OPINION OF Mr ADVOCATE GENERAL MISCHO
delivered on 18 November 1988 *

Mr President,
Members of the Court,

1. In 1983, the Government of the United Kingdom, concerned by the number of Spanish vessels obtaining registration and fishing licences in the United Kingdom, passed legislation (the British Fishing Boats Act and the British Fishing Boats Order) providing that, in order to be able to fish within United Kingdom fishery limits, at least 75% of the members of the crews of British fishing vessels must have British nationality or that of another country of the Community.

2. Agegate Ltd, the applicant in the main proceedings, operates such a fishing vessel called the *Ama Antxine*, which, after being properly registered in the United Kingdom in 1981, flies the British flag. However, the crew of the *Ama Antxine* continued to be composed essentially of Spanish fishermen who, moreover, are remunerated by a share of the proceeds of the sale of their catches. Agegate Ltd itself is a company incorporated in the United Kingdom and has its registered office in London. 95% of its share capital is owned by Spanish interests and 5% by British interests.

3. On 23 January 1986 Agegate Ltd obtained the renewal, with effect from 1 January 1986, of a series of licences for the *Ama Antxine*. However, the conditions to which those licences are subject were altered so as to better ensure, in the view of the British authorities, that vessels fishing against fishing quotas allocated to the United Kingdom have a 'real economic link' with that country.

4. Those conditions are of three kinds:

(1) the vessel must operate from the United Kingdom, the Isle of Man or the Channel Islands;

(2) at least 75% of the crew must be British citizens or nationals of the European Community ordinarily resident 'on shore' in the United Kingdom, the Isle of Man or the Channel Islands, to the exclusion, however, until 1 January 1988 of Greek nationals and, until 1 January 1993, of Spanish or Portuguese nationals, with the exception of spouses or children under 21 years of age of Greek, Spanish or Portuguese workers already installed in the United Kingdom;

(3) the skipper and all the crew must be making contributions to the social security scheme of the United Kingdom or to an equivalent scheme in the Isle of Man or the Channel Islands.

5. Whereas the first condition relating to the operating conditions for fishing vessels is the subject-matter of Case 216/87, the

* Original language: French.

preliminary questions which the High Court of Justice of England and Wales has submitted to the Court in the present case inquire in substance about the compatibility with Community law of the two other conditions, namely those relating to nationality and residence and to the affiliation of the crew of the said vessels to the social security scheme, in the light in particular of the interpretation to be given to Articles 55 and 56 of the Act of Accession of Spain and Portugal [1] and to certain other provisions of Community law, including those concerning the common fisheries policy.

6. First of all, however, the national court, in its first question, asks,

'in deciding whether in Community law a share fisherman is a provider of services or a worker, what are the relevant tests to be applied?'

The first question

7. The reason why that question is asked is that, as regards Spain, the Act of Accession contains transitional provisions on freedom of movement for workers but not on the freedom to provide services.

8. First of all, Article 60 of the EEC Treaty provides that:

'services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons'.

Therefore, the rules relating to the freedom to provide services may be relevant only if the rules on freedom of movement for workers are not applicable.

9. According to the established case-law of the Court, referred to in particular in its judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121,

'since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term "worker" in Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning'.

10. The reasons for this had been given by the Court in its judgment of 19 March 1964 in *Hoekstra*, [2] in which it stated that:

'if the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of "migrant worker" and to eliminate at will the protection afforded by the Treaty to certain categories of person' ([1964] ECR 177, at p. 184).

According to the same case-law of the Court,

'since it defines the scope of that fundamental freedom, the Community concept of a "worker" must be interpreted broadly'.

1 — OJ L 302, 15.11.1985.

2 — Case 75/63 *Hoekstra (née Unger)* v *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177.

11. It follows from the foregoing that the way in which share fishermen are classified by national laws must not be relied upon in the present context.

12. The same applies as regards the way in which the parties themselves describe their relationship. In its judgment in *Lawrie-Blum*, cited above, the Court stated that

'that concept [of worker] must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration' (paragraph 17).

13. Although there is no doubt that all the factors mentioned by the Court are useful for determining whether or not a person is a worker, particular importance attaches to the fact that the work is done for and under the direction of another person and that it lasts a certain length of time. That seems to be the case in this instance.

14. As for the remuneration test, its use lies rather in determining whether or not there is an economic activity.

15. The Court has stated that the level[3] of the remuneration received by a person cannot prevent that person from being classifed as a worker. The fact that a person's level of remuneration varies in time cannot have such an effect either. As far as I am aware, no one denies that a person who is remunerated, for example, in proportion to the quantity of ore he extracts or according to the number of tyres he makes during a given period is a worker. *A fortiori*, the position cannot therefore be any different in the case of a fisherman whose activity is performed, unlike in the examples I have just mentioned, in very close conjunction with that of other persons performing an identical activity and where it is not possible to separate the contribution which each makes to the final result. The fisherman is in fact remunerated on the basis of the work done by the crew as a whole and his pay does not consist in the right to be able to keep the fish which he took from the sea personally and by himself or the money which such fish are worth.

