OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 6 MARCH 1974 [1]

Mr President,

Members of the Court,

The French Code du Travail Maritime of 13 December 1926 provides in Article 3 (2) that such proportion of the crew of a ship as is laid down by order of the Minister for the Merchant Fleet must be French nationals. Article 1 of the Ministerial Order of 21 November 1960 (amended by Order of 12 June 1969) implements this and provides that certain employments (e.g. such as on the bridge) shall — apart from particular exceptions — be reserved to French nationals. Under Article 2 of this Order certain other employments — again apart from certain exceptions — on every ship are reserved to French nationals in the ratio of 3:1. Finally Article 3 of the Order provides that the competent administrative authorities shall decide the said particular exceptions.

In the view of the Commission these provisions are incompatible with Community law and conflict with Article 48 of the EEC Treaty, which in the interests of freedom of movement for workers provides for 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. Moreover, the French provisions are incompatible with Articles 1, 4 and 7 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257 of 19. 10. 1968). This Regulation was issued under the aforesaid Article 48.

For this reason the Commission in a letter dated 8 October 1971 requested the French Government to amend the provisions objected to as soon as possible.

The French Government apparently wanted at first to comply. At any rate in a letter from its Permanent Representative dated 30 November 1971 it informed the Commission of such an intention and announced that an appropriate draft law would be laid before Parliament at the next session. In spite of a letter from the Commission to the French Government dated 18 April 1972, in which the expectation was expressed that the matter in question should be resolved at the latest by 1 July 1972 (this was the end of the said session), nothing came of it. On the contrary the Permanent Representative of France informed the Commission in a telex dated 15 November 1972 that it had not been possible to lay a draft law before Parliament.

The Commission thereupon delivered a reasoned opinion on 15 December 1972 in accordance with Article 169 of the EEC Treaty. In the opinion it was maintained that the above mentioned French provisions infringed the aforesaid provisions of Community law and the request was expressed that the necessary measures to put an end to the infringement of the Treaty should be taken within 30 days.

The Commission thereafter learned from a letter from the Permanent Representative for France dated 6 February 1973 that a draft law to amend the provisions objected to had been adopted on a first reading on 13 December 1972 by the National Assembly and had been passed to the Senate. It had however not been possible to conclude the legislative process in the

1 — Translated from the German.

Senate before the end of the session in question. The examination of the draft would therefore be taken up by the Senate again after 2 April 1973, i.e. after the commencement of the next session.

Since this in fact did not happen, the Commission brought the matter before the Court on 14 September 1973 and thus initiated the present proceedings.

In accordance with the Commission's application the Court must now determine whether the French Republic, by not repealing the discriminatory provisions on access to employment in sea transport, has failed to fulfil its obligations under Community law and in particular under Articles 1, 4, and 7 of Regulation No 1412/68 of the Council of 15 October 1968.

I shall consider how this application should be judged in what follows.

1. The first reaction of the French Government was to explain that it would try to conclude the aforesaid legislative process shortly, i.e. during the then current session. The application should therefore be regarded as otiose. Accordingly its main claim in the answer was for a declaration that the proceedings were otiose.

In the rejoinder however the French Government gave it to be understood that the French Parliament was at the moment rejecting the amendment of the law which it had before it because it was of the opinion that the provisions and principles referred to by the Commission did not apply to sea transport. This pleading, logically enough, did not persist in the application to have the proceedings declared otiose, since there is no longer any prospect of the legal position being settled independently of a judgment of this Court.

I therefore do not need to go into this question.

2. On the other hand the French Government maintains unchanged its second line of argument, according to which the Commission has not shown that it is entitled to the declaration it seeks. In other words, the Commission was not able to show that the application of the provisions of Community law to which it referred had been undermined by the French measures; it had not been able to cite any examples of actual discrimination against workers from other Member States. This was in fact impossible, because there was no discrimination, for the competent French authorities had received a direction to see that workers from other Member States were treated equally and this direction had always been followed. It was thus significant that the provisions, the amendment of which the Commission sought, were not applied at all in France.

