the ambit of their dispute. If these parties were to be allowed to bring legal proceedings before a national court merely by reference to the applicable Treaty rules on freedom of movement, the risk would arise that the national rules which applied would be left out of consideration. In order to prevent that from happening, Member States may require, in conformity with the principle of procedural autonomy, that proceedings against a private party on account of a contravention of the right to freedom of movement, be brought within the national legal framework, pursuant to a domestic cause of action — for instance tort or breach of contract.

53. When adjudicating on the dispute thus brought before it, the national court is invited to apply its domestic law in a manner that is consistent with the Treaty rules on freedom of movement. [60] If that is not possible, and domestic law conflicts with the rules on freedom of movement, then the latter will prevail. [61] Should there be no remedy available, because domestic law does not provide a cause of action through which to challenge a breach of the right to freedom of movement, then, in accordance with the principle of effectiveness, the claim can be based directly on the relevant Treaty provision. [62]

54. National law, grounded in the values of the national legal system, accordingly preserves its proper place in the normative framework that governs conflicts between private parties. At the same time the effectiveness of Community law is assured.

Analysis of the present case

55. It follows from the facts as they are stated in the order for reference, that the practical effect of the coordinated actions of

60 — *Defrenne*, cited in footnote 38, paragraphs 24 to 26.

61 — Case 6/64 *Costa* v *ENEL* [1963] ECR 585 and Case 106/77 *Simmenthal* [1978] ECR 629.

62 — See, by analogy, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, paragraph 22; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357; and *Courage*, cited in footnote 31.

the FSU and the ITF, in particular where they preclude negotiations with ITF-affiliated unions in Estonia, is to render the exercise by Viking Line of its right to freedom of establishment subject to the FSU's consent. Taken together, the actions of the FSU and the ITF are capable of effectively restricting the exercise of the right to freedom of establishment of an undertaking such as Viking.

56. I therefore propose that the Court reply as follows to the second question referred by the national court: 'Article 43 EC and Article 1(1) of Regulation No 4055/86 have horizontal effect in national legal proceedings between an undertaking and a trade union or an association of trade unions in circumstances such as those under consideration in the main proceedings.'

D — *Striking a balance between the right to freedom of establishment and the right to collective action*

57. Viking, for business reasons that are clear, seeks above all to exercise its right to freedom of establishment. The Treaty protects this right, because the possibility for a company to relocate to a Member State where its operating costs will be lower is pivotal to the pursuit of effective intra-Community trade. If companies were to be allowed to draw only on the productive resources available in a particular country or region, it would hamper the economic development of that region as well as of those regions where the required resources are better available. The exercise of the right to freedom of establishment is therefore instrumental to increasing the economic welfare of all the Member States. [63]

58. Yet, while the right to freedom of establishment generates overall benefits, it also often has painful consequences, in particular for the workers of companies that have decided to relocate. Inevitably, the realisation of economic progress through intra-Community trade involves the risk for workers throughout the Community of having to undergo changes of working circumstances or even suffer the loss of their jobs. This risk, when it materialised for the crew of the *Rosella*, is exactly what prompted the actions of the FSU and the ITF.

59. Although the Treaty establishes the common market, it does not turn a blind eye to the workers who are adversely affected by its negative traits. On the contrary, the European economic order is firmly anchored in a social contract: workers throughout

63 — See, for example, Corden, M.W., 'The Normative Theory of International Trade,' *The Handbook of International Economics*, Vol. 1, Elsevier, Amsterdam, 1984, pp. 63-130; Kenen, P., *The International Economy*, Cambridge University Press, Cambridge, 2000; Molle, *The Economics of European Integration: Theory, Practice and Policy*, Ashgate, Aldershot, 2006.

Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties. [64] As its preamble demonstrates, that contract is embodied in the Treaty.

60. The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract. They provide the means to emphasise that relocation, while ultimately gainful for society, entails costs for the workers who will become displaced, and that those costs should not be borne by those workers alone. Accordingly, the rights to associate and to collective action are of a fundamental character within the Community legal order, as the Charter of Fundamental Rights of the European Union reaffirms. [65] The key question, however, that lies behind the present case, is to what ends collective action may be used and how far it may go. This touches upon a major challenge for the Community and its Member States: to look after those workers who are harmed as a consequence of the operation of the common market, while at the same time securing the overall benefits from intra-Community trade.

61. The referring court asks whether the anticipated actions by the ITF and the FSU 'strike a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services'. Having placed this question in its broader perspective, it is now possible to look more closely at the form and purpose of the collective action under discussion.

62. A coordinated policy of collective action among unions normally constitutes a legitimate means to protect the wages and working conditions of seafarers. Yet, collective action that has the effect of partitioning the labour market and that impedes the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States would strike at the heart of the principle of non-discrimination on which the common market is founded.

64 — See, for a similar observation, Elwell, C.K., *Foreign Outsourcing: Economic Implications and Policy Responses*, CRS Report for Congress, 2005, available at: http://ec.europa.eu/employment_social/restructuring/facts_en.htm.

65 — Articles 12 and 28 of the Charter of Fundamental Rights of the European Union. See also point 48 of my Opinion in Case C-305/05 *Ordre des barreaux francophones et germanophone and Others*, currently pending before the Court.

63. In order to establish whether the policy of coordinated collective action currently under consideration has the effect of partitioning the labour market in breach of the principle of non-discrimination, it is useful to distinguish between two types of collective action that may be at issue in the present case: collective action to persuade Viking Line to maintain the jobs and working conditions of the current crew and collective action to improve the terms of employment of seafarers throughout the Community.