16. The single fact that the remuneration of share fishermen depends on the (variable) volume of catches does not therefore deprive them of the status of employees.

17. Consequently, I consider that the first question referred to the Court should be answered as follows:

'A fisherman who performs services for and under the direction of another person in return for which he receives remuneration must be regarded as a worker within the meaning of Article 48(1) of the EEC Treaty, even if his remuneration varies according to the proceeds of the sale of the catches of fish to which he has contributed and irrespective of how national law or the parties themselves classify their relationship.'

3 — See in this regard the judgments of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035 and of 3 June 1986 in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741.

The second question

18. The second question referred to the Court is worded as follows:

'Can a Member State, in granting, after the accession of Spain and Portugal to the European Communities, a licence to the owner or charterer of a fishing vessel flying the flag of and registered in that Member State, rely on Articles 55 and 56 of the Act of Accession of Spain and Portugal to the European Communities (which apply only to workers) and require that:

(i) 75% of the crew of a fishing vessel registered in that Member State flying its flag be EEC nationals resident on shore in that Member State but excluding until 1 January 1993 any Spanish nationals who are not the spouses or children under 21 of Spanish workers already installed in the Member State issuing the licence; and that

(ii) the skipper and all the crew must be making contributions to the social security scheme of that Member State?'

19. It should be recalled first of all that Article 55 of the Act of Accession provides that:

'Article 48 of the EEC Treaty shall only apply, in relation to the freedom of movement of workers between Spain and the other Member States, subject to the transitional provisions laid down in Article 56 to 58 of this Act'.

20. The first subparagraph of Article 56(1) provides that:

'Articles 1 to 6 of Regulation (EEC) No 1612/68 on the freedom of movement of workers within the Community shall apply in Spain with regard to nationals of the other Member States and in the other Member States with regard to Spanish nationals, only as from 1 January 1993'.

21. Articles 1 to 6 of that regulation [4] relate to the conditions of access to employment and, in this regard, implement the principle of equal treatment already laid down in Article 48 of the Treaty. Under the Act of Accession, therefore, that principle is put into abeyance in relations between Spain and the other Member States until 1 January 1993.

22. The second subparagraph of Article 56(1) of the Act of Accession goes on to provide that:

'the Kingdom of Spain and the other Member States may maintain in force until 31 December 1992, with regard to nationals of the other Member States and to Spanish nationals respectively, national provisions, or those resulting from bilateral arrangements, making prior authorization a requirement for immigration with a view to pursuing an activity as an employed person and/or taking up paid employment'.

4 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement of workers within the Community (OJ, English Special Edition 1968 (II), p 475)

23. It has been argued that this case presents the same kind of situation as that in *Peskeloglou*,[5] in which the second subparagraph of Article 45(1) of the Act of Accession of Greece,[6] identical in content to the second subparagraph of Article 56(1) of the Act of Accession of Spain, was at issue.

24. In that judgment the Court considered that, as a derogation from the principle of freedom of movement for workers laid down in Article 48 of the EEC Treaty, that provision must be interpreted restrictively and that consequently that provision, whilst authorizing the Member States and the acceding Member States to maintain restrictions already in existence, could not in any circumstances, after the entry into force of the Act of Accession, authorize them to make the conditions on the taking up and pursuit of employment by their respective nationals more stringent by introducing fresh restrictive measures (paragraphs 12 and 13).

25. But what was the situation in *Peskeloglou*? The German legislation concerning the taking-up and pursuit of employment by nationals of non-member countries had in fact been made more restrictive subsequent to the accession of Greece in so far as a work permit could no longer be granted to the spouse of a foreign worker until after a period of lawful residence in Germany of at least two years.

26. In the case now before the Court the situation is, in my view, very different. Spanish citizens were excluded from 75% of crews, which had to be composed of British and Community nationals after 1983, the year in which the British Fishing Boats Act and the British Fishing Boats Order were enacted, since at that time they were not Community nationals.

27. After that date, they still did not enjoy the rights to take up and pursue employment which Articles 1 to 6 of Regulation No 1612/68 confer on Community workers and their situation therefore remains comparable in this regard to that of nationals of non-member countries. Since the 75% rule antedates accession, it may continue to be applied to them.

28. Far from constituting a new measure, the press release of 6 December 1985 and the clause excluding Spanish fishermen from 75% of crews, which is contained in all fishing licences issued after that date, merely indicate, in my view, the United Kingdom's intention to make use of the possibility afforded to it by Article 56(1) of the Act of Accession to maintain in force with regard to Spanish nationals the rules previously applicable to them.

29. As regards the condition relating to residence on shore, it is not a measure concerning nationals of non-member countries or assimilated countries but relates to Community nationals including British citizens. Even if that condition is new, it does not therefore fall under the standstill provision contained in the Act of Accession. However, I shall later come to consider its compatibility with Community law in general.

30. It remains to say a few words about the Joint Declaration relating to workers from the present Member States established in Spain or Portugal and to Spanish or Portuguese workers established in the Community and members of their families.[7] I do not believe that the declaration is of

5 — Judgment of 23 March 1983 in Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1085.

6 — OJ L 291, 19.11.1979.

