OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 13 March 1991 *

Mr President,
Members of the Court,

1. The factual and legal background to the two cases with which this Opinion is concerned is well known to the Court. The cases form part of a series of actions relating to the various measures which the United Kingdom, and Ireland, took successively from 1983 onwards in order to combat what is termed in English as 'quota hopping', that is to say the practice whereby, according to the United Kingdom, its fishing quotas are 'plundered' by vessels flying the British flag but lacking any genuine link with the United Kingdom. The history of the British measures is summarized in the interlocutory order of the President of the Court of 10 October 1989 in Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125.

2. As can be seen from paragraph 3 of the reports for the hearings in the two cases, the British legislation at issue, dating from 1988, provided for the establishment of a new register of all British fishing vessels including those registered in the old register maintained under the Merchant Shipping Act 1894. However, only fishing vessels fulfilling the conditions laid down in section 14 of the 1988 Act may be registered in the new register.

3. Section 14(1) provides that, subject to a dispensation granted by the Secretary of State for Transport, a fishing vessel is only to be eligible to be registered in the new register if:

'(a) the vessel is British-owned;

(b) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom; and

(c) any charterer, manager or operator of the vessel is a qualified person or company.'

Under section 14(2), a fishing vessel is to be regarded as being British-owned if the legal title to the vessel is vested wholly in one or more qualified persons or companies and the vessel is beneficially owned wholly by a qualified company or companies or, as to at least 75%, by one or more qualified persons. Section 14(7) states that 'qualified person' means a person who is a British citizen resident and domiciled in the United Kingdom and that 'qualified company'

* Original language: French.

means a company which is incorporated in the United Kingdom and has its principal place of business there; at least 75% of its shares must be owned by one or more qualified persons or companies and at least 75% of its directors must be qualified persons.

4. The question to be considered is whether and to what extent laying down such requirements for the registration of fishing vessels is compatible with Community law and in particular with Articles 7, 52 and 221 of the EEC Treaty. In the proceedings relating to the action for a declaration that the United Kingdom has failed to fulfil its obligations under the Treaty (Case C-246/89) only the requirements relating to the nationality of the natural or legal persons in question are at issue. In the reference for a preliminary ruling (Case C-221/89) it will also be necessary, in connection with the second question before the Court, to consider the requirements relating to the residence and domicile of the natural persons in question or to the principal place of business of the companies, and to the place of management, direction and control of the vessels. In view of the questions put by the national court and of the written observations submitted by the parties, account will have to be taken in the course of that examination of the competence of the Member States in this area, of their obligations under public international law (first question in Case C-221/89) and of the objectives of the Common Fisheries Policy and, in particular, of the quota system (third question in Case C-221/89). Lastly, the fourth question referred to the Court in Case C-221/89 is concerned with the fact that the 1988 Act also applies to fishing vessels which were registered in the old register but, because they do not satisfy all the new requirements, in principle ceased to be registered on 31 March 1989.

I — The scope of the competence of the Member States with regard to the registration of fishing boats

5. It is uncontested that as Community law stands at present competence to determine the conditions for the registration of fishing boats is vested in the Member States. The Court confirmed this in its judgment of 19 January 1988 in *Pesca Valentia* (Case 223/86 *Pesca Valentia* v *Minister for Fisheries and Forestry* [1988] ECR 83, paragraph 13), in which it held that although the Community regulations on fisheries refer to fishing vessels 'flying the flag' of a Member State or 'registered' there, they leave those terms to be defined in the legislation of the Member States.

6. This does not mean, however, that the Member States may exercise that competence in complete liberty without regard to the principles of Community law.

7. In its judgment of 21 June 1988 in Case 127/87 *Commission* v *Hellenic Republic* [(1988] ECR 3333, paragraph 7) the Court referred to its established case-law (see, *inter alia*, the judgment of 7 June 1988 in Case 57/86 *Hellenic Republic* v *Commission* [1988] ECR 2855) to the effect that:

'the fact that Member States retain certain monetary powers does not entitle them to take unilateral measures prohibited by the Treaty'.

8. Consequently, without having to decide whether the right of registration is a retained power or whether the Community could legislate at any time in that field, it

must be held that in exercising that competence the Member States must comply with the general rules of the Treaty.

9. What is at issue in this case is the taking-up, on a self-employed basis, of activities in the fisheries sector and the pursuit of those activities, in other words, the right of establishment in the fisheries sector. Indeed, even without having to go so far as the Commission did at hearing in arguing that registration itself already constitutes a form of establishment, it must be observed that in any event registration is a precondition for taking up and pursuing activities in the fisheries sector. In its judgment of 18 June 1985 in Case 197/84 *Steinhauser* v *City of Biarritz* [(1985] ECR 1819, paragraph 16), the Court held that freedom of establishment, as provided for in Article 52 of the Treaty, included the right not only to take up activities as a self-employed person but also to pursue them *in the broad sense of the term* and that

'[t]he renting of premises for business purposes furthers the pursuit of an occupation and therefore falls within the scope of Article 52 of the EEC Treaty'.

Moreover, in the judgment of 30 May 1989 in Case 305/87 *Commission* v *Hellenic Republic* [(1989] ECR 1461, paragraph 21), the Court pointed out that, as it had held on several occasions (see, *inter alia*, the judgment of 14 January 1988 in Case 63/86 *Commission* v *Italy* [1988] ECR 29), the prohibition of all discrimination on grounds of nationality set out in Article 52 of the Treaty

'is concerned not solely with the specific rules on the pursuit of an occupation but also with the rules relating to the various general facilities which are of assistance in the pursuit of that occupation'.

What was at issue in that case was the right to acquire, use or dispose of immovable property on the territory of another Member State; the Court held that that right was the 'corollary' of freedom of establishment.

10. I take the view that the *right to register a fishing vessel*, as a precondition for pursuing the activity of fishing in another Member State, likewise constitutes a element which is inseparable from the right of establishment in the sea-fishing sector and, on that basis, falls within the sphere of application of Article 52 of the EEC Treaty. The fact that it was not expressly mentioned in the Council's General programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition, Second Series IX, p. 7) makes no difference, since, useful as it is, the programme only contains guidelines and is not exhaustive. However, it appears from Annex III thereto, to which paragraph D of Title IV (Timetable) of the programme refers, that it also covers the elimination of restrictions on freedom of establishment in the sea-fishing sector.

