of national measures the direct or indirect effect of which is to alter unfavourably the situation in a Member State of carriers from other Member States in relation to national carriers, does not preclude a Member State from making navigation on its national inland waterways conditional upon the possession of a master's certificate for inland navigation issued in accordance with national law.

It does however preclude the national legislative provisions or administrative practices governing masters' certificates for inland navigation when the Treaty entered into force from being amended or changed in a manner unfavourable to carriers of other Member States. It is for the national court to decide whether any such change has taken place.

REPORT FOR THE HEARING
in Joined Cases C-184/91 and C-221/91 *

I — Facts and procedure

(1) *Legal background*

Under the Verordnung über Befähigungszeugnisse in der Binnenschiffahrt (Regulation on Certificates of Competence in Inland Waterway Navigation) of 7 December 1981 (*Bundesgesetzblatt* I, p. 1333) (hereinafter 'the Verordnung'), navigation on German inland waterways is subject to the possession of a master's certificate. The Verordnung provides for several types of certificates which differ depending on the nature and size of the vessel. It lays down the conditions with which persons wishing to obtain certificates must comply. In principle, they have to take an aptitude test and have at least five years' experience as a mariner.

In order to ensure that foreign boatmasters also satisfy the safety standards, the Verordnung requires in principle that they too should have a German master's certificate. However, under Paragraph 5(2) of the Verordnung, the Federal Minister for Transport may recognize foreign certificates. Recognition is granted as a general rule for a particular type of certificate and it is notified by publication in the *Verkehrsblatt* (Official bulletin of the transport sector). In this way, for example, French certificates have been recognized by the Federal Minister for Transport.

The German Government has entered into discussions with the Netherlands Government on the reciprocal recognition of masters' certificates for inland navigation. Those negotiations have not yet culminated in a full agreement.

In the Netherlands, the rules on masters' certificates are set out in the Binnenschepenwet

* Language of the case: German.

(Inland Waterways Vessels Law) of 30 September 1981 (*Staatsblad* 1981, 678). Under Article 18 of that Law, there are two classes of certificates, depending on the size of the vessel concerned. The certificates for larger vessels ('Groot Vaarbewijs II') authorize navigation with all types of vessel. The obligation to have a valid master's certificate prescribed by the Law did not enter into force until 1 April 1991 (see the Royal Decree of 20 March 1991 on the entry into force of Article 16(1)(a), (b), (c) and (d), Article 16(2) and Article 46 of the Binnenschepenwet, Staatsblad 1991, 150).

5. By decision of the Minister for Transport, Water Control and Construction of 9 May 1988, several German masters' certificates were recognized for the purposes of commercial navigation on Netherlands inland waterways (*Staatscourant* 1988, 99).

6. On 16 December 1991 the Council adopted a Directive 91/672/EEC on the reciprocal recognition of national boatmasters' certificates for the carriage of goods and passengers by inland waterway (OJ 1991 L 373, p. 29). Among the certificates covered by that directive, which is based on Article 75 of the EEC Treaty, is the 'Groot Vaarbewijs II'.

(2) *The main proceedings and the question referred to the Court*

7. Mr Oorburg, a Netherlands national, and Mr van Messem, a Belgian national, hold the Netherlands 'Groot Vaarbewijs'. They have sailed under that certificate on the Dortmund-Ems canal. Mr van Messem has also sailed on the Küstenkanal. Taking the view that the Netherlands certificate was not valid for navigation in Germany, the Wasser- und Schiffahrtsdirektion Nordwest (North-West Waterways Authority), Aurich, fined Mr Oorburg DM 250 and Mr van Messem DM 500.

8. Both masters protested against the fines and the proceedings are pending before the Amtsgericht (Local Court), Emden. They claim that the Netherlands 'Groot Vaarbewijs II' authorizes them also to sail on German waterways. Mr van Messem states in this connection that he has been checked on several occasions and has never had any problems with his master's certificate.

