Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 5 June 2014[1]

Case C-270/13

Iraklis Haralambidis
v
Calogero Casilli

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Free movement of workers — Functions of President of a Port Authority — Article 45(4) TFEU — Condition relating to nationality — Concept of 'public service' — Powers conferred by public law — Functions exercised in the general interest — Powers exercised sporadically or in exceptional circumstances)

1. Does the post of President of a Port Authority fall within the concept of 'public service' within the meaning of Article 45(4) TFEU and, as a consequence, may Member States limit that post to their own nationals, in derogation from the rule on free movement of workers? That is, in essence, the key issue raised by the questions referred for a preliminary ruling by the Consiglio di Stato (Council of State) (Italy).

2. The Court has already dealt with the concept of 'public service' in a number of cases brought before it, both in preliminary rulings and in infringement proceedings. However, a number of the Court's rulings, especially the earlier ones, are rather concise and do not shed much light on aspects which are — to my mind — crucial in assessing whether a given post in a Member State's public administration does or does not fall within the scope of Article 45(4) TFEU.

3. The present case thus offers an opportunity to the Court to refine and bring further clarity to the concept of 'public service' — a concept the scope and meaning of which can only be assessed, as I will try to explain in this Opinion, by looking at the very *raison d'être* of Article 45(4) TFEU.

I – **Relevant Italian legislative provisions**

4. Article 38(1) and (2) of Legislative Decree No 165 of 30 March 2001, 'General rules for the organisation of work in the public administration',[2] in the version in force at the material time, stated:

'1. Citizens of [EU] Member States shall have access to posts in the public administration that do not involve the direct or indirect exercise of public powers, or do not relate to the protection of the national interest.

1 — Original language: English.

2 — Decreto Legislativo 30 marzo 2001, n. 165, *Norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche* (GURI No 106 of 9 May 2001, Ordinary Supplement No 112).

2. A decree of the President of the Council of Ministers ... shall determine the posts and functions for which access is restricted to Italian nationals, as well as the mandatory criteria governing the access to posts of the citizens referred to in paragraph 1.'

5. The Decree of the President of the Council of Ministers at issue was adopted on 7 February 1994.[3] Article 1(1)(b) of that decree provides that the posts in the public administration to which access cannot be obtained without Italian citizenship include 'the highest administrative posts of the peripheral structures of the public administration, including autonomous administrations, of the non-economic public entities, of provinces and municipalities as well as regions, and of the Bank of Italy'.

6. According to the order for reference, Port Authorities are a particular type of public body, governed by Law No 84 of 28 January 1994, 'Recast of the rules on ports' ('Law No 84/1994').[4]

7. Article 6(1) of Law No 84/1994 establishes a Port Authority in the port of Brindisi, and elsewhere, entrusting it with the following tasks:

'(a) Direction, programming, coordination, promotion and control of port operations and other commercial and industrial activities in ports, with powers of regulation and order, including with respect to safety against risks of accidents related to such activities and health at work ...;

(b) Ordinary and extraordinary maintenance of common areas in the port area ...;

(c) Award and control of activities aimed at providing, for remuneration, services of general interest … to port users … defined by Decree of the Minister of Infrastructure and Transport.'

8. Pursuant to Article 6(2) to (4) of Law No 84/1994, the Port Authority is a legal person governed by public law and enjoys administrative autonomy, subject to the provisions of Article 12 of the same law, as well as budgetary and financial autonomy, within certain limits. The assets and financial management of the Port Authority are governed by an accounting regulation approved by the Minister of Transport and Navigation, in agreement with the Minister of the Treasury. The financial statement of the Port Authority is subject to review by the Italian Court of Auditors.

9. According to Article 7 of Law No 84/1994:

'1. The governance bodies of the Port Authority are: (a) the President; (b) the Port Committee; (c) the Secretariat General; (d) the Board of Auditors.

2. The remuneration of the President [and of the other members of the Port's governance bodies] is defrayed by the Port Authority and is determined by the Port Committee within the maximum limits established … by decree of the Minister of Transport and Navigation …'

10. The same provision, in paragraph 3, states that the Minister of Transport and Navigation may order, by way of decree, the removal from office of the President and the dissolution of the Port Committee under certain circumstances.

3 — 'Regulation laying down the rules on access by citizens of EU Member States to posts within the public administration' (Decreto del Presidente del Consiglio dei Ministri 7 febbraio 1994, n. 174, *Regolamento recante norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche*) (GURI No 61 of 15 March 1994).

4 — Legge 28 gennaio 1994, n. 84, *Riordino della legislazione in materia portuale* (GURI No 28 of 4 February 1994, Ordinary Supplement No 21).

11. Article 8(1) and (2) of Law No 84/1994 provides that the President of the Port Authority is to be appointed by decree of the Minister of Transport and Navigation, in agreement with the region concerned, from a group of three qualified experts in the fields of transport and port economics designated by the relevant bodies of the competent province, town, and board of trade. The President's mandate is for four years, renewable once. He represents the Port Authority.