11. It also appears from the Court's case-law (see, for example, the judgment of 7 July 1988 in Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877, paragraph 10) that Article 52, as a directly applicable rule of Community law, is binding on the Member States even though, in the absence of Community legislation, they retain legislative jurisdiction in the particular field.

12. The United Kingdom and certain other Member States contest that view on the ground that the Treaty and, in particular, Articles 7, 52 and 221 thereof cannot be interpreted as depriving the Member States of their competence under public international law with regard to the registration of ships.

13. As far as public international law is concerned, the Member States in question refer above all to the Geneva Convention of 29 April 1958 on the High Seas, Article 5(1) of which expressly recognizes the right of each State to fix

'the conditions for the grant of nationality to ships, for the registration of ships in its territory, and for the right to fly its flag'.

The same provision stipulates in this connection that

'[t]here must exist a genuine link between the State and the ship'

and that

'in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.

14. Admittedly, the first paragraph of Article 234 of the EEC Treaty provides that

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

Although the Geneva Convention was not signed until 29 April 1958, that is to say after the EEC Treaty entered into force on 1 January 1958, the United Kingdom may in principle rely on it, since under Article 5 of the 1972 Act of Accession

'Article 234 of the EEC Treaty and Articles 105 and 106 of the Euratom Treaty shall apply, for the new Member States, to agreements or conventions concluded before accession'.

15. It appears, however, from the case-law of the Court that the purpose of Article 234

'is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'. [1]

In the judgment of 22 September 1988 in Case 286/86 *Ministère public* v *Deserbais* [(1988] ECR 4907, paragraph 18) the Court concluded as follows from that case-law:

1 — See, as regards a convention concluded after the entry into force of the EEC Treaty but before the accession of the United Kingdom, Ireland and Denmark, the judgment of 14 October 1980 in Case 812/79 *Attorney General* v *Burgoa* [1980] ECR 2787, paragraph 8.

'provided that . . . the rights of non-member countries are not involved, a Member State cannot rely on the provisions of a pre-existing convention of that kind in order to justify restrictions on the marketing of products coming from another Member State where the marketing thereof is lawful by virtue of the free movement of goods provided for by the Treaty'.

It seems to me that the same reasoning can be applied in this case: in so far as compliance with the rules of the Treaty in relations between the Member States does not jeopardize non-member countries' rights under the 1958 Geneva Convention, the United Kingdom cannot rely on that Convention in order to justify infringements of those rules. No provision of the 1958 Geneva Convention obliges it to have recourse to particular conditions in order to ensure that there is a 'genuine link' between it and the ships to which it intends to grant flag rights. Consequently, even if a non-member country may possibly be entitled not to recognize a flag granted in a manner contrary to the Geneva Convention, it can do so only in so far as there is no 'genuine link', regardless as to its nature, between the vessel and the State whose flag it is flying. Moreover, unless the United Kingdom is taken to be consciously disregarding the very international obligations on the basis of which it claims that the requirements at issue are compatible with Community law, the fact that those requirements are applicable only to fishing vessels tends to show that, in the United Kingdom's eyes also, they are not the sole requirements suitable for ensuring the existence of a 'genuine link' as required by international law.

16. In so far as the United Kingdom might wish to argue that it itself has the right under the Convention to retain requirements such as those at issue, reference can also be made to the Court's judgment of 27 February 1962 in Case 10/61 *Commission* v *Italy* [1962] ECR 1, from which it appears that,

'according to the principles of international law, a Member State which, by virtue of the entry into force of the EEC Treaty, assumes new obligations which conflict with rights held under an earlier agreement *ipso facto* agrees to forgo the exercise of such rights to the extent necessary for the performance of its new obligations' (see summary, paragraph 2).

In that judgment the Court expressly adopted the Commission's argument to the effect that

'the terms "rights and obligations" in Article 234 refer, as regards the "rights", to the rights of third countries and, as regards the "obligations", to the obligations of Member States' (at p. 10).

This led the Court to hold in that judgment that, as a result of Article 234, a Member State may have to apply, in its relations with the other Member States, rules different from those which it applies in its relations with non-member countries even though they are all party to the same international convention. The Geneva Convention itself recognizes that that possibility exists by providing in Article 30 that

'the provisions of this Convention shall not affect conventions or other international

agreements already in force, as between States parties to them'.

17. In avoid to escape those conclusions, the United Kingdom argued in its rejoinder in Case C-246/89 (see paragraphs 2.17 and 2.18 of that document and paragraph 89 of the Report for the Hearing) and at the hearing that the criterion of the nationality of the owner of the vessel merely reflects customary international law, which the Treaty cannot be assumed to disregard. Without its even being necessary to resolve the question of the hierarchy of legislation which is implicit in this argument, I consider that it must be rejected, since even though according to the preamble to the Geneva Convention its provisions are 'generally declaratory of established principles of international law', I do not consider the United Kingdom's statement to be well founded. On the one hand, as I have just observed, the Convention itself confines itself to requiring there to be a 'genuine link' between the flag State and the ship. On the other, it is explicitly stated in the report of the International Law Commission, to which the United Kingdom itself refers, that, in view of the divergent practice in the various States, the International Law Commission 'thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag' and did 'not consider it possible to state in any greater detail what form this link should take' (see Annex I to the Commission's reply in Case C-246/89).

18. As for the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, of which the Community is a signatory but which has not yet entered into force, it contains provisions similar to Article 5(1) of the Geneva Convention (see Articles 91 and 94). Lastly, the United Nations Convention of 1986 on Conditions for Registration of Ships, which no Member State has yet signed, even goes as far as expressly to confer on States party thereto the right to choose between the criterion of the nationality of the owner and the criterion of the nationality or place of residence of the crew (see Articles 7, 8 and 9, Annex I to the Commission's written observations in Case C-221/89). Whilst, therefore, the criterion of the owner's nationality is consistent with a fairly widespread international practice, it cannot, however, be regarded as forming part of customary international law.

19. Neither, in my view, is it possible to accept the argument of the United Kingdom, also put forward by Belgium and Greece and, as regards ships in general, Denmark, that Articles 7, 52 and 221 of the EEC Treaty have no bearing on requirements of the type at issue in this case.