7 — OJ L 302, 15.11.1985, p. 480.

such a nature as to alter the conclusion which I have just drawn.

31. The declaration is worded as follows:

'1. The present Member States and the new Member States undertake not to apply to nationals of the other Member States who reside or work, in accordance with regulations, on their territory, any new restrictive measure that they may adopt after the date of signature of this Act in the field of the residence and employment of aliens.

2. The present Member States and the new Member States undertake not to introduce in their rules, after the signature of this Act, new restrictions with regard to the taking-up of employment by members of families of those workers.'

32. However, the rule under which Spanish nationals are excluded from 75% of a crew's composition does not, as we have seen, constitute a new restrictive measure. It cannot therefore be affected by that Joint Declaration (which is in any event appended to the Final Act and not to the Act of Accession itself).

33. Moreover, it must be observed that, according to paragraph (1) of the declaration, the undertaking of the present Member States and of the new Member States not to apply any new restrictive measures that they may adopt after 12 June 1985 in the field of the residence and employment of aliens applies only to nationals of other Member States who 'reside or work, in accordance with regulations, on their territory'. Its very title confirms that it concerns only Spanish workers already 'established' in the territory of another Member State of the Community.

34. However, in their case too, the condition contained in the new fishing licences does not constitute a new restriction because it merely confirms that, as before, they will still not be able to be included amongst the 75% of crew members who must be Community nationals.

35. Before 12 June 1985, no Spanish national could in fact be regarded as 'working in accordance with regulations' as one of that 75%.

36. In my view, the foregoing considerations cannot be put in doubt by the fact that Article 57(1) of the Act of Accession confers, in the conditions which it lays down, the right to take up and pursue employment on certain members of a worker's family, namely his spouse and their descendants who are under the age of 21 years or are dependants (see Article 10(1)(a) of Regulation No 1612/68) 'installed in accordance with regulations with the worker in the territory of a Member State' either on the date of signature of the Act of Accession (Article 57(1)(a)) or after the date of its signature (Article 57(1)(b)).

37. Indeed, it is probably because of that provision that the United Kingdom is now conferring the right to be one of the 75% on the spouses and children under 21 of Spanish workers already installed in the United Kingdom on 12 June 1985. However, if my interpretation is right, the United Kingdom was not obliged to do this

because no Spanish national had the right to be one of the 75% before that date. A Spanish national could not therefore transmit that right to members of his family.

38. But since the United Kingdom is now conferring the right in question on the members of the family of a Spanish national who was already installed in the United Kingdom before the signature of the Act of Accession, it should also grant it to the worker himself who fulfils that condition. Furthermore, as I explain later, the fishing quotas are intended to benefit that part of each Member State's population which lives by the fishing industry. If a Spanish national already lived in the territory of the United Kingdom before 12 June 1985, there is no reason not to allow him to pursue the occupation of fisherman after that date and from that territory and to be one of the 75%.

39. Finally, as regards the *condition relating to social security*, it must be observed that the only relevant transitional measure in the Act of Accession is Article 60,[8] which, however, only concerns family benefits and allowances. Therefore, the compatibility of the aforementioned condition with Community law is not to be assessed with reference to the Act of Accession either, but with reference to 'ordinary' Community law, especially since the condition applies to the whole crew.

40. On the basis of the foregoing considerations I propose that the second question referred to the Court should be answered as follows:

'Articles 55, 56 and 57 of the Act of Accession of Spain and Portugal must be interpreted as authorizing a Member State to maintain, with regard to Spanish nationals, the same restrictions regarding access to and the pursuit in its territory of paid employment which applied to them before the entry into force of the Act of Accession.'

The third question

41. Whereas the second question submitted to the Court expressly refers to only Articles 55 and 56 of the Act of Accession of Spain and Portugal and, according to its wording, relates exclusively to the situation of Spanish nationals, the third question concerns quite generally the compatibility with Community law, including the common fisheries policy, of the conditions relating to nationality, residence and affiliation to the social security scheme which the licences in question require respectively 75% and all the crew members of British fishing vessels to fulfil.

42. It reads as follows:

'In any event, is the grant of a licence by a Member State after the accession of Spain and Portugal to the European Communities to the owner or charterer of a fishing vessel registered in that Member State and flying its flag which is subject to the following conditions:

(i) the condition that at least 75% of the crew must be (i) nationals of the Member State issuing the licence or EEC nationals (but excluding until 1 January 1993 any Spanish nationals who are not the spouse or children under 21

8 — In the case of Portugal, it is Article 220.

of Spanish workers already installed in the Member State issuing the licence in accordance with the transitional arrangements on the free movement of workers following the accession of Spain to the Communities provided for in the Treaty of Accession) and (ii) ordinarily resident in the Member State issuing the licence (residence meaning residence on shore not including service aboard a ship of that Member State)

(ii) the condition that the skipper and all the crew must be making contributions to the social security scheme of the Member State issuing the licence

compatible with Community law including the common fisheries policy?'