12. According to Article 8(3) of the same law, the President of the Port Authority has the following tasks:

'(a) to chair the Port Committee;

(b) to submit to the Port Committee the three-year operational plan for adoption;

(c) to submit to the Port Committee the port planning scheme for adoption;

(d) to submit to the Port Committee the draft decisions on the budget estimate and the amendments thereto, the balance sheet and the remuneration of the Secretary General, as well as the implementation of the contractual agreements for the staff of the technical and operational secretariat;

(e) to propose to the Port Committee draft decisions on those concessions referred to in Article 6, paragraph 5;

(f) to ensure coordination of the activities carried out in the port by the various public administrations, as well as coordination and control of the activities subject to licensing and concession, and of port services ...;

(h) to administer the State-owned maritime property in the area [in which it exercises its competences], in conformity with the applicable legislation, by exercising, after hearing the Port Committee, the functions provided for in Articles 36 to 55, and 68 of the [Italian] Navigation Code [5] and the rules of implementation of those provisions;

(i) to exercise the powers attributed to the Port Authority under Articles 16 [6] and 18 [7] and to award, after hearing the Port Committee, the authorisations and concessions provided for in those articles, when those have a duration not exceeding four years in duration, and to determine the amount of the charges due …;

(l) to promote the establishment of a union for the port workers ...;

(m) to ensure navigability in the port area and the excavation and maintenance works of the sea bed … in case of immediate necessity and urgency, by adopting binding decisions ...;

(n) to make proposals concerning the delimitation of free zones, after hearing the Maritime Authority and the local authorities concerned;

(n-bis)
to exercise any other powers which this law does not entrust to the other governance bodies of the Port Authority.'

5 — Those provisions of the Italian Navigation Code concern concessions or use of areas of State-owned maritime property (Articles 36 to 55) and the supervision of the activities exercised in ports (Article 68).

6 — Article 16 of Law No 84/1994 concerns 'port operations and port services'.

7 — Article 18 of Law No 84/1994 concerns 'award of concessions for [port] areas and docks'.

13. Pursuant to Article 12 of Law No 84/1994, the Port Authority is subject to the supervision of the Minister of Transport and Navigation. In particular, the decisions of the President and of the Port Committee are subject to approval of that Minister when they concern: (a) the approval of the estimated budget, possible amendments thereto and the balance sheet; and (b) recruitment of the technical and operational staff secretariat. Moreover, the decisions mentioned above under letter (a) also require the agreement of the Minister responsible for the Treasury. The Italian Court of Auditors is also required to supervise certain activities of the Port Authority.

II – **Facts, procedure and the questions referred**

14. Mr Iraklis Haralambidis ('Mr Haralambidis'), a Greek national, was appointed President of the Port Authority of Brindisi (Italy) by the Italian Minister of Infrastructure and Transport by decree of 7 June 2011, issued following an appointment procedure regulated by law.

15. Subsequently, one of the other candidates for the post, Mr Calogero Casilli ('Mr Casilli'), an Italian national, brought an action before the Tribunale Amministrativo Regionale per la Puglia, Sede di Lecce ('TAR Puglia') (the Regional Administrative Court of Puglia, Lecce Section) for annulment of the ministerial decree. Mr Casilli claimed that Mr Haralambidis could not be appointed President of the Port Authority of Brindisi, since Italian citizenship was a mandatory requirement for that public office.

16. The TAR Puglia upheld the action of Mr Casilli and, by judgment of 26 June 2012, annulled the ministerial decree appointing Mr Haralambidis.

17. The judgment of the TAR Puglia was appealed by Mr Haralambidis to the Consiglio di Stato. In that context, Mr Haralambidis argued that, if the relevant national provisions were to be interpreted as requiring Italian nationality in order to obtain the post in question, those provisions would be incompatible with Article 45(4) TFEU.

18. Entertaining doubts as to the compatibility of the relevant Italian provisions with EU law, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Given that the derogation laid down in Article 45(4) TFEU does not appear to apply to the present case (which concerns the appointment of a national of another Member State of the European Union as President of a Port Authority, a legal entity which can be classed as a body governed by public law) in that it relates to ... employment in the public service (which is not an issue ... in the present case) and given also that the fiduciary role of President of a Port Authority may nevertheless be regarded as an "employment activity" in the broad sense, ... does the provision limiting that post exclusively to Italian nationals constitute discrimination on grounds of nationality prohibited by Article 45 TFEU?

(2) Alternatively, may the holding of the office of President of an Italian Port Authority by a national of another Member State of the European Union be regarded as falling within the scope of the right of establishment laid down in Article 49 et seq. TFEU and, if so, does the prohibition laid down in national law on non-Italian nationals holding that office constitute discrimination on grounds of nationality, or would such a finding be precluded by Article 51 TFEU?

(3) As a further alternative, in the event that the holding of the office of President of an Italian Port Authority by a national of another Member State of the European Union may be regarded as the provision of "services" for the purposes of Directive 2006/123/EC, [8] is the exclusion of port

8 — Directive of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

services from the scope of that directive relevant to the present case and, if not, does the prohibition under national law in relation to the holding of that office constitute discrimination on grounds of nationality?

(4) As a yet further alternative, … in the event that the holding of the office of President of an Italian Port Authority by a national of another Member State of the European Union does not fall within the scope of any of the above provisions, may it nevertheless be regarded, more generally, in accordance with Article 15 of the Charter of Fundamental Rights of the European Union [("the Charter")], as a prerogative coming under the right of [Union] citizens to "work, to exercise the right of establishment and to provide services in any Member State", irrespective of the specific "sectoral" provisions laid down in Article 45 and Article 49 et seq. TFEU, and in [Directive 2006/123] on services in the internal market, and is the prohibition under national law in relation to the holding of that office accordingly inconsistent with the equally general prohibition on discrimination on grounds of nationality laid down in Article 21(2) of [the] Charter?'