20. I grant that the principle of non-discrimination on grounds of nationality does, as the United Kingdom maintains, presuppose the existence of the concept of nationality and that the prohibition of discrimination set out in Article 7 and Articles 52 and 59 of the Treaty, as the Belgian, Greek and Danish Governments point out, applies only where the legislation of a Member State treats individuals differently on account of their different nationality. However, it seems to

me to be incorrect to conclude as a result that Article 7 of the Treaty, together with Articles 52 and 221, which are specific expressions of that article, cannot apply to nationality requirements of the type at issue in this instance.

21. The principle of non-discrimination prohibits all discrimination on grounds of nationality *both* between ships of the Member States *and* between nationals of the Member States, as the case may be. As far as fishing vessels are concerned, the principle is, moreover, expressly set out in Article 2(1) of Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976 L 20, p. 19), which provides as follows:

'Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction 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.'

It is from this general rule of equal conditions of access to fisheries resources that derogation is made by the system of national quotas[2] (see paragraph 24 of the judgment of 14 December 1989 in Case C-216/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd* [1989] ECR 4509), as established by Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (Official Journal 1983 L 24, p. 1) whereby only fishing vessels flying the flag of or registered in a Member State may fish against the quotas allocated to that Member State, which in other words are reserved to 'national' vessels to the exclusion of vessels from other Member States.

22. However, the matter at issue in the cases now before the Court is not access by vessels of Member States to fishing activities in the Community but access by nationals of Member States to vessels and to the operation of vessels. The argument put forward by the Member States mentioned above is tantamount to seeking to graft onto the derogation from the principle of non-discrimination on grounds of nationality a second derogation as regards fishing vessels relating to the nationality of the owners or operators of such vessels. It is based on confusion between the 'nationality' of the vessels and the nationality requirements applicable to nationals of the Member States and would end up by re-introducing, through the medium of rules applicable to the registration of vessels, discrimination based on the nationality of persons, the prohibition of which constitutes one of the fundamental rules of the EEC Treaty. The view that ships are fundamentally different from companies — see paragraph 90 of the Report for the Hearing in Case C-246/89 — does not justify discrimination in the field of the 'nationality' of vessels between companies and nationals of the Member States. On the contrary, it seems to me to be significant in this context that when, in Article 58, the Treaty defined the companies to which the chapter on the right of establishment is applicable, it adopted, alongside the criterion of formation in accordance with

2 — For the compatibility with the Treaty, and in particular with Articles 7 and 30, of the distribution between national quotas of the total volume of catches available to the Community, see the judgment of 16 June 1987 in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671, paragraphs 23 and 24.

the law of a Member State, the criterion of the registered office, central administration or principal place of business and not that of the nationality of the founders, directors or shareholders.[3] The United Kingdom therefore cannot argue on the basis of the fact that Article 7 can only apply to discrimination between *ships* if they are of different 'nationalities' in order to justify differences in treatment between natural or legal *persons* of different nationalities. As for Articles 52 and 221, in as much as they refer to establishment and participation in capital, they can in any event apply only to persons and not to ships.

23. In sum, I conclude from the whole of the considerations set out above that, whilst international law does indeed impose certain obligations on the Member States in point of the registration of vessels, they are, however, fairly vague. In particular, international law does not define what is to be understood by a 'genuine link'. It follows that States may make the exercise of the right of registration subject to particular rules applicable in inter-State relations, such as the provisions of Articles 7, 52 and 221 of the EEC Treaty. Consequently, I propose that the first question in Case C-221/89 should be answered as follows:

'Whilst at present it falls to the Member State concerned to determine whether a vessel is entitled to be registered in that State, the Member State in question is none the less bound to comply with the relevant principles and provisions of Community law.'

II — The compatibility with Community law, and in particular with Articles 7, 52 and 221 of the EEC Treaty, of the registration requirements at issue

24. So as to keep to the order of the questions put by the national court in Case C-221/89 I shall first consider the compatibility of the registration requirements with Community law leaving aside any consideration relating to the Community system of fishing quotas. In any event, reference to the quota system can have no influence on the compatibility with Community law of the registration requirements except as regards the registration of vessels fishing for species subject to quotas.

25. In order to facilitate consideration of the national court's second question it appears advisable to divide it into sections depending on whether it relates to the nationality or the place of residence of the owners and operators[4] or to the place from which the vessel is operated, and hence to reformulate it as follows:

'Is it contrary to Community law and in particular to Articles 7, 52 and 221 of the EEC Treaty for a Member State to stipulate the following requirements for registering a fishing vessel in its national register:

3 — I would refer in this context to the case-law of the Court according to which it is the registered office of a company within the meaning of Article 58 that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons (see the judgments of 28 January 1986 in Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18, and of 10 July 1986 in Case 79/85 *Segers* v *Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375, paragraph 13).

4 — 'Operator' covers charterers, managers or operators within the meaning of section 14(1)(c) of the 1988 Act.

(a) the owners and operators of the vessel must be citizens of the Member State in question or companies incorporated in that State and, in the case of such a company, at least 75% of its shares must be owned by citizens of that State or by companies incorporated there and 75% of its directors must be citizens of that State;

(b) the said owners, operators, shareholders and directors, as the case may be, must be resident and domiciled in that Member State and, in the case of a company, it must have its principal place of business there;

(c) the vessel must be managed and its operations directed and controlled from within that Member State?'

26. Before considering these various requirements *seriatim* I should like to make the following four preliminary remarks:

(1) The Commission has raised the First Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty (Official Journal, English Special Edition 1959-62, p. 49), as amended,[5] only in connection with the residence requirement laid down for shareholders and it will therefore be considered only in the context of part (b) of the question as I have reformulated it above. Moreover, the Commission made no mention of this directive in its action for failure to fulfil obligations, which relates only to the nationality requirements.

(2) Since the cases before the Court are concerned with the taking-up of fishing activities by nationals of a Member State and the pursuit of those activities in another Member State using a vessel registered in that State, Article 59 of the Treaty on freedom to provide services, which was raised by the Spanish Government, does not seem to me to be applicable. I consider that, for the provision of a service within the meaning of Article 59 to be involved in the sea-fishing sector, there must be an operation carried out by a national established in one Member State for a recipient established in another Member State by means of a fishing vessel registered in the first State.