A — *The conditions regarding nationality and residence*

43. For point (i) of the High Court's third question the obvious starting point is the Court's judgment of 19 January 1988 in Case 223/86 *Pesca Valentia Ltd* v *Minister for Fisheries and Forestry, Ireland and the Attorney General* [1988] ECR 83).

44. According to that judgment, it is clear from the provisions of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry[9] that,

'pending the entry into force of such Community measures, the Member States may apply their own rules in respect of fishing in the maritime waters coming under their sovereignty or within their jurisdiction (Article 2) and define their structural policy for the fishing industry (Article 1)'.

The Court went on to state that:

'Furthermore it should be noted that the provisions of the regulation refer to fishing vessels "flying the flag" of a Member State or "registered" there, leaving these terms to be defined in the legislation of the Member States' (paragraph 13).

From this the Court concluded that

'neither Article 1 nor Article 2(1) of the regulation precludes a Member State from enacting a measure, such as that at issue, concerning the composition of the crews of fishing vessels flying its flag and fishing in the maritime waters within its jurisdiction' (paragraph 14).

45. It must be remembered that the Irish measure at issue in the *Pesca Valentia* case was identical to the British measure except that it did not involve a residence condition.

46. Having thus confirmed the power of the Member States to adopt a measure of that type, the Court also declared (in paragraph 21 of the judgment) that the condition requiring a minimum proportion of the crews of vessels to be Community nationals was not contrary to Article 7 of the EEC Treaty either.

9 — OJ L 20, 28.1.1976, p. 19

47. One part of the High Court's question may thus be answered on the basis of the *Pesca Valentia* judgment. It only remains for me to examine the residence condition.

48. Before dealing with it, I would like, however, to point out that it is clear from the passage in the *Pesca Valentia* judgment relating to the power of the Member States to define their structural policy that *the Member States have the power to limit the capacity of their fishing fleets* in order to avoid a situation in which a rash increase in the number of vessels would reduce catch potential for existing vessels to the point of jeopardizing their profitability and the standard of living of the fishermen working aboard them.

49. Regulation No 101/76 also provides that the Member States (Article 8) or the Community (Article 9) may grant aid with a view to increasing the productivity of fishing activity, in particular through restructuring of fleets. Council Regulation (EEC) No 2908/83 of 4 October 1983 on a common measure for restructuring, modernizing and developing the fishing industry and for developing aquaculture (Official Journal L 290, 22.10.1983, p. 1), which is based on Article 9(2) of Regulation No 101/76, is also intended to establish, within the framework of multi-annual programmes, a satisfactory balance between fishing capacity and the available resources of the sea (see in particular the third recital and Articles 3, 4 and 11).

50. Finally, the Council Directive of 4 October 1983 concerning certain measures to adjust capacity in the fisheries sector (Official Journal L 290, 22.10.1983, p. 15) is intended to encourage the Member States to introduce specific measures for the structural adjustments of their fishing fleets by way of national laws, regulations and administrative provisions (see in particular the fifth, sixth and seventh recitals). That directive allows the Member States to grant laying-up premiums for vessels which are liable to become unprofitable because of the catch restrictions, or cessation premiums in order to reduce permanently the capacity of fishing fleets, the technical characteristics of which make it difficult to adapt them to the types of fishing anticipated in the medium term.

51. All those provisions prove that the Member States have retained the power to adopt, within the parameters defined by the Community, all the measures necessary to undertake a rational restructuring of their fishing fleets. That power necessarily includes the power *to refuse registration for new fishing vessels* if the competent authorities consider that an increase in the total tonnage of their fleet is incompatible with the aim of maintaining a fair standard of living for those who live by the fishing industry (see the fifth recital of the preamble to Regulation No 101/76).

52. The same concern to maintain a certain relation between catch potential and the number of fishing vessels was a guiding factor in the drafting of Articles 156 to 164 of the Treaty of Accession of 12 June 1985. Without prejudice to the annual fixing of quotas, those provisions lay down, as regards Spain, a list of specifically designated vessels authorized to fish in rotation in the waters falling within the jurisdiction of the old Member States and, as far as those States are concerned, the annual fixing of the number of vessels according to the fishing possibilities

allocated to those Member States in the waters falling within the jurisdiction of Spain.

53. Finally, the observation in the *Pesca Valentia* judgment regarding the power of the Member States to define themselves the concepts of fishing vessels 'flying the flag of' a Member State or 'registered' in a Member State implies in particular, in my view, that those States have the power to adopt appropriate measures to prevent their flag from becoming what has come to be called 'a flag of convenience'.

54. There remains the question whether a Member State which considers that it must not go so far as to refuse registration for any new vessel may nevertheless adopt measures to ensure that the catches of those new vessels mainly benefit the fishermen residing in its territory.

55. First of all, let us see which rule of Community law is applicable in this case. When considering the first question I reached the conclusion that share fishermen are employees, so the rules applicable can only be Article 48 *et seq.* and Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II) p. 475). Article 1(1) of that regulation provides that:

'any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State'.

56. Let us now examine the contested United Kingdom provision in the light of those principles.

57. The first point to be noted is that, for the purposes of the 75% rule, the United Kingdom has completely assimilated the nationals of other Member States to its own nationals. In order to be able to be counted as one of the 75%, British citizens, too, must reside in the United Kingdom. The residence condition applies to British nationals and those of other Member States alike.