19. Written observations in the present proceedings have been submitted by Mr Haralambidis, Mr Casilli, the Autorità Portuale di Brindisi, by the Italian, Spanish and Netherlands Governments, and by the Commission.

20. On 12 February 2014, the Court requested certain clarifications from the Italian Government regarding the meaning of certain provisions of Italian law and, at the same time, asked the parties participating at the hearing to concentrate their oral submissions on the first two questions posed by the referring court. The Italian Government responded to the request for clarification on 27 February 2014.

21. The Italian Government and the Commission presented oral argument at the hearing on 26 March 2014.

III – **Analysis**

A – *Reformulation of the questions referred*

22. By its four questions, the referring court essentially seeks guidance on the question whether a domestic rule which restricts to nationals the post of President of a Port Authority is compatible with EU law.

23. Before commencing my legal analysis, I think it is important to place the present case in the correct legal context in order to appropriately re-formulate the questions referred. To that end, I will offer four preliminary observations.

24. In the *first* place, the wording of the request for a preliminary ruling contains a reference to several provisions of EU primary law (Articles 45 and 49 et seq. TFEU, as well as Articles 15 and 21(2) of the Charter) and of secondary legislation (the provisions of Directive 2006/123), as provisions which might be incompatible with the national rule at issue.

25. However, as mentioned in the introduction to this Opinion, it is clear to me that the key provision of EU law in the case at hand is Article 45 TFEU.

26. Despite the doubts expressed, on the one hand, by the referring court and, on the other hand, by the Italian Government, I am of the view that the President of a Port Authority can be defined as a worker within the meaning of Articles 45 to 48 TFEU.

27. As the Court has consistently held, the concept of 'worker' cannot be interpreted differently according to the rules or principles applicable in the different Member States, as it has an autonomous meaning in EU law. [9] In addition, such a concept must be broadly construed so as to encompass any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. [10]

28. As has been argued by the Spanish Government and by the Commission, the President of a Port Authority seems to fulfil those requirements. Indeed, the person appointed to that post enters into a contractual relationship with the Port Authority which, for the work provided by that person on a regular basis over a fixed period of time (four years, renewable on one occasion), pays him remuneration. The amount of remuneration is determined in advance and is pegged to that of comparable high-level posts in the public administration, within the limits set out by the competent ministers.

29. Despite holding an executive post within the entity which employs him, and thereby enjoying relatively wide discretion with regard to the actual performance of his functions, the President is still subject to supervision. In particular, the Minister of Infrastructure and Transport (acting, at times, in agreement with the Minister of the Treasury or other public authorities) retains powers of direction, control and, where appropriate, sanction over the President of a Port Authority.

30. Not only is the President of a Port Authority appointed by the Minister of Infrastructure and Transport (in agreement with the competent regional authority), but he can also be dismissed by that minister. That is possible when the circumstances set out in Article 7(3) of Law No 84/1994 arise and, more generally, when the dismissal becomes necessary to ensure the good management of the Port Authority, by virtue of the implicit powers which the government holds on this matter according to the case-law of the Italian courts. [11]

31. Furthermore, some of the key decisions that the President, or the Port Committee that he chairs, must take are also subject to governmental approval, as laid down in Article 12 of Law No 84/1994. The powers of direction of the competent Minister seem, moreover, to go even further than that. Indeed, as the Italian Government pointed out, the case-law of the Consiglio di Stato has described as 'inconceivable' the possibility that a President of a Port Authority could deliberately ignore the instructions repeatedly given to him by the competent Minister. The Consiglio di Stato has, in that context, emphasised the relationship of trust that must exist between the President of a Port Authority and the competent Minister. [12] So, although somewhat limited, and mainly in the form of *ex post* control, the subordination of the President of a Port Authority to the competent Minister cannot be denied.

32. Conversely, the post of President of a Port Authority manifestly lacks the features which are typically associated with the idea of an independent service provider: more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that work or those tasks are to be performed, of working hours and place of work, as well as in terms of selecting his own staff. [13]

9 — See, among many, Case C-542/09 *Commission* v *Netherlands* [2012] ECR, paragraph 68, and Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16.

10 — See, inter alia, Case C-544/11 *Petersen* [2013] ECR, paragraph 30, and *Lawrie-Blum*, paragraphs 16 and 17.

11 — See, in particular, judgment of the Consiglio di Stato of 13 May 2013, Sezione IV, No 2596, *Ciani c. Ministero delle Infrastrutture e Trasporti*, point 4.4.1.

12 — Ibid., point 4.6.

13 — See, to that effect, Case C-3/87 *Agegate* [1989] ECR 4459, paragraph 36. See also Case C-596/12 *Commission* v *Italy* [2014] ECR, paragraph 16 et seq., and, *a contrario*, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 26.

33. Summing up, it can be said that the President of a Port Authority is in a *sui generis* employment relationship with the State which is, *mutatis mutandis*, similar to that examined by the Court in *Danosa*.[14] In that case, the Court held that a member of the Board of Directors of a private company was to be regarded as a 'worker' within the meaning of Directive 92/85/EEC.[15]

34. I thus take the view that the situation which forms the subject of the main proceedings is to be examined in light of the Treaty provisions on the free movement of workers. More specifically, the freedom of movement for workers (as guaranteed by Article 45(1) to (3) TFEU), and the derogation therefrom (in paragraph 4 of the same provision), are provisions which will provide an answer to the case at hand.