(3) In its judgment of 30 May 1989 in Case 305/87 *Commission* v *Hellenic Republic* [(1989] ECR 1461, paragraphs 12 and 13), the Court pointed out that

'the general principle of non-discrimination on grounds of nationality laid down in Article 7 of the Treaty has been implemented, in regard to their several domains, by Articles 48, 52 and 59 of the Treaty. Consequently, any rules incompatible with those provisions are also incompatible with Article 7' (. . .),

which therefore

'applies independently only to situations governed by Community law in regard

5 — This directive was repealed and replaced with effect from 1 July 1990 by Directive 88/361/EEC (OJ 1988 L 178, p. 5).

to which the Treaty lays down no specific prohibition of discrimination'.

Accordingly, the compatibility of the registration requirements with Article 7 of the Treaty should be considered only in so far as there are situations other than those covered by one or other of the specific provisions at issue here.

27. As for Article 40(3) of the Treaty, which is raised by the applicants in the main proceedings in Case C-221/89, that provision is merely an expression, specific to the agricultural sector, of the general principle of equality. The latter principle is broader in scope than the principle of non-discrimination on grounds of nationality, which, however, is the only general principle at issue here.

(4) Lastly, reference to Article 53 of the Treaty, which is also prayed in aid by the applicants in the main proceedings in Case C-221/89 and provides that

'Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in this Treaty',

no longer adds anything to the general prohibition set out in Article 52, since the Court has held that, as from the end of the transitional period, Article 52 is directly applicable.

28. Having made these clarifications, let us now consider each of the registration requirements at issue in turn.

(a) *The nationality requirements*

29. There can be no doubt that nationality requirements of the type contained in the 1988 Act are incompatible with the prohibition of discrimination on grounds of nationality set out in Articles 52 and 221 of the Treaty as regards, respectively, the right of establishment and the right of participation in the capital of companies or firms within the meaning of Article 58. In this regard, I fully concur with the Commission's assessments as they are set out in the reports for the hearings (see paragraphs 49 and 50 of the report in Case C-221/89 and paragraphs 21 and 22 of the report in Case C-246/89). As the President of the Court observed in paragraph 30 of the order of 10 October 1989 in Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125,

'The rights deriving from the abovementioned provisions of the Treaty include not only the rights of establishment and of participation in the capital of companies or firms but also the right to pursue an economic activity, as the case may be through a company, under the conditions laid down by the legislation of the country of establishment for its own nationals.'

30. Indeed, the second paragraph of Article 52 provides as follows:

'Freedom of establishment shall include the right to take up and pursue activities as self-

employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, *under the conditions laid down for its own nationals by the law of the country where such establishment is effected*, subject to the provisions of the chapter relating to capital.'

The first paragraph of Article 52 extends the scope of the abolition of the restrictions on freedom of establishment to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

31. It follows from that provision, and in particular from the passage which I have underscored, that it is necessary to reject the United Kingdom's argument that no infringement of Article 52 has taken place because the nationality requirements do not prevent nationals of other Member States from establishing themselves in the United Kingdom and operating fishing vessels there but only from doing so under the British flag: British citizens are not subject to that restriction. I would add that if all the Member States made the registration of their fishing vessels subject to residence or domicile requirements of the type laid down in the United Kingdom Act, nationals of other Member States established in the United Kingdom would not even be able to carry on any fishing activity under any flag, because they would not be entitled to fly the flag of any Member State.

32. The above also holds good as regards shareholders and company directors who are nationals of other Member States. Under Article 52 they are entitled to set up and manage companies and firms within the meaning of the second paragraph of Article 58 under the same conditions as shareholders and directors of British nationality.

33. As for companies from other Member States, which by virtue of the first paragraph of Article 58, are equated to natural persons for the purposes of the application of the provisions on the right of establishment, the 1988 Act deprives them of the right to establish themselves in the United Kingdom through the intermediary of agencies, branches or subsidiaries, since it provides that only companies set up under the laws of the United Kingdom may be owners and operators of fishing vessels and restricts their right of participation in the capital of companies or firms as the corresponding right of natural persons is restricted by the Act.

34. In addition, Article 221 of the Treaty, which provides that

'Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 58, without prejudice to the application of the other provisions of this Treaty',

prohibits the application of nationality requirements even where the persons concerned do not intend to establish themselves in the United Kingdom.

35. Lastly, the power vested in the Secretary of State under section 14(4) of the

1988 Act to dispense with the nationality requirement in the case of one or more individuals in view of the length of time he has or they have resided in the United Kingdom and been involved in the fishing industry there, is not such as to make the nationality requirements compatible with the Treaty. As the Commission has pointed out, it is settled law that the mere fact that the competent authority is empowered to grant exemptions or derogations cannot justify a national measure which is contrary to the Treaty, even if that power is freely used. [6]

36. It follows from the foregoing considerations that part (a) of the second question in Case C-221/89 must be answered in the affirmative: it is contrary to Community law for a Member State to stipulate as a requirement for the registration of a fishing vessel in its national register that the owners and operators of the vessel, whether they be natural or legal persons, or 75% of the directors and shareholders of a company owning or operating the vessel must be nationals of that State, even if the competent national authority has the legal power to dispense with that requirement in the case of certain persons.

37. Before leaving the question on the nationality requirement, I would also point out in passing that at the hearing the Commission agreed that the flag State could stipulate that the captain of the vessel and the mate should have its nationality.

6 — See, in particular, the judgments of 24 January 1978 in Case 82/77 *Openbaar Ministerie* v *Van Tiggele* [1978] ECR 25, paragraph 19, and of 16 December 1980 in Case 27/80 *Fietje* [1980] ECR 3839, paragraph 14.

(b) *The requirements relating to the residence and domicile of natural persons and the principal place of business of legal persons*

38. As regards the requirements referred to in part (b) of the national court's second question as I reformulated it above, it may be noted *in limine* that the mere fact that that fishing activity is carried out, on a self-employed basis, using a fishing vessel registered in a Member State does not mean that there is establishment in that State. This is borne out by the Court's judgment of 27 September 1989 in Case 9/88 *Lopes da Veiga* v *Staatssecretaris van Justitie* [1989] ECR 2989, from which it appears that in order for a national of a Member State who is permanently employed on board a ship flying the flag of another Member State to have the status of a worker/national of a Member State who is employed in the territory of another Member State, the relationship of employment must exhibit a sufficiently close link with that territory. In order to decide whether this is so, account must be taken, not only of the fact that the worker is employed on board a vessel registered in the Member State in question, but also of other circumstances such as the fact that he is in the employ of a company incorporated under the law of that State and established there, or the fact that he was hired in that State and that the employment relationship between him and his employer is subject to the law of the flag State, or the fact that he is insured under the social security system of that State and pays income tax there (judgment, paragraphs 12 to 17).