58. As from 1 January 1993, Spanish citizens will in their turn be so treated. In this part of my argument I must therefore disregard the position in which Spanish nationals are placed as a transitional measure (a problem which is the subject of the High Court's second question) and confine myself to examining the arguments put forward in relation to the residence requirement in so far as it is imposed on nationals of other Member States, regardless of their nationality.

59. Thirdly, the United Kingdom does not generally preclude the free movement of fishermen from other Member States since they may establish their residence in that country at any time and pursue their occupation there. The restriction in question, is, so to speak, more like a ban on pursuing that occupation as a *frontier* or *seasonal worker*, without those expressions having to be understood in a technical sense.

60. Incidentally, one may inquire whether a worker who embarks, in one Member State, on a vessel registered in another Member

State in order to fish in waters beyond the 12-mile limit of that other Member State without ever going ashore, who is not affiliated to the social security scheme of that country, who is paid in the currency of his country of origin and who, at the end of his fishing trip, returns directly to a port in his own country is actually exercising the right to move freely within the territory of another State (Article 48(3)(b)) or to stay in another Member State for the purpose of employment there (Article 48(3)(c)). Most countries consider in fact that vessels do not constitute a part of the territory of the country whose 'nationality' they have.

61. However, I shall refrain from considering that question because the solution to the problem under consideration cannot be made to depend on a factual situation which may vary from case to case.

62. In the statement which the British Minister for Agriculture, Fisheries and Food made to the United Kingdom Parliament on 6 December 1985 in order to announce the new conditions to which fishing licences would be subject from 1 January 1986 he said that: 'The objectives of the common fisheries policy, and in particular the principle of relative stability of fishing activities, are clearly threatened if fishing vessels from other countries are able to attach themselves artificially to a Member State in order to fish against its quotas'.

63. In substance, therefore, the British position amounts to saying that the very concept of national quotas constitutes the 'objective justification' on which any Member State may rely to adopt measures to ensure that mostly persons who live from fishing in its territory benefit from those quotas.

64. Agegate, on the other hand, maintains that 'the quota system established by the Community should not constitute a disguised means of abolishing the principle of equal access to the waters of the Member States' (paragraph 56 of the Report for the Hearing).

65. As regards the latter argument, it must be emphasized that, although the quota system does not abolish that principle, it does restrict its scope very substantially but without the Court having considered it necessary to declare it unlawful.

66. Like all common policies, the common fisheries policy is also based on the principle that there should be no discrimination. This principle was expressed in the following way in Article 2 of Regulation No 101/76:

'Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisidiction shall not lead to differences in treatment of other Member States.

Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory.'

67. The principle of 'equal conditions of access' thus constitutes an expression, in the very specific field of deep-sea fishing, of the

general principle of no discrimination laid down in Article 7 of the EEC Treaty; it is also expressed in Article 48 (freedom of movement for workers), Article 52 (freedom of establishment) and Article 59 (freedom to provide services.

68. But, since, in the field of fishing, the overfishing of the main species of fish has jeopardized the standard of living of those who live by the fishing industry, very important exceptions to the principle of equal conditions of access have been introduced, on a transitional basis, by the 1972 Treaty of Accession, various Council regulations and the 1985 Treaty of Accession

69. Thus, in a six-mile zone the Member States are authorized to restrict fishing to vessels which traditionally fish in those waters from ports in the geographical coastal area. The same rule applies as regards waters situated between the six-mile and the 12-mile limits except that in this regard Annex I to Regulation (EEC) No 170/83 grants in certain areas to fishermen from other Member States rights defined species by species (sometimes those rights may also be exercised in the area between three or four miles and 12 miles). In the waters falling within the jurisdiction of the Member States, that is to say those situated between the 12-mile and 200-mile limits, the Member States may fish only if they observe the catch quotas defined each year, species by species and Member State by Member State. The catch rights obtained by the Community in the waters falling within the jurisidiction of non-member countries and international waters are similarly distributed, in the form of quotas, between the Member States. Finally, the Act of Accession of Spain and Portugal, which gave treaty status to those quotas, restricted the number of vessels authorized to fish.

70. The total allowable catches are distributed according to the rule laid down in Article 4(1) of Regulation No 170/83, which provides that:

'the volume of the catches available to the Community . . . shall be distributed between the Member States in a manner which assures each Member State *relative stability* of fishing activities for each of the stocks considered'.

71. For each species of fish, the percentage of the volume of available catches allocated to each Member State is calculated by taking into account the average quantities caught by the fleets of the different Member States between 1973 and 1978.

72. In paragraph 23 of its judgment in *Romkes*[10] the Court held that such a method

'is not contrary to the prohibition of discrimination laid down in Article 7 of the Treaty since it *requires the fishermen of each Member State to make an effort to restrict their catches to levels in proportion to* the catches they were taking before the entry into force of the Community system for the conservation of fishery resources'.

73. Whilst constituting a fundamental derogation from the principle of free access, justified by the scarcity of fish, the quota system is not therefore contrary to the principle of no discrimination because it apportions on an objective basis the sacrifices to be made by the *fishermen* of each Member State.