35. Having said that — and I come to my *second* preliminary observation — it is my conviction that, despite their different wordings, the rules set out in Articles 45(4) and 51 TFEU should be interpreted consistently. As Advocates General Mayras[16] and Mancini[17] have convincingly argued, the different content of the two provisions is accounted for by the difference in the situations envisaged therein. The aim pursued by both provisions is however the same: to permit Member States to derogate from the fundamental principle which prohibits discrimination based on nationality within the internal market, by limiting to their own citizens the exercise of certain activities carried out in the general interest by individuals who have, for that purpose, been vested with some powers of authority. Accordingly, I believe that, in interpreting and applying Article 45(4) TFEU, regard must be had not only to the Court's case-law which concerns that provision but also, *mutatis mutandis*, to the principles laid down in the Court's case-law on Article 51 TFEU, which has in fact developed in a largely similar manner.[18]

36. In the *third* place, as the Commission has rightly pointed out in its observations, the other provisions of EU law referred to by the national court are either inapplicable to the main proceedings or, in any event, redundant for the purpose of assessing the case at hand. To begin with, Article 2(2)(d) of Directive 2006/123 explicitly states that it does not apply to 'services in the field of transport, including port services, falling within the scope of Title V of the Treaty'. Thus, even if one were to regard the President of a Port Authority as a service provider, the applicability of Directive 2006/123 would seem *prima facie* to be excluded. Moreover, the two provisions of the Charter mentioned by the referring court do not seem to add any further aspect of incompatibility, in addition to that which may derive from the application of the rules on free movement of workers.[19] Indeed, both Article 15, which concerns the 'freedom to choose an occupation and right to engage in work', and Article 21(2) of the Charter, prohibiting discrimination based on nationality within the scope of application of the EU Treaties, lay down principles which are explicitly or implicitly contained in Article 45 TFEU.

14 — Case C-232/09 [2010] ECR I-11405, paragraphs 38 to 51.

15 — Council Directive of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

16 — Opinion in Case 2/74 *Reyners* [1974] ECR 631.

17 — Opinion in Case 307/84 *Commission* v *France* [1986] ECR 1725.

18 — To that end, in legal doctrine, see Dashwood, A., et al., *Wyatt and Dashwood's European Union Law*, Hart Publishing, Oxford and Portland: 2011 (6th ed.), p. 569; Mortelmans, K.J.M., 'The Functioning of the Internal Market: The Freedoms', in Kapteyn, P.J.G. et al. (eds.), *The Law of the European Union and the European Communities*, Kluwer International, Alphen aan den Rhijn: 2008 (4th ed.), pp. 575 to 784, at p. 731; and Barnard, C., *The Substantive Law of the EU. The Four Freedoms*, Oxford University Press, Oxford: 2007 (4th ed.), p. 520.

19 — See Article 52(2) of the Charter.

37. In the *fourth* place, and lastly, I would like to emphasise from the outset that the Court has consistently adopted a *functional* definition of the posts forming part of the public service for the purposes of Article 45(4) TFEU.[20] So, what is truly relevant under that provision is not the designation or legal status of the post, its organic links with the public authorities,[21] or its position within the public administration,[22] but rather its actual nature, responsibilities and functions.[23]

38. Consequently, in the present case, the Court cannot rule *in abstracto* on whether the post of the President of a Port Authority can, by virtue of Article 45(4) TFEU, be limited to nationals of the Member States. The Court can only examine, and give a ruling on, whether that is possible in respect of the post of President of a Port Authority as regulated under Italian laws in the concrete case. It is conceivable, in fact, that the assessment of the compatibility with EU law of a domestic rule of another Member State which concerns a similar post could lead to a different conclusion, to the extent that the nature, responsibilities and functions of such a post would differ from those examined in the present case. That does not mean, however, that the principles underpinning the legal analysis in the present case would be any different in future cases.[24]

39. In the light of the above, I am of the view that the four questions referred by the Consiglio di Stato can be examined together and be re-formulated as follows: 'Is a national rule which limits to nationals of the Member State the post of President of a Port Authority, exercising functions such as those indicated in Article 8(3) of Law No 84/1994, compatible with Article 45 TFEU?'

B – *Consideration of the questions referred*

40. Before explaining the reasons why I take the view that the answer to the question referred by the Consiglio di Stato, as reformulated, should be in the negative, I will briefly recall the relevant case-law of the Court and, at the same time, try to elaborate on the principles contained therein, in the hope of bringing further clarity to the correct interpretation of Article 45(4) TFEU.

41. The free movement of persons, and in particular workers, constitutes one of the fundamental principles of the European Union. Pursuant to Article 45(2) TFEU, it entails the abolition of any discrimination on the basis of nationality, whatever its nature or extent, between workers of the Member States as regards employment, remuneration and other conditions of work and employment.[25]

42. Article 45(4) TFEU, however, states that the provisions of that article are not to apply to employment in the public service. Yet, as an exception to a general principle, this provision must be interpreted restrictively or, as the Court has repeatedly stated, 'in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect'.[26]

20 — See Case 307/84 *Commission* v *France*, paragraph 12, and the Opinion of Advocate General Léger in Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285, point 21.

21 — The fact that the person occupying that post may be employed by a private natural or legal person is not, as such, enough to rule out the applicability of Article 45(4) TFEU if it can be established that the person, with regard to certain activities, acts as a representative of the public authorities. See Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391, paragraph 43.

22 — See, to that effect, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5, and Case 307/84 *Commission* v *France*, paragraph 11.

23 — See, to that effect, Case C-473/93 *Commission* v *Luxembourg* [1996] ECR I-3207, paragraph 28, and Case 307/84 *Commission* v *France*, paragraph 12.