39. I consider that this must also hold good for the right of establishment: in order for a national of a Member State to be eligible to be regarded as exercising his right of establishment in another Member State, it is not

enough that he should be operating a fishing vessel registered in that State, in addition his activity must have other links with the territory of that State.

40. The question is, therefore, what are those other links which a Member State, without infringing Article 52 of the Treaty, is entitled to require of a national of another Member State who wishes to operate a fishing vessel flying its flag and, in particular, whether it can stipulate, as the 1988 Act does, that all the owners and operators of such a vessel and 75% of the shareholders and directors of the companies owning or operating the vessel should have their residence and domicile in its territory.

41. It must be observed that in this case, leaving aside the nationality requirements, the residence and domicile requirements apply without distinction to British citizens and to nationals of other Member States. The Commission, the Spanish Government and the applicants in the main proceedings in Case C-221/89 argue, however, that even though, formally, those requirements apply in the same way to nationals, they are in reality discriminatory as regards both their objectives and their effects, since the very great majority of British citizens fulfil them automatically. Admittedly, in the judgment of 5 December 1989 in Case C-3/88 *Commission* v *Italy* [1989] ECR 4035 (paragraph 8), the Court expressly confirmed that Article 52 of the Treaty, as a specific embodiment of the principle of equal treatment,

'prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result'.

42. However, I take the view that, in the context of the right of establishment, a residence requirement does not necessarily constitute such a criterion of differentiation leading in fact to discrimination on grounds of nationality. Certainly, a residence requirement which consisted of a requirement to have resided for a certain time in the country *before* a self-employed occupation could be taken up would involve covert discrimination, because it would be satisfied virtually automatically by nationals and would therefore affect nationals of other Member States, if not exclusively at least chiefly.

43. The problem arises in different terms, however, where the residence requirement does not have to be satisfied before an occupation is taken up but when it is being pursued. As Mr Advocate General Darmon observed in paragraph 3 of his Opinion of 7 June 1988 in the *Daily Mail* case (Case 81/87 *The Queen* v *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR 5500):

'establishment within the meaning of the Treaty involves two factors: physical location and the exercise of a economic activity, both, if not on a permanent basis, at least on a durable one'.

According to the Council's General programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition, Second Series IX, p. 7), establishment is defined in terms of '*installation* en vue d'exercer une activité non salariée sur le territoire d'un Etat membre' (rendered in English as '[persons wishing] *to establish themselves* in order to pursue activities as self-employed persons in a Member State').

44. However, the right of establishment does not imply only physical location in the country of establishment, but also that this must have taken place with a view to pursuing an economic activity. According to the Court's case-law,[7] the rules of the Treaty on the free movement of persons cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The physical presence in the territory of the country of establishment must therefore be such as to enable such effective and genuine activities to be pursued on or from the territory of the country of establishment.

45. Lastly, it is worth pointing out that that presence in the territory of the country of establishment must be intended to be permanent, or at least of an indefinite duration, because if that were not the case there would be no distinction between establishment and the supply of services. It is clear from the judgment of 5 October 1988 in Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, paragraphs 16 and 17, that an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services, but falls within the scope of Articles 48 to 51 or Articles 52 to 58 of the Treaty, depending on the case, and that is certainly the position where a national of a Member State goes to reside in the territory of another Member State and establishes his principal residence there.

7 — See, in the context of the free movement of workers, the judgments of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 17, of 3 June 1986 in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 10, of 21 June 1988 in Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, paragraph 21, and of 31 May 1989 in Case 344/87 *Bettray* v *Staatssecretaris van Justitie* [1989] ECR 1621, paragraph 13, and, on a general level, for the definition of 'economic activities' within the meaning of Article 2 of the EEC Treaty, the judgment of 5 October 1988 in Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, paragraph 13.

46. It follows from the whole of those considerations that every residence requirement is not necessarily contrary to Article 52, given that, by definition, the right of establishment entails continuous physical presence in the territory of the country of establishment such as to permit the effective and genuine pursuit of the economic activity in question.

47. Having said this, I consider that the Commission is right when it argues that to require *all* owners and operators of British fishing vessels to have their residence in the United Kingdom goes beyond what is permitted under Article 52 of the Treaty. The same applies with even greater reason to the domicile requirement, which, according to the United Kingdom, is a more stringent requirement than mere residence and means living in the Member State with the intent to make it a fixed and permanent home. This is also true of the requirement that 75% of directors and shareholders of companies owning or operating fishing vessels registered in the United Kingdom must be resident and domiciled in that country.

48. There remains the question as to the position where such a vessel belongs wholly to one person. In this connection, it must be observed that whilst the right of establishment implies physical location in the territory of the country of establishment, it does not require that a person exercising the right should have his residence or, *a fortiori*, his principal residence or domicile in the territory of that country. Such an approach would unduly restrict the right of establishment guaranteed by the Treaty inasmuch as it would prevent the exercise of the right of establishment on a secondary basis. It is settled law, as borne out in particular by the Court's judgment of 7 July 1988 in Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877, paragraph 11, that

'freedom of establishment is not confined to the right to create a single establishment within the Community, but entails the right to set up and maintain, subject to observance of the relevant professional rules of conduct, more than one place of work within the Community'.

49. As for the requirement for companies which own or operate fishing vessels registered in the United Kingdom to have their principal place of business in the United Kingdom, little needs to be added to that which has already been stated in discussing the nationality requirements. According to the Court's case-law, with regard to companies, their seat within the meaning of Article 58, that is to say their registered office, central administration or principal place of business, serves as the connecting factor with the legal system of a particular State, as does nationality in the case of legal persons. The Court concluded from this that

'Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would thus deprive [Article 58] of all meaning.' [8]

50. That principle must also be applied here, since to require a company incorporated under the law of one Member State, which has its registered office, central administration or principal place of business in that Member State (within the meaning of Article 58) — or even in another Member State —, to transfer its principal place of business to the Member State where a certain activity, such as fishing, is to be carried on, deprives that company of the possibility of exercising its right of establishment through the setting up of agencies, branches or subsidiaries as is expressly provided for in the second sentence of the first paragraph of Article 52.

51. It can be added, moreover, that a secondary establishment need not necessarily take the form of an agency, branch or subsidiary, but may possibly consist, as the Court held in the judgment of 4 December 1986 in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21,

'merely of an office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency'.