10 — Judgment of 16 June 1987 in Case 46/86 *Albert Romkes and Officier van Justitie for the District of Zwolle* [1987] ECR 2671

74. Consequently, if the fishermen of one of those States to which quotas have been allocated on the basis of their catches in the period 1973-78 are suddenly confronted by competition from vessels previously registered in another country and having on board mariners residing in other Member States or in non-member countries, it is the fishermen of the first Member State who may claim that they are being discriminated against since the balance of sacrifice intended by the Community legislature has been upset in a way which adversely affects them.

75. That claim may not be answered by the objection that the aim of the Community quota regulations is simply to assure 'each Member State relative stability of fishing activities for each of the stocks considered' and that it does not matter whether those activities are carried on by 100 or by 150 vessels, by persons residing in that State or by persons who merely pass through the waters under that State's jurisdiction.

76. It is clear from the preambles and provisions of most of the regulations adopted for the fishing industry that the objective of all those regulations is that '*those* who live by that industry should be assured of a fair standard of living' (fifth recital of the preamble to Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry).

77. Clearly, this can only mean persons who actually live in a given Member State because if persons who merely pass through the waters under that State's jurisdiction could take a part of its national quotas, the standard of living of the former would be in jeopardy.

78. The standard of living of fishermen living in other Member States must be assured by the quotas allocated to those States.

79. It is the fishing communities of each Member State that the Community quota system requires to make an effort to restrict their catches to levels in proportion to the catches that they were taking before the entry into force of the Community system for the conservation of fishery resources; it is for the benefit of those same communities that the system of national quotas is intended to guarantee the pursuit of their fishing activities on a stable, long-term basis.

80. Such exceptional rules are justified because, as the Council stated in the second recital of the preamble to Regulation No 101/76,

'sea fisheries . . . have their own social structure and fish under special conditions'.

81. It is because of those specific characteristics of the fishing industry and the need to allow the quota system to achieve its aims that the residence condition laid down by the United Kingdom must be considered compatible with Community law.

82. That residence condition constitutes the corollary, so to speak, of the derogation from certain rules of Community law entailed in the quota system itself.

83. The condition relating to the composition of crews may also be regarded as one of the detailed rules for the utilization of national quotas referred to in Article 5(2) of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (Official Journal L 24, 27.1.1983, p. 1).

84. That provision is worded as follows:

'Member States shall determine, in accordance with the applicable Community provisions, the detailed rules for the utilization of the quotas allocated to them.'

85. In its judgment of 3 October 1985 in Case 207/84 *De Boer* v *Produktschap voor Vis en Visprodukten* [1985] ECR 3203, at p. 3218, the Court held that:

'if national rules *restrict the number of vessels which may fish* for herring by making it a condition for access to the quota that the fisherman applying for a quota share must have the capacity to process the herring caught . . . such rules constitute detailed rules for the utilization of the quota within the meaning of Article 5(2) of Regulation No 170/83 which are within the powers of the Member States . . . ' (paragraph 28, at p. 3218).

86. Whether that article confers on the Member States the power to make their vessels" right to fish for species of fish for which quotas exist subject to certain conditions cannot therefore be questioned.

87. In the present case, a Member State is controlling the number of vessels which may fish by making it a condition for access to the quota that 75% of the crew members of those vessels must be Community nationals residing on shore in that country. Since I considered that such a rule was compatible with Community law, it could therefore be adopted on the basis of Article 5(2) of Regulation No 170/83.

88. I do not believe that the argument which the Commission bases on the judgment of 20 April 1978 in the *Commissionnaires réunis* case [11] is such as to cast doubt on those conclusions.

89. In relying in particular on that judgment the Commission argued that even if the Community legislature had intended, when conferring on the Member States the power to determine the detailed rules for the utilization of quotas, to authorize them to derogate from any of the provisions of the Treaty, in particular those concerning the fundamental freedoms, it would certainly not have the power to do so.

90. It is indeed the case, as the Court has repeatedly held with regard to the free movement of goods, [12] that in the absence of a clear exception, which in any event must be strictly construed, the powers, even wide powers, which the Community institutions have do not allow them to derogate, or to authorize the Member States to derogate, from provisions of the Treaty, particularly those concerning the fundamental principles of the common market.

11 — Joined Cases 80 and 81/77 *Société les Commissionnaires réunis and les fils de Henri Ramel* v *Receveur des douanes* [1978] ECR 927.

12 — See, besides the judgment in *Commissionnaires réunis*, cited above, the judgments of 7 October 1985 in Case 199/84 *Procuratore della Republica* v *Migliorini and Fischl* [1985] ECR 3317 and of 2 February 1988 in Case 61/86 *United Kingdom* v *Commission* [1988] ECR 431.

91. However, I note that whilst affirming that principle, the Court has accepted, in the *Commissionnaires Réunis* judgment itself, that such derogations are possible if there is a provision in the Treaty which provides for them or authorizes them not only *'expressly'* but also *'by necessary implication'* ([1978] ECR 946, paragraph 26). Since the Act of Accession of Spain and Portugal, the quota system has treaty status.