In my opinion, in considering this objection the fact is significant that the proposed amendment of the law failed in the French Parliament because of the view that Community law did not give rise to such obligations and that the provisions on freedom of movement did not apply to workers in sea transport. The defendant pursued this argument before the Court both in its rejoinder and in the oral proceedings. There is accordingly a dispute between the parties on an important question of Community law, which the Commission has a substantial interest in settling, and it therefore rightly insists on a decision of the Court.

Further, it may be noted that the competent French authorities have apparently been given only oral directions to the effect that they should see that there is equal treatment of workers from other Member States. Such directions certainly provide no guarantee comparable with that resulting from a change in the law. They could easily be revoked, and in view of the attitude of the French Government, as a matter of principle, to the legal questions now under discussion, such a revocation is by no means entirely improbable. The Commission therefore rightly from its standpoint attaches importance to a formal settlement of the legal position.

The Commission moreover makes the significant point that the maintenance of a law which the Commission considers to infringe the Treaty could, in spite of contrary administrative directions, leave uncertainties remaining for workers and undertakings involved in arranging employment. Such uncertainties, perhaps also the lack of awareness of the directions which had been given only orally, could lead to no effective equal treatment being guaranteed in actual fact such as is compatible, in the view of the Commission, with the Treaty and the Regulations which implement it. This too justifies the pursuit by the Commission of the proceedings it has initiated.

Finally, according to the case law it does not matter that the provisions of Community law now under discussion on freedom of movement of workers are directly applicable and override conflicting national law by reason of the priority of Community law. Proceedings under Article 169 are justified notwithstanding such considerations (cf. Cases 28/67 *Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn* (Rec. 1968, p. 215) and 31/69 *Commission v Italian Republic* (Rec. 1960, p. 25).

The interest of the Commission in having the French legal position brought into line by the application made by the Commission can therefore in no way be disputed.

3. As regards the consequent examination therefore of the question whether the application is well-founded, one point can first of all be clarified.

If the view is taken that the provisions referred to by the Commission (Article 48 of the EEC Treaty and Articles 1, 4 and 7 of Regulation No 1612/68) are applicable to workers in sea transport, there can be no doubt that the French provisions in question, as they appear from the Code du Travail Maritime of 13 December 1926 in conjunction with the aforesaid ministerial orders implementing them, are incompatible with Community law.

The principle obtains in Community law that nationals of a Member State are entitled to take up employment for salaries or wages within the territory of another Member State in accordance with the provisions applying to workers of the Member State concerned. In this respect Article 4 of Regulation No 1612/68 is clear when it provides:

'Provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member States.'

In contrast to this under the French Code du Travail Maritime certain employments on ships are completely and others partly reserved to French nationals. Special consent is required to except foreigners from this rule, which without doubt makes it more difficult for them and thus discriminatory.

However, as already mentioned, the fundamental question in dispute is whether the Treaty provisions on freedom of movement for workers in fact apply to sea transport.

Let me remind you first of all of the arguments of the French Government. This states that it appears clearly from the Treaty that a special system applies in the transport sphere and that a common policy must be developed in this sphere to attain the objectives of the Treaty. In recognition of the fact that special problems attach to sea transport, there is a special provision in Article 84 that the provisions on transport do not apply to it. It can therefore certainly be taken that the general provisions of the Treaty could not apply to sea transport. These general provisions could be applied to sea transport only by a special decision of the Council, reached unanimously and within the framework of a common policy. This is also true in

the sphere of freedom of movement for workers, since the freedom of movement of seamen is an essential part of the aforesaid common policy.