52. For the sake of completeness I would add that the reference made by the United Kingdom to the judgment of 6 November 1984 in Case 182/83 *Fearon* v *Irish Land Commission* [1984] ECR 3677, in which the Court held to be compatible with Article 52 a requirement to reside in Irish territory which was imposed on nationals of other Member States, is not relevant. Apart from the fact that in that case the residence requirement was not coupled with a nationality requirement, *Fearon's* case can be distinguished on several counts. First, the residence requirement was imposed on nationals of other Member States who had already exercised their right of establishment in Ireland under Article 52 of the Treaty by setting up a company within the meaning of Article 58, whereas in this case the very right of nationals of other Member States to take part in setting up a company

8 — See the judgments of 28 January 1986 in Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18, and of 10 July 1986 in Case 79/85 *Segers* [1986] ECR 2375, paragraphs 13 and 14.

in the United Kingdom is restricted by the residence requirement. Secondly, in *Fearon's* case it was not the right to exercise an economic activity which was conditional on the shareholders' satisfying the residence requirement, but merely immunity from compulsory acquisition measures adopted under legislation governing the ownership of rural land designed to ensure as far as possible that the land belonged to those who worked it. Lastly, the residence requirement did not apply to the whole of the national territory but was limited geographically: it was only fulfilled — also in the case of Irish nationals — if the persons concerned lived within three miles of the land in question.

53. Since the residence and domicile requirements as imposed, in particular, on 75% of the shareholders are therefore already incompatible with Article 52 of the Treaty I can deal relatively briefly with the question of their compatibility with the First Council Directive of 11 May 1960 for the implementation of Article 67 of the Treaty (Official Journal, English Special Edition 1959-62, p. 49), as subsequently amended. It is noted in passing that the First Directive has been replaced, with effect from 1 July 1990, by Council Directive 88/361/EEC of 24 June 1988 (Official Journal 1988 L 178, p. 5), which, subject to some limited and temporary derogations, provides for the total abolition of 'restrictions on movements of capital taking place between persons resident in Member States' (Article 1), including 'direct investments on national territory by non-residents' and 'acquisition by non-residents of domestic securities not dealt in on a stock exchange' (see points I. A. and III. A.3 of Annex I to the directive), which are the operations to which the Commission expressly refers. But even under the First Directive, as amended in particular by Directive 86/566/EEC of 17 November 1986 (Official Journal 1986 L 332, p. 22), there was no doubt that residence and domicile requirements imposed on shareholders were unlawful. The fact that the First Directive was formally concerned only with restrictions on foreign-exchange transactions did not prevent the Court, in the judgment of 24 June 1986 in Case 157/85 *Brugnoni and Ruffinengo* v *Cassa di risparmio di Genova e Imperia* [1986] ECR 2013 (paragraph 22), from applying it to any kind of obstacles constituting a 'hindrance' to the widest liberalization of those capital movements which the First Directive sought to liberalize in full. Admittedly, the judgment in *Brugnoni* is concerned with Article 2(1) of the First Directive, which provided for the grant of general authorizations in respect of the capital movements set out in List B of Annex I and that Directive 85/566/EEC, cited above, repealed that article and merged List B with List A referred to in Article 1(1), under which Member States are to grant all foreign-exchange authorizations required. However, this makes no difference to what has been stated above, since the judgment in *Brugnoni* is based, as the Commission points out, on the general objective of the First Directive in so far as it applies to transactions which the directive liberalized and it is clear from the Court's judgment of 3 December 1987 in Case 194/84 *Commission* v *Hellenic Republic* [1987] ECR 4737 (paragraph 9), that capital movements set out in List A also benefit from 'unconditional liberalization'.

54. For all those reasons, part (b) of question II in Case C-221/89, as I have reformulated it, must also be answered in the affirmative. In other words, it is contrary to Community law for a Member State to lay down as a requirement for registration that the owners, operators, shareholders and directors, as the case may be, must reside and be domiciled in that Member State and, in the case of a

company, that it must have its principal place of business there.

(c) *The requirement relating to the place of management, direction and control of the vessel*

55. Under section 14(1)(b) of the 1988 Act, a fishing vessel may be registered in the new register only if it

'is managed, and its operations are directed and controlled, from within the United Kingdom'.

56. It is clear from the more general observations which I have set forth with regard to the actual concept of establishment within the meaning of the Treaty that that requirement is compatible with Article 52 of the Treaty. As I have already stated, establishment entails continuous, physical presence in the territory of the country of establishment and the effective and genuine pursuit, on or from that territory, of the economic activity in question, even in the case of sea fishing.

57. The Commission points out that, in Communication 89/C 224/03 of 19 July 1989 on a Community framework for access to fishing quotas (Official Journal 1989 C 224, p. 3), it agreed that it was lawful to require undertakings operating fishing vessels to maintain a representation on shore in the flag State. I consider it worth setting out *in extenso* the Commission's position in that regard as it is set out in section 3.1 of the communication:

'Whether a fishing vessel is operated by a company or an individual, the responsibility of the operator must be traceable through some real and continuous representation at the main base of operations concerned.

Such representation must take the form of an onshore administrative unit of the undertaking, commensurate with the size of the latter and operating with responsibility for the technical and commercial management of the fishing vessels concerned (manning, wages, welfare benefits, leave, taxation, repairs, ships' supplies, etc.).'

The Commission added in the context of the present cases that

'In this context the Member State may also require a person appointed by the owner or operator of the vessel to be resident in its territory so as to be legally responsible for the operations of that administrative unit and the management of the fishing vessel concerned' (see section 8.1. of the Commission's written observations in Case C-221/89).

58. I consider that all those methods of presence or representation in the territory of the flag Member State are not only justified from the point of view of the Community system of fishing quotas, they are also indissociable from the actual exercise of the right of establishment in the sea-fishing sector. There cannot be 'establishment without establishment'.

59. This does not mean that the 'base of operations' cannot receive general directives from the owners of the vessel residing in another Member State or from a company having its registered office, central administration or principal place of business in another Member State. In my view, the requirement at issue as it is worded does not in itself rule this out: it is the *vessel* which has to be operated from within the United Kingdom and it is its *use*, that is to say the operations of the vessel, which must be directed and controlled from the United Kingdom; this does not prevent the onshore unit responsible for the actual management of the vessel — whether it be in the form of a subsidiary, a branch, an agency or an administrative unit — from being subject to the general control of the natural or legal person who set it up.