92. Similarly, in its judgment of 2 February 1988 in Case 61/86 *United Kingdom* v *Commission* [1988] ECR 431, the Court expressly accepted that

'an obstacle to the free movement of products within the common market ... may [nevertheless] be justified in an organization of the market which has not yet been completely unified where it is intended to offset inequalities arising from the fact that the common organization of the market has not been fully achieved, in order to enable products covered by the organization to circulate on equal terms without thereby artificially distorting competition between producers in different regions' (paragraphs 10 and 11).

93. Since freedom of movement for persons is one of the foundations of the Community as well as the free movement of goods, that ruling must, in my view, also apply to the rules of the Treaty guaranteeing such freedom, so that whilst exceptions to the relevant rules of the Treaty, even if not expressly provided for, must still be interpreted strictly, they may be accepted provided that they do not go further than is necessary for ensuring that other provisions of Community law, in themselves perfectly justified and in accordance with the objectives of the Treaty, can have the effect intended by the legislature.

94. As far as the fishing industry is concerned, the Court has already been faced by a similar situation in *Kramer.* At a time when there were still no Community rules on the conservation and management of fishery resources, the compatibility of national quotas with the Community rules governing structural policy and the common organization of the markets in the fisheries sector had been called in question.

95. In its judgment or 14 July 1976 in *Kramer,* [13] the Court had to recognize that such measures may have an effect on the functioning of certain parts of the general system established in this field, and in particular on the price system, and it held that there was an obligation on the Member States to ensure that catches were limited in such a way as to keep such effects to a minimum. It none the less concluded that, in adopting such measures, a Member State does not jeopardize the objectives or the proper functioning of the Community system (paragraphs 50 to 52).

96. It expressly based its reasoning on the general system and the objectives of the Community rules established in the fisheries sector and in particular on the nature and the circumstances of the 'production' of fish (paragraphs 56 and 57).

97. There is no doubt that the view to be taken in this case is also that national measures intended to ensure that the population of that Member State which lives by the fishing industry receives at least some

13 — Judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *Cornelis Kramer and Others* [1976] ECR 1279.

benefit from the national quotas are in accordance with the general system and the objectives of the Community rules established in this field.

98. In other judgments the Court has accepted that it is possible to derogate from a rule of the Treaty. For example, it is apparent from the judgment of 2 February 1988 in Case 61/86 *United Kingdom* v *Commission*, that derogations may be justified owing to the fact that *a common organization of the market is incomplete.*

99. Similarly, in its judgment of 27 September 1988 in Case 51/87 concerning generalized tariff preferences, to which the Commission referred in detail at the hearing, the Court accepted that,

'*as the common commercial policy stands at present*, such a system (of national quota shares which is likely to cause distortions and deflections of trade) may be compatible with Articles 9 and 113 of the Treaty where the allocation of national quota shares is justified by *compelling circumstances* of an *administrative technical or economic nature* which make the Community administration of the quota more difficult' (paragraph 8).

100. Finally, in its judgment in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347, cited at the hearing by the United Kingdom, the Court stated that:

'it follows from Article 38(2) of the EEC Treaty that the provisions of the Treaty relating to the common agricultural policy have precedence, in case of any discrepancy, over the other rules relating to the establishment of the common market' (paragraph 37).

It went on to state that:

'the specific provisions creating a common organization of the market therefore have precedence in the sector in question over the system laid down in Article 37 in favour of State monopolies of a commercial character' (paragraph 38).

101. In its judgment of 4 December 1986 in Case 205/84 *Commission* v *Germany* (the insurance case) the Court held that:

'If the requirement of an authorization constitutes a restriction on the freedom to provide services, *the requirement of a permanent establishment is the very negation of that freedom.* It has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided'.

However, this did not prevent it from going on to state that:

'if such a requirement is to be accepted, it must be shown that it constitutes a *condition which is indispensable for attaining the objective pursued*' (paragraph 52).

In that case, the objective pursued was the protection of the person seeking insurance and of the person insured which the German Government claimed that it could not provide effectively except by means of verifications at a permanent establishment at which all the necessary documents were kept.

102. In the *Agegate* and *Jaderow* cases, the objective sought is to restrict the national quotas to those persons for whom they were established, namely the fishermen of each Member State. As I have already stated, this can only mean fishermen living in that Member State, regardless of their nationality.

103. To conclude, I would also cite the Court's judgment of 15 January 1987 in Joined Cases 271/83, 15, 36, 113, 158, 203/84 and 13/85 *Ainsworth and Others* v *Commission and Council* [1987] ECR 167, in which the Court held that scientific researchers carrying out work identical to that done at the same place by other researchers could be paid less because the quite specific position of the United Kingdom Atomic Energy Agency to which they belonged, unlike the other researchers, constituted an *objective justification for that different treatment.*

104. Finally, it may be noted that in the present case Community nationals, even those of non-member countries, not fulfilling the residence condition are not necessarily excluded on that ground from the crews of British fishing vessels. They may always form part of the 25% of crew members who are not subject to such a condition.