24 — See in particular the considerations developed, *infra*, in points 46 to 62.

25 — See, among others, Case 167/73 *Commission* v *France* [1974] ECR 359, paragraphs 43 and 44, and Case C-514/12 *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betrieb* [2013] ECR, paragraph 23.

26 — See, among many, *Lawrie-Blum*, paragraph 26, and Case 225/85 *Commission* v *Italy* [1987] ECR 2625, paragraph 7.

43. According to settled case-law, the concept of 'public service' within the meaning of that provision must be given a uniform interpretation and application throughout the European Union, and cannot therefore be left to the discretion of the Member States. [27] The Court has consistently held that the concept of public service covers only those posts which presume, on the part of those occupying them, the existence of a 'special relationship of allegiance' to the State and reciprocity of rights and duties which constitute the foundation of the bond of nationality. [28]

44. Yet, the Court has never explored the concept of 'special relationship of allegiance' to the State. The Court has only indicated that two, *very strict*, [29] conditions must be cumulatively met for a post to fall within the concept of 'public service': the post must involve direct or indirect participation in the exercise of powers conferred by public law, and the discharge of functions whose purpose is to safeguard the general interest of the State or of other public authorities. [30] It has also added that, despite the fulfilment of those two conditions, derogating from the prohibition on discrimination would not be justified if public powers are exercised only sporadically, or constitute a minor part of the post's overall activity. [31]

45. Thus, the Court's case-law lays down a three-step analysis for the application of Article 45(4) TFEU. Before examining in more detail those three steps, I would like to touch briefly upon the concept of 'special relationship of allegiance' since that enlightens, in my view, the very *raison d'être* of the provision. As such, that concept constitutes the background against which the principles which can be extracted from the Court's case-law ought to be interpreted and applied.

1. The concept of 'special relationship of allegiance'

46. The concept of special relationship of allegiance comes into play with reference to posts which — the State may legitimately claim — entail duties that, because of their intrinsic characteristics, only persons who are bound to the State by not only a mere employment relationship, but also nationality, are in the best position to carry out. The underlying assumption is that a person generally has stronger feelings of loyalty, trust and devotion towards the country to which he, his family and his roots belong. Are not the predominant legal principles in establishing the nationality of a person connection by blood ('*ius sanguinis*') or by territory ('*ius soli*')? In the absence of such ties of *sanguis* and *solum* — according to that view — a person might be less willing, or merely less able, to carry out, under all circumstances, his duties in such a way as fully to achieve a task in the public interest.

47. That person might be less *willing* because, for example, the post-holder may be required to put the interests of the community or the State before his own, despite the fact that — under certain circumstances — it may not be easy to do so. That could be the case, in particular, of persons holding posts in the Member States' armed or police forces.

48. He might be less *able* because, for instance, citizens affected by the exercise of the public powers granted to him may fail to recognise that person as acting on behalf of, and in the interest of, the State. [32] To give an example, a non-national might be regarded as not being sufficiently representative of that country to accede to posts at the apex of the government. Likewise, a person lacking strong ties to the social, political and cultural aspects of the society in which he must carry out his public

27 — See Case C-47/02 *Anker and Others* [2003] ECR I-10447, paragraph 57 and case-law cited.

28 — Ibid., paragraph 58 and case-law cited.

29 — See *Commission* v *Luxembourg*, paragraph 33 and case-law cited.

30 — See, inter alia, Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 10, and *Commission* v *Greece*, paragraph 2.

31 — See *Anker and Others*, paragraphs 63 and 64, and *Colegio de Oficiales de la Marina Mercante Española*, paragraphs 44 and 45.

32 — I note that such an idea has been alluded to, correctly to my mind, at the hearing, by the Italian Government.

functions may not be regarded by all citizens as 'one of them'. This might have the result that the acts undertaken by that person on behalf of the State, which may even have serious consequences for its citizens, will enjoy a diminished level of legitimacy and acceptance. That may be the case for, among others, members of the national judiciary.

49. Yet, the Communities were founded with the very aim of overcoming the times of '*Blut und Boden*'. In addition, neither the Member States as sovereign entities, nor their citizens, are today what they were at the time the Communities were founded. [33]

50. First, the perception of the role of the State, (i) within society, and (ii) in the international context, is changing significantly. As regards the former, what citizens expect the State to do for them, and how, is manifestly subject to rapid change within society. There has been, in recent decades, a clear trend towards privatisation and outsourcing of tasks which were in the past strictly reserved to the public authorities. [34] As regards the latter, academic legal writers have in recent times emphasised how, in today's globalised world, where significant parts of the constitutional competences of sovereign States have either been transferred to supranational organisations or are de facto being exercised in various international *fora*, [35] the concept of sovereignty cannot be understood in terms of the same traditional concepts as were employed in the past. [36]

51. Second, the concept of citizenship has also undergone significant changes. With increased mobility of workers (and, more generally, of persons) within the European Union, the allegiance which has historically been expected by a State of its citizens has been, if not eroded, then at least subject to transformation in conceptual terms within the European Union. Moreover, since the Maastricht Treaty, the EU Treaties include Union citizenship as a concept which is distinct, and collateral, to that of Member State citizenship. As the Court has stated in the landmark case *Grzelczyk*, 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.' [37] In other words, paraphrasing what Advocate General Jacobs stated in his Opinion in *Konstantinidis*, [38] any EU citizen is now entitled to say '*civis europaeus sum*' and to invoke that status to oppose any infringement of his fundamental rights and — I would add — any unreasonable and unjustified discrimination based on nationality within the European Union.