60. Lastly, I consider that, by virtue of the same principles, a Member State may, if it wishes, stipulate that vessels wishing to fly its flag must undertake to operate habitually from a port in that country.

61. In other words, the obligation which the Court accepted as permissible in the context of the quota system in paragraph 28 et seq. of the judgment of 14 December 1989 in Case C-216/87 *Jaderow* [1989] ECR 4509, is also valid as a requirement for entitlement to registration, since it is an indissociable principle of the very concept of establishment.

62. Part (c) of question II, as I reformulated it, must therefore be answered in the negative: it is not contrary to Community law for a Member State to make the grant of its flag subject to the requirement that the vessel must be managed and its operations directed and controlled from within that Member State.

III — The Community system of fishing quotas

63. In its third question in Case C-221/89 the national court asks whether the answer to question II is affected by

'the existence of national catch quotas allocated to Member States pursuant to the common fisheries policy'.

The United Kingdom and the governments of several other Member States consider that, if national measures of the type at issue were to be contrary to the articles of the Treaty considered above, they would nevertheless be justified from the point of view of the Community system of fishing quotas and its objectives.

64. I would recall that the Court ruled as follows in the judgment of 14 December 1989 in Case C-216/87 *Jaderow* [1989] ECR 4509:

'Community law as it now stands does not preclude a Member State, in authorizing one of its vessels to fish against national quotas, from laying down conditions designed to ensure that the vessel has a real economic link with that State if that link concerns only the relations between that vessel's fishing operations and the popu-

lations dependent on fisheries and related industries' (paragraph (1) of the operative part).

The Court reached that conclusion after holding that the quota system established by Council Regulation No 170/83 constituted a derogation from the general rule of equal conditions of access to fishery resources laid down in Article 2(1) of Regulation No 101/76, cited above (paragraph 24 of the judgment).

65. In paragraph 25 of the judgment in *Jaderow*, the Court stated that therefore

'the measures which the Member States may adopt when exercising the power conferred on them by Article 5(2) of Regulation No 170/83 with a view to excluding certain of the vessels flying their flag from sharing in the utilization of their national quota are justified only if they are suitable and necessary for attaining the aim of the quotas . . . ',

which

'is to assure to each Member State a share of the Community's total allowable catch, determined essentially on the basis of the catches from which traditional fishing industries, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established' (paragraph 23).

66. However, it is debatable whether the judgment in *Jaderow*, and the judgment of the same date in Case C-3/87 *Agegate* (*The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd* [1989] ECR 4459), are of any relevance to the cases now before the Court. In those judgments the Court expressly left aside the question whether the conditions at issue were in conformity with Community law in relation to fishing not subject to quotas[9] and limited its examination to whether and to what extent Community law permits a Member State to determine, by means of such conditions, those vessels in its fishing fleet which are to be allowed to fish against its national quota. However, the 1988 Act does not govern access to quotas but the registration of fishing vessels and therefore affects access to all sea-fishing activities, including fishing for species not subject to quotas.

67. Secondly, the Member States' power to exclude certain vessels from sharing in the utilization of their national quota, as recognized by the Court in paragraph 25 of the judgment in *Jaderow*, stems from Article 5(2) of Regulation No 170/83, which provides that

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

That power can be exercised only with regard to vessels flying the flag of the Member State concerned or registered there. Consequently, requirements for the registration of fishing vessels — even though they may determine, in the same way as

9 — See paragraph 11 of the judgment in *Agegate* and paragraph 12 of the judgment in *Jaderow*.

conditions for the grant of licences, access to fishing activities, including fishing for species subject to quotas — do not constitute measures for the management of national quotas within the meaning of Article 5(2) of Regulation No 170/83. Moreover, if they were, in themselves, to constitute measures relating to the conservation of fishery resources — which, in the light of paragraph 11 of the judgment of 19 January 1988 in Case 223/86 *Pesca Valentia* v *Minister for Fisheries and Forestry* [1988] ECR 83, is very doubtful in the case of requirements relating to the characteristics of the natural or legal persons who are the owners of the fishing vessels — they would fall 'fully and definitively' within the competence of the Community (see paragraph 10 of the judgment in *Pesca Valentia*) and hence the Member States could adopt them only on the basis of an express and clear delegation of powers.

68. I consider in the light of the foregoing that a reference to the objectives of the Community system of quotas cannot be used to justify national rules on the registration of fishing vessels, even if those rules were applicable only to vessels intended to fish for species subject to quotas.

69. If my understanding is correct that was also the conclusion expressed by the Commission in its written observations in Case C-221/89, which were submitted before the judgments in *Jaderow* and *Agegate* were delivered. However, in its reply in Case C-246/89, which was lodged after the judgments were delivered, the Commission discussed the compatibility of the nationality requirements with Community law also in the light of those judgments, that is to say in relation to the aims of the quota system. I would therefore also give my views on this aspect in case the Court should consider that the registration requirements are capable of constituting 'detailed rules for the utilization of the quotas' within the meaning of Article 5(2) of Regulation No 170/83.

70. In the judgment in *Agegate* the Court held that a requirement for 75% of the vessel's crew, irrespective of their nationality, to reside ashore in the Member State in question was irrelevant to the aim of the quota system and could not therefore be justified by that aim (paragraph 25). In all logic, therefore, the Court must, *a fortiori*, reach the same conclusion with regard to *the nationality requirements* at issue here. To restrict access to national quotas to fishing vessels which are owned, chartered, managed or operated by nationals, be they natural or legal persons, is neither 'suitable' nor 'necessary' in order to enable the local populations dependent on fisheries and related industries to benefit from the quotas. In my Opinion in the *Agegate* case, the fact that the residence requirement was applicable to British citizens and nationals of other Member States alike was the main element in the reasoning which led me to take the view, unlike the Court, that that requirement was compatible with Community law (see paragraph 57, [1989] ECR 4483). I remain of the view, moreover, that since the quotas were introduced in order to safeguard the interests of local populations dependent on fishing, it is legitimate to require the majority — and even 75% — of crew members of vessels fishing for species subject to quotas to be ordinarily resident *on the coast* of the country in question. The residence requirement at issue in *Agegate* did not include the latter stipulation, although, to my mind, it was implicit therein. Perhaps the Court would have accepted it had that stipulation been explicit.