105. B — It remains for me to examine *the condition relating to social security contributions,* which applies to the whole crew and not only to those crew members who are required to reside in the United Kingdom, on the Isle of Man or in the Channel Islands. In this regard, it must first be borne in mind that it is clear from established case-law that the provisions of Title II of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, as extended to self-employed persons by Council Regulation (EEC) No 1390/81,

'constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned. As the Court pointed out in its judgments of 23 September 1982 in Case 267/81 (*Kuijpers*, cited above), and Case 275/81 (*Koks* [1982] ECR 3013), "the Member States are [not] entitled to determine the extent to which their own legislation or that of another Member State is applicable" since they are "under an obligation to comply with the provisions of Community law in force" (see the judgment of 12 June 1986 in Case 302/84 *Ten Holder* [1986] ECR 1827, paragraph 14)'. [14]

106. Article 13(2) of Regulation No 1408/71 [15] provides that

'subject to Articles 14 to 17: . . .

. . .

(c) a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of that State;

. . .'.

14 — See in particular the judgment of 10 July 1986 in Case 60/85 *M. E. S. van Vermoolen, née Luitjen and Raad van Arbeid, Breda* [1986] ECR 2365, at pp. 2372 and 2373, paragraph 14.

15 — For a codified version, see Council Regulation (EEC) No 2001/83 of 2 June 1983, OJ L 230, 22.8.1983, p. 6.

107. It follows that a condition requiring all the crew of a fishing vessel flying the British flag to make contributions to the United Kingdom's social security scheme is in principle compatible with Community law.

108. In this regard it does not matter whether the members of the crew are to be regarded as employed persons or as self-employed persons with regard to the activities which they perform on board that vessel. Article 13(2)(c) refers generally to an 'activité professionnelle', unlike subparagraphs (a) and (b), which distinguish between activities pursued as an employed person and those pursued as a self-employed person.

109. It is true that the English version uses the term 'employed', which — in contrast to subparagraph (b) ('self-employed') and like subparagraph (a) ('employed') of the same provision — could be understood as referring only to persons pursuing activities as employed persons. The other language versions, however, correspond to the French version, using for example the terms 'Berufstätigkeit', 'beroepswerkzaamheden', and 'attività professionale'. Moreover, it is clear from the English version of Article 14b, which is applicable to mariners only, that Article 13(2)(c) also covers those of them who pursue activities as self-employed persons on board a vessel. It must therefore be concluded that there is an error of translation here and that the actual intention of the legislature was to determine the legislation applicable to mariners according to the flag of the vessel on which they pursue their activity, whether as employed persons or as self-employed persons.

110. Article 14b makes provision, however, for certain cases in which the legislation of another Member State applies. Consequently, it is only if the condition requiring the skipper and all the crew to be making contributions to the British social security scheme was so absolute that exceptions could not be made to it in the cases defined in Article 14b that that provision would be incompatible with Community law. There is nothing to suggest, however, that the United Kingdom authorities would not be prepared to apply that article in the cases — probably exceptional — in which the circumstances it envisages are met.

111. In conclusion, I propose that the Court should reply to the third question as follows:

'(a) Community law does not preclude a Member State from making the grant of a fishing licence for a fishing vessel registered in that Member State and flying its flag subject to the condition that at least 75% of its crew must be nationals of the Member State granting the licence or nationals of the European Economic Community or from requiring that, in order to fish for species of fish subject to quotas, the crew members in question must ordinarily reside in its territory.

(b) Subject to the special cases provided for in Article 14b of Regulation (EEC) No 1408/71 of the Council, Community law does not preclude that Member State from requiring the skipper and all the crew of such a vessel to be making contributions to its own social security scheme'.

Fourth question

112. By its fourth question the High Court seeks to ascertain whether

'the holder of such a licence [can] rely, in proceedings before a national court, on the incompatibility with Community law of one or other or both of the conditions referred to in Question 3, for the purpose of establishing that the imposition of such conditions or either of them is unlawful and should be quashed'.

113. The High Court is thus raising the question of the direct applicability of the provisions of Community law examined above which guarantee, within the limits of the transitional provisions of the Act of Accession of Spain and Portugal, freedom of movement for workers within the Community.

114. In its judgment of 4 December 1974 in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, the Court held that Article 48 of the Treaty is directly applicable and 'confers on individuals rights which the national courts must protect'.

115. The same applies to the provisions of Regulation No 1612/68 [16] and Regulation No 1408/71 which, by there very nature, may be relied upon before a national court.

116. However, I found earlier that the condition relating to the composition of crews is not incompatible with Community law so that from that viewpoint the question loses its purpose.

117. As regards the condition relating to the payment of social security contributions, it has been seen that it is compatible with Community law save where one of the cases envisaged in Article 14b of Regulation No 1408/71 materializes.

118. Consequently, I propose that the Court should reply to the fourth question as follows:

'The provisions of Article 14b of Regulation (EEC) No 1408/71 may be relied upon by individuals before a national court to oppose the application of provisions of national law which are contrary to them'.

16 — In this regard, see in particular the judgment of 4 April 1974 in Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 35.