Against this the Commission takes the view that the EEC Treaty applies basically to all branches of the economy. The general provisions of the Treaty do not apply in a particular field only when a provision expressly so states. There is no such proviso for sea transport as regards freedom of movement for workers. In truth Article 84 can in no way be understood to mean that sea transport is completely excluded from the Treaty. The meaning of the provision is, rather, simply to exempt sea transport from the application of the special provisions of the Treaty on transport.

In judging this dispute regard must be had to the position which the Title 'Transport' plainly occupies in the Treaty.

It is significant that in principle integration under the EEC Treaty is of a comprehensive character and is not to take place separately according to the economic sector. This implies the principle that particular provisions, which relate to individual economic sectors, must be interpreted narrowly by reason of their exceptional nature. As regards the transport sector, for which the necessity of a common policy is embedded in the Treaty, it can therefore not be taken as a premise that this economic sphere is subject to special rules in every respect. Rather, special rules were considered necessary simply in the spheres which are expressly mentioned in the Title 'Transport'. Such spheres are international transport to or from the territory of a Member State or passing across the territory of one or more Member States and the conditions under which non-resident carriers may operate transport services within a Member State (Article 75). Another is the sphere of transport rates and conditions (Article 78), the abolition of discrimination in transport within the Community (Article 79) or the sphere of rates involving an element of support within the meaning of Article 80. Such is, finally, the sphere of charges or dues in respect of the crossing of frontiers which are charged by a carrier (Article 81 of the Treaty). These rules however in no way exclude the application of the general provisions of the Treaty, especially the principle of freedom of movement for workers which is particularly significant for integration.

An analysis of a few special provisions of the Treaty points in the same direction, perhaps even more persuasively.

The Commission rightly refers in this connection to Article 61 (1) of the Treaty in which it is stated:

'Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.'

It makes it clear that Articles 59 to 66 of Chapter 3 on services are not to be applied to transport. For this a special Title applies whereby, since this Title includes Article 84 on sea transport, it is moreover clear that this is likewise excluded from the Chapter on services. Indeed it can be said that a special provision such as that of Article 61 would not have been necessary if the general provisions of the Treaty did not apply to transport anyway. In other words the existence of a special provision points to the fact that the general provisions of the Treaty apply also to transport.

The Commission further refers to Article 77 of the Title 'Transport' in which it is stated:

'Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

If this is compared with the provision of Article 42 (according to which the provisions of the Chapter relating to

rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council) and if the wording of Article 77 is borne in mind, which obviously implies the application of Articles 92 to 94, then the conclusion drawn by the Commission is compelling, that the object of Article 77 is to exclude the application of the rules of the Treaty on competition only as regards certain aids in the transport sector. This too points clearly to the fact that the Treaty proceeds on the basis that the general provisions, which include the rules on competition, apply to transport.

Finally in support of its argument, the Commission could refer to the case law of the Court and in particular to the judgment in Case 22/70 *(Commission v Council)* of 31 March 1971 (Rec. 1971, p. 263). Indeed the same basic tendency is at the root of this judgment, which was given on the competence of the Community to conclude treaties in the transport sector. This follows mainly from the sentence in which it is stated:

'In the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy . . . one must turn to the general system of Community law in the sphere of relations with third countries.'

Nothing can be derived from this other than the principle that the general provisions of the Treaty are inapplicable to transport only insofar as special provisions expressly provide exceptions.

It must however now be pointed out that the arguments so far adduced applied simply to transport. It remains to be examined whether they also cover sea transport, to which, as is known, a special provision is devoted in the Title 'Transport'. This special provision (Article 84) states as follows:

'The provisions of this Title' (viz. the Title on transport) 'shall apply to transport by rail, road and inland waterway. The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.'

It must first be observed that from the point of view of the system of the Treaty it is an exception within an exception. This immediately indicates a narrow interpretation. Further, Article 84 must be looked at as a whole; its meaning is simply that the rules for transport do not apply to sea transport and that this lacuna must be filled by special decisions of the Council. On the other hand a statement of the exclusion of the general provisions of the Treaty cannot be inferred.