71. However, since the Court held that a requirement that the crew reside on shore in the Member State in question is not related to the aim of the quota system, no reason can be seen which might induce the Court to take the view that *residence and domicile requirements* imposed on all owners and operators of fishing vessels and on 75% of shareholders and directors of companies owning or operating such vessels may be so related.

72. Moreover, when the Court accepted, in *Jaderow*, that a Member State may make the right of its fishing vessels to fish against national quotas subject to those vessels' having a real economic link with that State, it took care expressly to stipulate that the link had to concern only the relations between that vessel's fishing *operations* and the populations dependent on fisheries and related industries (paragraph 27). Moreover, it was

'in view of that very narrow definition of the link which a Member State may require when authorizing a vessel to fish against its quotas' (paragraph 44),

that the Court considered that there was no need to answer the second part of question I(d) in the *Jaderow* case and hence held that certain economic, financial and fiscal evidence was irrelevant in order to establish the existence of a real economic link between the vessel and the Member State in question, such as, for example:

'the fact that the companies owning or managing the fishing vessels concerned are incorporated under the laws of the United Kingdom, that they are subject to corporation tax and VAT in the United Kingdom . . . ' (paragraph 42).

No more than the fact that a company owning a fishing vessel was incorporated under the laws of the United Kingdom does the fact that it has its principal place of business in the United Kingdom and that 75% of its shareholders and directors reside and are domiciled there serve to prove the existence of a real economic link between the *operations* of the vessel and the populations dependent on fisheries and related industries. The same must be true of the residence and domicile of natural persons owning fishing vessels. *A fortiori*, the requirement for all owners to reside and be domiciled in the United Kingdom cannot be justified in the light of the aims of the quota system.

73. It must moreover be noted that the only requirement which the Court held to be justified under the quota system in *Jaderow* concerned precisely the operations of the vessels. The requirement was for vessels to operate habitually from a national port (paragraph 28) and, hence, for vessels to be present at national ports with a certain frequency (paragraph 40). As I have already stated, I consider that that rule is merely a manifestation of the more general rule that the vessel must be operated from the flag State and that its use must be directed and controlled from the territory of that State. Hence, the primary justification for that requirement is to be found in the very concept of establishment, even though it may, in addition, be justified under the quota system.

74. Ireland, for its part, argued that the requirements at issue were justified under Article 56(1) if the Treaty. However, it must be borne in mind that, according to the case-law of the Court:

'As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard.' [10]

Even if the protection of the rights of local fishing communities were capable of falling within the concept of public policy for the purposes of Article 56(1), it must be held that it follows from what has been stated above that the nationality, residence and domicile requirements are disproportionate to that objective.

75. In conclusion, I propose that the Court should state in answer to the third question raised in Case C-221/89 that the existence of the system of national quotas does not alter the answers given to the second question.

IV — The application of the requirements at issue to fishing vessels previously registered in the old register

76. In its fourth question referred to the Court for a preliminary ruling in Case C-221/89, the national court seeks essentially to establish whether the principle of legitimate expectations precludes the introduction of new registration conditions such as those at issue from having the effect that fishing vessels duly registered in a Member State have their registration withdrawn and hence their right to fish and to fish against the catch quotas allocated to that Member State.

77. Logically, that question is otiose as regards the nationality and residence requirements if the Court rules, as I suggest it should, that those requirements are in any event contrary to Community law.

78. From its wording, the question does not seem to relate to the requirement for vessels to be operated from within the flag State but merely to the case where, following the introduction of new registration requirements, a vessel loses its flag because the owners and operators are nationals of other Member States and are resident and domiciled in those States.

79. In order to avoid any misunderstanding I would add, however, that since the requirement for the vessel to be operated from the national territory is indissociable from the very concept of establishment, its formal introduction could not constitute an infringement of anyone's legitimate expectations. In addition, it should be observed that although the 1988 Act entered into force on 1 December 1988, the validity of registrations effected under the former system was extended by section 13 of the 1988 Act until 31 March 1989, and hence

10 — Judgment of 26 April 1988 in Case 352/85 *Bond van Adverteerders* v *The Netherlands State* [1988] ECR 2085, paragraph 36.

owners and operators who might not have fulfilled that requirement in the past were given a reasonable transitional period in which to comply therewith.

80. Accordingly, rather than declaring that the fourth question in Case C-221/88 has become otiose, I propose that the Court should answer it in the negative.

Conclusion

81. In the light of all the considerations set out above I propose that the Court should rule as follows in Case C-221/89:

'1. Whilst at present it falls to the Member State concerned to determine whether a vessel is entitled to be registered in that State, the Member State in question is none the less bound to comply with the relevant principles and provisions of Community law.

2. (a) It is contrary to Community law for a Member State to stipulate as a requirement for the registration of a fishing vessel in its national register that the owners and operators of the vessel, whether they be natural or legal persons, or 75% of the directors and shareholders of a company owning or operating the vessel must be nationals of that State, even if the competent national authority has the legal power to dispense with that requirement in the case of certain persons.

(b) It is contrary to Community law for a Member State to lay down as a requirement for registration that the owners, operators, shareholders and directors, as the case may be, must reside and be domiciled in that Member State and, in the case of a company, that it must have its principal place of business there.

(c) It is not contrary to Community law for a Member State to make the grant of its flag subject to the requirement that the vessel must be managed and its operations directed and controlled from within that Member State.

3. The existence of the system of national quotas does not alter the answers given to the second question.

4. The matters adverted to in the fourth question do not affect the answers given to questions 2 and 3.'

82. It follows from those answers that the Commission's action against the United Kingdom for failure to fulfil its obligations is well founded and hence the Court should declare in Case C-246/89 that, by imposing the nationality requirements enshrined in sections 13 and 14 of the Merchant Shipping Act 1988, the United Kingdom has failed to fulfil its obligations under Articles 52 and 221 of the EEC Treaty.

83. As for the costs in Case C-221/89, it should be held that the costs incurred by the Kingdom of Belgium, the Commission of the European Communities, the Federal Republic of Germany, the Kingdom of Spain, the Hellenic Republic, the Kingdom of Denmark, Ireland and the United Kingdom, which have submitted observations to the Court, are not recoverable. Since the proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

84. As far as Case C-246/89 is concerned, the United Kingdom must be ordered to pay all the costs, including those of the Kingdom of Spain, which intervened in support of the Commission's conclusions, but with the exception of the costs incurred by Ireland, which intervened in support of the United Kingdom.