Collective action in the interests of the jobs and working conditions of the current crew

64. A first reason for the ITF and the FSU to take collective action may be to alleviate any adverse consequences reflagging of the *Rosella* will have on its current crew. Coordinated collective action may accordingly serve, for example, to secure their wages and working conditions, to prevent redundancies, or to obtain equitable compensation.

65. In view of the margin of discretion which Community law leaves to the Member States, it is for the national court to determine, in the light of the applicable domestic rules regarding the exercise of the right to collective action, whether the action under consideration goes beyond what domestic law considers lawful for the purpose of protecting the interests of the current crew. However, when making this determination, national courts have a duty under Community law to guarantee that cases of intra-Community relocation are not treated less favourably than relocations within the national borders.

66. Thus, in principle, Community law does not preclude trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking.

67. However, collective action to persuade an undertaking to maintain its current jobs and working conditions must not be confused with collective action to prevent an undertaking from providing its services once it has relocated abroad. The first type of collective action represents a legitimate way for workers to preserve their rights and corresponds to what would usually happen if relocation were to take place within a Member State. Yet, that cannot be said of collective action that merely seeks to prevent an undertaking that has moved elsewhere from lawfully providing its services in the Member State in which it was previously established.

68. Blocking or threatening to block, through collective action, an undertaking established in one Member State from lawfully providing its services in another Member State is essentially the type of trade barrier that the Court held to be incompatible with the Treaty in *Commission* v *France*, [66] since it entirely negates the rationale of the common market. Furthermore, to allow those kinds of action would carry the risk of creating an atmosphere of constant retaliation between social groups in different Member States, which could gravely threaten the common market and the spirit of solidarity embedded in it.

69. Contrary to what the ITF and the FSU contend, this finding is not affected in the slightest by the Court's case-law on posted workers. In the specific context of posted workers, the Court has held that the provisions on freedom of movement do not preclude Member States from applying their national rules on working conditions and minimum wages to posted workers who work within their territory on a temporary basis. [67] Member States are entitled to apply their national standards of worker protection to posted workers in so far as that is necessary and proportionate in order to provide an equivalent level of worker protection to posted workers and workers from the host State. [68] Yet, this line of case-law derives mainly from a concern with equal treatment and social cohesion between workers. The purpose of the case-law on posted workers is not to allow for the imposition of domestic working conditions and wages on undertakings established in another Member State — though to some degree it may have that effect — but to ensure that workers who are temporarily stationed in the territory of a Member State enjoy an equivalent level of worker protection as their colleagues from the host Member State, alongside whom they will often have to perform their work. That issue simply does not arise in the present case.

Collective action to improve the terms of employment of seafarers throughout the Community

70. Naturally, the FSU may, together with the ITF and other unions, use coordinated collective action as a means to improve the terms of employment of seafarers throughout the Community. A policy aimed at coordinating the national unions so as to promote a certain level of rights for seafarers is consistent with their right to collective action. In principle, it constitutes a reasonable method of counter-balancing the

66 — Cited in footnote 35.

67 — See, for example, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 41 to 42; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 29; and Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 36.

68 — Case C-168/04 *Commission* v *Austria* [2006] ECR I-9041, paragraph 47; *Arblade and Others*, cited in footnote 67, paragraph 53; *Finalarte and Others*, cited in footnote 14, paragraph 41; and *Mazzoleni and ISA*, cited in footnote 67, paragraph 35.

actions of undertakings who seek to lower their labour costs by exercising their rights to freedom of movement. One must not ignore, in that regard, the fact that workers have a lower degree of mobility than capital or undertakings. When they cannot vote with their feet, workers must act through coalition. The recognition of their right to act collectively on a European level thus simply transposes the logic of national collective action to the European stage. However, in the same way as there are limits to the right of collective action when exercised at the national level, there are limits to that right when exercised on a European level.

71. A policy of coordinated collective action could easily be abused in a discriminatory manner if it operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions. It would enable any national union to summon the assistance of other unions in order to make relocation to another Member State conditional on the application of its own preferred standards of worker protection, even after relocation has taken place. In effect, therefore, such a policy would be liable to protect the collective bargaining power of some national unions at the expense of the interests of others, and to partition the labour market in breach of the rules on freedom of movement.

72. By contrast, if other unions were in effect free to choose, in a given situation, whether or not to participate in collective action, then the danger of discriminatory abuse of a coordinated policy would be prevented. Whether this is the situation in the circumstances of the present case must be left to the referring court.

III — Conclusion

73. In view of the foregoing, I suggest that the Court give the following answer to the questions referred by the Court of Appeal:

(1) Collective action taken by a trade union or association of trade unions which seeks to promote the objectives of the Community's social policy, is not, for that

reason alone, exempted from the application 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.

(2) Article 43 EC and Article 1(1) of Regulation No 4055/86 have horizontal effect in national legal proceedings between an undertaking and a trade union or an association of trade unions in circumstances such as those under consideration in the main proceedings.

(3) Article 43 EC does not preclude a trade union or an association of trade unions from taking collective action which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking. It is for the national court to determine whether such action is lawful in the light of the applicable domestic rules regarding the exercise of the right to collective action, provided that cases of intra-Community relocation are not treated less favourably than cases of relocation within the national borders.

(4) Article 43 EC precludes a coordinated policy of collective action by a trade union and an association of trade unions which, by restricting the right to freedom of establishment, has the effect of partitioning the labour market and impeding the hiring of workers from certain Member States in order to protect the jobs of workers in other Member States.