52. Article 45(4) TFEU should, accordingly, be subject to an interpretation in the light of present day circumstances. [39]

53. It is in the light of all these considerations that I will now discuss in more detail the three-step analysis mentioned in points 44 and 45 above.

33 — See, in this context, the recent discussion on the possibility of acquiring citizenship merely on the basis of wealth in some States.

34 — Interestingly, that trend is not only leading to an increased involvement of private citizens and businesses in governmental activities, but is also giving rise to a noticeable growth of government-to-government trade on the international stage. See, Dettmer, O., 'Unbundling the nation state — Countries have started to outsource public services to each other', 14(2014) *The Economist* (published on 8 February 2014).

35 — Sand, I.J., 'From National Sovereignty to International and Global Cooperation: The Changing Context and Challenges of Constitutional Law in a Global Society', 2007 *Scandinavian Studies in Law*, pp. 273 to 298, at p. 275.

36 — See, inter alia, Weiler, J.H.H., *The Constitution of Europe — 'Do the new clothes have an emperor?' and other essays on European integration*, Cambridge University Press, Cambridge: 1999; MacCormick, N., *Questioning Sovereignty*, Oxford University Press, Oxford: 1999.

37 — Case C-184/99 [2001] ECR I-6193, paragraph 31.

38 — Case C-168/91 [1993] ECR I-1191, point 46.

39 — On that basis, I would say that the conclusions reached, in a particularly old case, concerning the applicability of (what is now) Article 45(4) TFEU might no longer constitute useful precedents. For example, currently, I would not subscribe to what the Court considered to be a correct application of that provision in paragraph 8 of its judgment of Case 149/79 *Commission* v *Belgium* [1982] ECR 1845.

2. The three-step analysis in the application of Article 45(4) TFEU

54. As concerns the first step, relating to the exercise of powers conferred by public law, the Court has not, to date, provided any general and clear-cut definition of those terms. However, a number of elements can be discerned from case-law, including — for the reasons already explained — the element related to the exercise of activities which are connected to the exercise of official authority under Article 51 TFEU.

55. First, it is certain that those terms include the power of *imperium*,[40] namely the supreme legislative, executive, judicial and military powers inherent in the concept of sovereign powers, which are exercised by the State through certain bodies or individuals.[41] Second, it is in my view undisputed that those terms also encompass powers often indicated with the term *potestas*,[42] meaning all those powers which involve the ability to adopt acts which are legally binding independently of (or despite) the will of the addressee, and which are enforced by means of coercion and punishment.[43] Third, it is equally evident that the mere exercise of *any* power of an administrative nature (i.e. of a nature different from that belonging to private individuals) cannot, by contrast, be automatically regarded as involving powers conferred by public law. Indeed, posts which are mainly concerned with the accomplishment of clerical tasks or the exercise of technical functions,[44] and which do not involve discretionary or decision-making powers,[45] are not covered by that concept.

56. There is, admittedly, a grey area between those categories, where it may not be so easy to determine whether the administrative powers connected to a specific public office are such that they fall within the scope of Article 45(4) TFEU. I think that only a case-by-case assessment which takes into account all the characteristics of the prerogatives and activities connected with a given post can enable the interpreter to make such a determination.

57. The 'compass' which, to my mind, indicates the correct direction to the interpreter cannot, as mentioned earlier, be other than the question whether there are objective reasons for which a State can take the view that only persons who are bound to it by a bond of nationality would, in all likelihood, be more willing or able to fulfil the duties which a given post entails. The elements that, in my opinion, may be particularly relevant in that regard include the following: (i) the proximity or connection of the activities exercised in relation to the abovementioned powers of *imperium* or *potestas*; (ii) whether the post involves dealing with matters which involve the protection of essential interests of the Member States' security;[46] (iii) the level of responsibility[47] that the exercise of those powers implies, in terms of seniority, or of management or supervisory duties;[48] (iv) whether those powers are, in modern society, by their very nature[49] or typically[50], regarded as exercised by State

40 — For this expression, cf. also the joined Opinion of Advocate General Cruz Villalón in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08 and C-61/08 *Commission* v *Belgium and Others* [2011] ECR I-4105, point 97.

41 — 'Now the notes of supreme command are these, To make and abrogate Lawes. To determine War and peace, to know, and judge of all controversies, either by himselfe, or by Judges appointed by him; to elect all Magistrates; Ministers, and Counsellors.' (Thomas Hobbes, *De Cive* (of the citizen), [1642] Chapter VI, §XVIII.)

42 — See, for the general meaning of that term, Berger, A., *Encyclopedic Dictionary of Roman Law*, The American Philosophical Society, Philadelphia: 1953, p. 640.

43 — See, to that effect, *Colegio de Oficiales de la Marina Mercante Española*, paragraph 42, and *Anker and Others*, paragraph 61.

44 — See, by analogy, Case C-3/88 *Commission* v *Italy* [1989] ECR 4035, paragraph 13; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraphs 39 and 40; and Case C-438/08 *Commission* v *Portugal* [2009] ECR I-10219, paragraph 40.

45 — Cf. Case 225/85 *Commission* v *Italy*, paragraph 9. See also, by analogy, Case C-50/08 *Commission* v *France* [2011] ECR I-4195, paragraph 76, and *Reyners*, paragraphs 51 to 53.