9. The Amtsgericht takes the view that the non-recognition of a master's certificate issued by another Member State amounts to treating transport undertakings from that State less favourably than domestic transport undertakings. In its opinion, there is no objective reason for not authorizing navigation with Netherlands certificates in districts such as the Ems or the west German canals, which are very similar to Netherlands waterways. It further considers that the fact that the Federal Minister for Transport may authorize exemptions from the Verordnung has no bearing on the matter, since the requirement of an application for an exceptional authorization also constitutes indirect discrimination against foreign transport undertakings, which operate on waterways comparable to waterways in their countries.

In those circumstances, the Amtsgericht stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 76 of the EEC Treaty to be interpreted as meaning that a Member State is precluded from making navigation on its national waterways conditional upon the possession of a Master's Certificate for inland navigation issued in accordance with national law without making any differentiation in principle according to the nature of the inland waterways to be sailed?'

(3) *Procedure before the Court of Justice*

10. The order for reference made by the Amtsgericht Emden on 2 July 1991 concerning Mr Oorburg's application was received at the Court Registry on 17 July 1991.

11. The order for reference concerning Mr van Messem's application, also made on 2 July 1991, was received at the Court Registry on 3 September 1991.

12. By order of 9 September 1991, the Court decided to join Cases C-184/91 and C-221/91 in accordance with Article 43 of the Rules of Procedure.

13. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were lodged by the German Government, represented by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and C. D. Quassowski, Regierungsdirektor at the same Ministry, acting as Agents; by the Netherlands Government, represented by B. R. Bot, Secretary-General of the Ministry of Foreign Affairs, acting as Agent; and by the Commission, represented by R. Wägenbaur, Principal Legal Adviser, acting as Agent, and B. Rapp-Jung of the Brussels Bar.

14. By decision of 3 June 1992, the Court assigned the cases to the Sixth Chamber.

15. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the observations submitted to the Court

16. The *German Government* observes that the objective of Article 76 is to ensure that existing national provisions are not amended in a manner contrary to the aims of the Treaty, that is, discriminating against nationals of other Member States of the Community, before a common transport policy is introduced. That objective has not been jeopardized in this instance. The 1981 Verordnung codified and amended the complex rules which previously applied to masters' certificates. The new rules are simpler and more favourable to holders of foreign certificates than the ones they replaced.

17. The German Government states in this connection that under the new rules the Federal Minister for Transport may grant exemptions to holders of foreign certificates. Such exemptions have not been granted for Netherlands certificates by reason of the inadequacy of the guarantees afforded by the Netherlands rules. Indeed, the requirement to hold a valid certificate has been in existence only since 1 April 1991. Before that date, certificates were granted to boatmasters who made a declaration that to the best of their knowledge they satisfied the aptitude requirements and that they had worked as masters for a sufficiently long time.

18. The German Government further observes that there are as yet no Community directives laying down obligations of reciprocal recognition in this field. On 7 October 1991 the Council adopted a directive, but it is confined to certificates relating to the carriage of goods and does not have to be transposed into national law until 1 January 1993.

19. In the German Government's view, in the final analysis the question raised by the cases at issue in the main proceedings does not fall within the field of application of Article 76 but within the scope of the freedom to provide services in the field of transport under Article 61(1) of the EEC Treaty as interpreted by the Court (see Case C-17/80 *Pinaud Wieger* [1991] ECR I-5253). The directive adopted by the Council on 7 October 1991 has to be seen from that point of view. The German Government concludes that, regard being had to the present stage of harmonization of Community law and until such time as the directive has been transposed into national law within the time-limits laid down, it is not precluded from maintaining the Verordnung in force in its present version and enforcing it.

20. According to the *Netherlands Government*, Article 76 does not in itself prohibit the introduction of new mandatory national provisions but makes such introduction subject to the requirement that the provisions should be applied equally to national undertakings and to undertakings from other Member States. That requirement does not seem to be met in this instance. It appears from the order for reference that the amendment of the rules for the implementation of the Verordnung affects the conditions of competition of masters from other Member States contrary to Article 76. The Netherlands Government states in this connection that, before the two cases at issue, it had no knowledge of serious difficulties having been encountered by Netherlands masters sailing in the Federal Republic of Germany.