Moreover, beyond these general considerations the following observations support the view that sea transport is also subject to the general provisions of the Treaty.

Carriers are also engaged outside the sphere of actual transport; they need personnel not only for transport and they also undertake financial operations and import and export material for their businesses. Against this the establishment of the Common Market is achieved by the establishment of free movement of goods, persons, services and capital in general and not separately according to economic sectors. If, taking the view that the Treaty basically does not include sea transport it were necessary to consider whether a more or less narrow realtionship exists with this economic sphere and thereupon decide the application of the general Treaty rules (on freedom of movement for goods, persons, services and capital) this would lead to considerable legal difficulties and uncertainties in the absence of precise criteria for delimitation, which it is not possible to conceive that the draftsmen of the Treaty intended.

As regards the sphere of freedom of movement for workers which is of particular interest here, a principle which, as stated, is of basic significance

in the context of integration, it is further of importance that Article 48 (4) of the Treaty provides an exception only in the case of employment in the public service and not for other employments. If it had been intended that the said Title should not include workers in sea transport it would have been simple to have provided an appropriate exception in Article 48. The fact that this was not done can only be understood as supporting the line of argument which the Commission has taken.

The fact that the list in Annex III to the EEC Treaty, which relates to the provision of Article 106 (payments between Member States), does not exclude sea transport, supports this argument.

In the same way Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17 (OJ No 124/62, 28. 11. 1962, p. 2751) is of importance. Article 1 deals simply with transport and Article 3 provides that Article 1 shall remain in force, as regards transport by rail, road and inland waterway, until 31 December 1965. From this it follows that it also includes sea transport. This too presupposes that the general provisions of the Treaty (including the rules of competition) apply equally to sea transport. If this were not so it would indeed appear incomprehensible that the Council should have found it necessary to lay down an exception simply for transport, based moreover only on Article 87 of the Treaty, i.e. not taking into consideration Article 84 (2).

Finally, in the present context — if the arguments (which are not at all unimportant) of the Commission based on the wording of the Common Customs Tariff are disregarded — Regulation No 3 on social security for migrant workers and Regulation No 1408/71 of 14 June 1971 (OJ L 149 of 5. 7. 1971) which replaces it are instructive. They were issued under Article 51 of the Treaty with the object of facilitating freedom of movement for workers by the provision of social security. If, as appears from Article 4 (6) and Article 13 (b) of Regulation No 3 and Article 4 (2) and Article 13 (b) of Regulation No 1408/71, they also cover transport workers, including those in sea transport, then it can only be deduced that the Council in this sphere too proceeded from the basis that the principle of freedom of movement was applicable, and did so moreover without finding it necessary to rely on Article 84 (2).

All the above considerations prompt me to agree with the view of the Commission that the general provisions of the Treaty, including those on the freedom of movement of workers, apply to sea transport, and to attach no decisive weight to the contrary arguments of the French Government. This holds true as regards its reference to Article 77 of the Treaty (namely the fact that the aids referred to therein do not come into question for sea transport), the reference to the general programme for the removal of restrictions on freedom of establishment and the reference to the preparatory work on the Treaty with its various textual proposals on Article 74, which in my view do not lead to the conclusion drawn by the French Government.

After all I have stated (in particular too on the question of a formal settlement of the national legal position) and having regard to the relevant case law according to which it is unimportant which state organ is responsible for an infringement of the Treaty, it is clear that the action brought by the Commission is well-founded.

4. Accordingly, to summarize, I propose that a judgment should be pronounced in which it is declared that the French Government, in not repealing discriminatory provisions on access to employment in sea transport in its Code du Travail Maritime, has infringed obligations which it has under the provisions of the Treaty on freedom of movement for workers and in particular under Articles 1, 4 and 7 of Regulation No 1612/68.

The costs of the proceedings in this event should be borne by the defendant.