46 — Cf. Article 346(1) TFEU.

47 — See, to that effect, Case C-4/91 *Bleis* [1991] ECR I-5627, paragraph 6.

48 — See, to that effect, Case 149/79 *Commission* v *Belgium* [1982] ECR 1845, paragraphs 8 and 11, and Case 225/85 *Commission* v *Italy*, paragraph 9. See also, by analogy, *Commission* v *Portugal*, paragraph 41.

49 — Cf. Opinion of Advocate General Stix-Hackl, in *Colegio de Oficiales de la Marina Mercante Española*, point 83.

50 — See *Commission* v *Luxembourg*, paragraph 27, and Case 149/79 *Commission* v *Belgium* [1982] ECR 1845, paragraph 12.

authorities; (v) the far-reaching or, conversely, limited effects that the activities which the post involves may have on other individuals; and (vi) whether the acts or measures adopted by the post-holder produce immediate and direct legal consequences vis-à-vis other individuals, or whether they are only of an auxiliary or preparatory nature. [51]

58. The latter point probably deserves some further explanation. Indeed, an *indirect* participation in the exercise of public powers could also, under certain circumstances, be considered sufficient to satisfy the requirements of the concept of 'public service'. [52] However, that indirect participation cannot be so *remote* [53] that — I would say — the connection between the actual exercise of the public powers, and the contribution to that exercise made by the post-holder appears weak or of little significance. [54]

59. Once it has been determined that the post in question involves participation in the exercise of powers conferred by public law within the meaning of Article 45(4) TFEU, it must still be verified — as a second step — that those powers are granted for the pursuit of the general interest. It must be ascertained, in other words, whether the person holding the public office is to discharge functions in the interest of the community, as opposed to the discharge of functions pursuing a private interest.

60. This condition is therefore not satisfied in cases where the State grants to an individual or entity special powers or prerogatives — in return for pecuniary remuneration, or in any event in the context of a synallagmatic relationship — which that person or entity may use to pursue its own interests or those of a limited number of individuals. Moreover, I concur with the Italian Government in that this condition is also not satisfied when the administrative powers are to be exercised for the pursuit of a mere economic or industrial interest of the State. In other words, it is the interest of the State as a community which is of relevance under Article 45(4) TFEU and not that of the State when it acts as a normal market operator.

61. Finally, and this is the third step of the analysis, it is necessary, in order for Article 45(4) TFEU to apply, that the exercise of those public powers granted for the pursuit of the general interest is not only occasional, or does not constitute only a minor part of the overall activities carried out by the person holding the post in question. In fact, the Court has considered that use of the public powers envisaged by Article 45(4) TFEU by non-nationals of the Member State in question which is only sporadic or exceptional is not capable of undermining the interests which that provision is meant to protect. A post can thus fall within the ambit of Article 45(4) TFEU only when the exercise of powers conferred by public law in the general interest constitutes the core functions of that post, [55] or it is at least intended to occur on a regular basis. [56] It seems to me that, in this regard, the principle of proportionality must play a key role. [57]

62. It is in the light of these principles that I will now examine the applicability of Article 45(4) TFEU to the post of President of a Port Authority exercising functions such as those provided for under Italian law.

51 — See, by analogy, *Commission* v *Portugal*, paragraph 36 and case-law cited.

52 — See the case-law cited *supra* in footnote 28.

53 — Cf. *Commission* v *Luxembourg*, paragraph 31.

54 — For example, see, by analogy, Case C-114/97 *Commission* v *Spain* [1998] ECR I-6717, paragraphs 37 and 38, and *Servizi Ausiliari Dottori Commercialisti*, paragraphs 47 and 48.

55 — See the Opinion of Advocate General Lenz in *Lawrie-Blum*, p. 2136.

56 — See the case-law cited *supra* in footnote 29.

57 — Cf. the Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium and Others*, point 140 et seq.

3. The applicability of Article 45(4) TFEU to the case at hand

63. Mr Haralambidis, the Autorità Portuale di Brindisi, the Italian Government and the Commission argue that Article 45(4) TFEU is not applicable in the main proceedings. In essence, they emphasise that that post mainly requires management and technical skills and that the exercise of any public power for the purposes of Article 45(4) TFEU is at most occasional. Article 45(1) to (3) TFEU would consequently preclude a national provision requiring Italian nationality for access to the post of President of a Port Authority.

64. Conversely, Mr Casilli as well as the Spanish and Netherlands Governments, contend that the post of President of a Port Authority falls squarely within the concept of 'public service' within the meaning of Article 45(4) TFEU. They stress that the administrative powers conferred upon the persons fulfilling that post are quite extensive, and that they must be exercised in the general interest.

65. I will now assess the powers which Italian law confers upon the post of President of a Port Authority under the three-step analysis illustrated above. As will be shown, most of the powers vested in the President of a Port Authority cannot be regarded as being conferred by public law within the meaning of Article 45(4) TFEU. Moreover, even those powers which may fall within that definition either do not appear to be exercised in the interest of the community, but merely in the particular economic interest of the Port Authority, or are meant to be exercised only sporadically or in exceptional circumstances.

66. At the outset, it should be pointed out that all the powers which the President of a Port Authority enjoys, under Italian law, are clearly not those which are normally conferred by the State on its supreme executive, military or judicial bodies. Nor are they closely linked to these sovereign powers.