21. The Netherlands Government considers that, apart from Article 76, the Treaty rules on freedom of movement are relevant in answering the question referred to the Court. The Court has consistently held that those rules imply that Member States, in considering whether a master has a right to sail on inland waterways, must take account of the qualifications which the boatmaster already possesses. It refers in this connection to Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007 as regards

Article 59, to Case C-340/89 *Vlassopoulou* [1991] I-2357 as regards Article 52 and to Case 120/78 *REWE-Zentrale* v *Bundesmonopolverwaltung* ('Cassis de Dijon') [1979] ECR 649 as regards Article 30.

22. For the purposes of the application of those principles to the cases at issue, the Netherlands Government attaches special importance to the observation of the national court to the effect that there is no objective reason for not authorizing navigation with Netherlands certificates on waterways such as the Ems or the west German canals, which are entirely similar to Netherlands waterways.

23. The *Commission* observes that the application of Article 76 in the two main proceedings presupposes that the present version of the Verordnung places foreign boatmasters in a less favourable situation, as compared with domestic boatmasters, than they were in under the former rules applicable to masters' certificates. However, comparison of the present German provisions with those previously applicable does not reveal any adverse change as far as foreign boatmasters are concerned. On the contrary, the present situation seems more favourable.

24. However, an infringement of Article 76 does not result solely from an amendment of the national rules to the detriment of nationals of other Member States but may also result from a change in an administrative practice. It is for the national court to examine whether there has been such a change in the cases at issue in the main proceedings, in particular in the light of Mr van Messem's claim that he never had problems with his 'Groot Vaarbewijs' in earlier checks.

25. The Commission considers that the answer to the preliminary question should not be confined to interpreting Article 76. The obligation to recognize masters' certificates may also flow from other provisions of Community law on freedom of movement which, as fundamental rules, are still applicable. It appears from the case-law of the Court that the basic rules of the Treaty may be rendered inapplicable only as a result of express provision in the Treaty (Case 167/73 *Commission* v *France* [1974] ECR 359). However, Article 61(1) excludes only provisions relating to services and hence the other rules continue to be applicable.

26. Under those rules, in the absence of Community rules on the reciprocal recognition of diplomas the Member States must take account of the existence of a diploma lawfully obtained in another Member State (Case 16/78 *Choquet* [1978] ECR 2293; Case 71/76 *Thieffry* [1977] ECR 765; Case 222/86 *Heylens* [1987] ECR 4097; and Case C-340/89 *Vlassopoulou*). The Court's case-law justifies that obligation by reference chiefly to Article 5 of the Treaty in conjunction with the general objectives and aims of the Treaty. It would be contrary to the general nature of that case-law to make the relevance of foreign diplomas dependent on the area of the Treaty within which they fall. The principle of reciprocal recognition must

therefore apply also in the transport field. If that were not the case, the strange result would be that the rules applicable to establishment, which aim at lasting integration in the economic life of a Member State, would be more liberal than the rules applicable to persons simply carrying out a temporary activity as boatmasters.

27. It follows that the Federal Republic of Germany must check the qualifications certified by the Netherlands 'Groot Vaarbewijs II' having regard to the factual circumstances under which the boatmasters concerned operate. If that comparative examination shows that the qualifications correspond only to some extent, Germany may require the concerned to show that they have acquired the missing knowledge and qualifications lacking. Although it is true that it is for the national court to carry out that comparative examination in the light of national law, the Commission points out nevertheless that the 'Groot Vaarbewijs' is the highest class of master's certificate issued in the Netherlands and that the German waterways in question have similar characteristics to Netherlands waterways.

P. J. G. Kapteyn
Judge-Rapporteur