67. It is true that the exercise of the President's functions generally involves a high level of responsibility and implies a relatively wide discretion. It is also undisputed that his activity is often exercised by means of acts of an administrative nature, which immediately produce legal effects vis-à-vis its addressees. Yet, only a few of those activities seem to involve true decision-making power and, when they do, they rarely entail the adoption of acts which can be enforced without the aid of the police or the national judiciary. [58]

68. As concerns the tasks attributed to the President of a Port Authority pursuant to Article 8(3)(a), (b), (c), (d), (e) and (n) of Law No 84/1994, I observe that the President is only granted a power of proposal to the Port Committee. Without questioning the importance or centrality of his role as chair of that body, the fact remains that the Port Committee is composed of several members and the President is not granted any special prerogative over the other members (such as, for example, the right of veto). In any event, those acts (e.g. the Port Authority's budget estimate, balance sheet and three-year operational plan) seem to have only a programmatic nature and produce most of their legal effects within the entity which adopts it.

69. With regard to the tasks indicated in Article 8(3)(f) and (l) of Law No 84/1994, it must be pointed out that they are loosely defined, and appear to involve mainly powers of coordination or promotion of activities to be finally exercised by other authorities or bodies.

70. Admittedly, the President of a Port Authority does exercise decision-making and executive powers in connection with the tasks assigned to him by Article 8(3)(h), (i) and (m) of Law No 84/1994.

58 — For the importance of this element, see, by analogy, *Commission* v *Portugal*, paragraph 44, and Case C-50/08 *Commission* v *France*, paragraph 93.

71. Yet, after closer scrutiny, I do not believe that the exercise of those powers is enough to fulfil the *very strict* conditions of Article 45(4) TFEU. On the one hand, it seems to me that the powers granted in connection with the award of authorisations and concessions to use certain port areas or to exercise certain activities within the port are, in substance, comparable to those exercised by private undertakings carrying out an industrial or commercial activity. In particular, despite the fact that they take the form of administrative acts and concern property belonging to the State, the acts adopted by the President of a Port Authority in that context are, from an economic point of view, akin to contracts of leasing or letting of properties which may be concluded between private undertakings.[59] On the other hand, the main aim pursued by the President of a Port Authority when carrying out his tasks in that respect is — as pointed out by the Italian Government — to ensure an efficient and profitable use of the State's properties managed by the Port Authority. In other words, the 'North Star' guiding the President's activity in that regard is the financial and economic interest of the authority which he presides over, rather than the more general interest of the community.

72. That said, in my view, there are two tasks, conferred upon the President of a Port Authority, which involve powers of coercion vis-à-vis citizens and which seem to be exercised not only in the interest of the Port Authority itself, but also in that of the community. I refer, first, to the power, conferred by Articles 54 and 55 of the Italian Navigation Code (to which Article 8(3)(h) of Law No 84/1994 refers), to adopt an order requesting a person, which has illegally occupied an area of the State maritime property, to restore the status quo within a fixed period of time and, in case of failure to respect that order, to provide for such restitution *ex officio*, at the expense of the offender. Second, I refer to the task of ensuring navigability of the port area and the excavation and maintenance works of the sea bed in relation to which the President of a Port Authority enjoys the power to adopt, in case of immediate necessity and urgency, binding decisions.

73. It is clear, however, that those powers do not concern the core functions assigned to the President of a Port Authority. They rather constitute a relatively minor part of his overall activity. Moreover, the Italian Government confirmed that they are intended to be exercised only sporadically or in exceptional circumstances. Indeed, more general and extensive powers of policing and coercion in the areas managed by the Port Authority are exercised by the competent police forces, and in particular by the *Capitanerie di Porto — Guardia Costiera* (the Italian Coast Guard).[60] In addition, the enforcement of any other act adopted by the President of a Port Authority requires the assistance of those police forces and, where appropriate, the intervention of a judge.

74. Lastly, Article 8(3)(n-bis) of Law No 84/1994 seems to provide a 'catch-all'-provision.[61] However, from an overall analysis of Law No 84/1994, I do not see any such power that could fulfil the requirements of Article 45(4) TFEU.

75. In conclusion, the post of President of a Port Authority seems to me to be one where the vast majority of the functions attributed to it and, in any event, the critical powers connected therewith, are of a technical and managerial nature. Fundamentally, the requisite criteria to carry out that post appear to be competence and experience in the fields of transport, economics, and human resources. I fail to see the reasons for which a Member State could reasonably take the view that, in all likelihood, only a national of that State would be sufficiently able or willing to carry out the duties involved in that post. In other words, I do not see what added value a bond of nationality could possibly bring to the proper accomplishment of the functions attributed by law to the President of a Port Authority.

59 — See, to that effect, Case C-174/06 *CO.GE.P.* [2007] ECR I-9359, paragraphs 31 to 35.

60 — The Italian Coast Guard is a corps of the Italian Navy the tasks and functions of which are mainly connected to the civil use of the sea.

61 — Article 8(3)(n-bis) of Law No 84/1994 states that '[t]he President of a Port Authority has the task to exercise any other powers [granted to the Port Authority] which that law does not entrust to the other governance bodies of the Port Authority'.

IV – **Conclusion**

76. In light of the foregoing, I propose that the Court answer the questions referred by the Consiglio di Stato as follows:

Article 45 TFEU must be interpreted as precluding a national rule which limits to nationals of the Member State the post of President of a Port Authority, exercising functions such as those indicated in Article 8(3) of Law No 84 of 28 January 1994, 'Recast of the rules on ports' (Legge 28 gennaio 1994, n. 84, *Riordino della legislazione in materia portuale*).