

OPINION OF ADVOCATE GENERAL
LÉGER
delivered on 27 May 2004¹

1. By this action, the Commission of the European Communities seeks a declaration by the Court that, by imposing requirements with regard to the nationality of the shareholders and directors of any company owning a sea-going vessel which they wish to have entered in the Netherlands register, the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 43 and 48 EC. The Commission also seeks a declaration by the Court that that Member State has failed to fulfil the said obligations by imposing requirements with regard to the nationality and place of residence of the directors of companies owning sea-going vessels and the nationality of the natural persons responsible for the day-to-day management of the establishment from which, in the Netherlands, the shipping business concerning such vessels is conducted.

I — The legal framework

A — The relevant provisions of international law

2. Two international conventions now in force contain provisions on the registration of sea-going vessels.

3. The first is the Geneva Convention on the High Seas of 29 April 1958.² It entered into force on 30 September 1962. There are 62 States Parties. The European Community is not a party to the Convention but many Member States are, including the Kingdom of the Netherlands.³

2 — *United Nations Treaty Series*, volume 450, No 6465, p. 11 (hereinafter the 'Geneva Convention').

3 — The following Member States of the Community are parties to the Geneva Convention: the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the Italian Republic, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland.

1 — Language of the case: French.

4. Article 5(1) of the Geneva Convention provides that '[e]ach State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag'. It goes on to state that '[s]hips have the nationality of the State whose flag they are entitled to fly', and that '[t]here must exist a genuine link between the State and the ship'.

6. Further to the provisions contained in Article 10 of the Geneva Convention, Article 94 of the Montego Bay Convention, entitled 'Duties of the flag State', provides in paragraph 1 that '[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag', and sets out in subsequent paragraphs a number of measures which the flag State is required to take to that end.

B — The relevant provisions of Community law

5. All these provisions were subsequently enshrined in Article 91(1) of the United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982.⁴ That Convention entered into force on 16 November 1994. 144 States and the European Community are parties to it. The Community acceded to it, within the limits of its competence, in accordance with Decision 98/392/EC.⁵ All the Member States of the Community except the Kingdom of Denmark are parties to the Montego Bay Convention. Pursuant to Article 311(1) of that Convention, it is to prevail, as between States Parties, over the Geneva Convention.⁶

7. The second paragraph of Article 43 EC confers on Community nationals the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

8. The first paragraph of Article 48 EC provides that companies or firms formed in accordance with the law of a Member State and having their registered office,⁷ central administration or principal place of business within the Community shall be treated in the

4 — Hereinafter the 'Montego Bay Convention'.

5 — Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1). The text of the Convention appears in Annex I to the Decision.

6 — It follows that, in principle, the Geneva Convention maintains its effects, as between States Parties to that Convention which are not parties to the Montego Bay Convention.

7 — This reference to their registered office is in fact linked with the earlier reference to the company or firm being formed in accordance with the law of a Member State.

same way as natural persons who are nationals of Member States, with the result that such companies or firms are entitled to benefit in the same way as nationals of Member States from the right of establishment defined in the second paragraph of Article 43 EC.

9. The establishment of a company or firm in a Member State other than the Member State under whose law it is constituted may take two different forms, namely a principal place of business or a secondary establishment.

10. We speak of a principal place of business where a company or firm intends to establish a connection with the legal system of a Member State other than the Member State under whose law it was originally constituted, in particular by transferring its central administration or by participating in the formation of a new company or firm in the other Member State.

11. We speak of a secondary establishment where a company or firm merely proposes to extend its geographical base in the Community by setting up agencies, branches or subsidiaries in the host Member State in accordance with the first paragraph of Article 43 EC, while maintaining its (principal) place of business in the Member State under whose law it was originally constituted.

C — *The relevant national provisions*

12. The registration of sea-going vessels is regulated, in the Netherlands, by the *Wetboek van Koophandel* (Commercial Code). Under Article 311(1) of the *Wetboek van Koophandel* in the version applicable from 1 August 1994, which is the only version that is relevant for the purposes of the present case, the grant of Netherlands nationality to sea-going vessels, that is to say the registration of such vessels in the Netherlands, is subject to a number of conditions.

13. One of those conditions concerns the nationality of the owner or owners of the vessel. Thus, Article 311(1)(a) of the *Wetboek van Koophandel* provides that 'the vessel [must be owned], as to at least two thirds, by one or more natural or legal persons who are nationals of a Member State or of a State Party to the Agreement on the European Economic Area'.⁸

14. Article 311(3) of the *Wetboek van Koophandel* defines a legal person who is a national of a Member State or of a State Party to the EEA Agreement, within the meaning of Article 311(1)(a), as 'a legal person formed in accordance [with] the law of a Member State ... or of another State Party to the [EEA] Agreement, and having its registered office, central administration or principal place of business in the territory of

⁸ — Agreement of 2 May 1992 (OJ 1994 L 1, p. 3, hereinafter the 'EEA Agreement').

a Member State ... or of another State Party to the [EEA] Agreement, provided that: shares representing at least two thirds of the subscribed capital are set aside from the start for natural persons who are nationals of a Member State ... or of a State Party to the [EEA] Agreement or for companies or firms within the meaning of this paragraph, and that a majority of the directors are nationals of a Member State ... or of another State Party to the [EEA] Agreement; or that all the directors are nationals of a Member State ... or of a State Party to the [EEA] Agreement'.

16. Also, Article 8:169 of the Burgerlijk Wetboek (Civil Code), in the version applicable from 1 August 1994, provides that the 'accountant', that is to say the director, of a shipping company may no longer perform his functions if he ceases to be a national of a Member State or of another State Party to the EEA Agreement or establishes his place of residence outside the territory of those States.

II — The pre-litigation procedure

15. In addition, Article 311(1)(b) of the Wetboek van Koophandel provides that, for a sea-going vessel to be registered in the Netherlands, the owner or owners of the vessel (as defined above) must conduct their shipping business in Netherlands territory through an undertaking which is established or has a secondary establishment in that territory, and must manage the vessel primarily from that Member State. Article 311(1)(c) and (d) of the Wetboek van Koophandel also provide that the day-to-day management of the undertaking in question must be conducted by one or more natural persons who are nationals of a Member State or of another State Party to the EEA Agreement, and who are authorised to represent the undertaking in all matters connected with the management of the vessel, the vessel itself, its captain and the other members of the crew.

17. A pre-litigation procedure had already been instituted against the Kingdom of the Netherlands in connection with its national regulations on sea-going vessels, in a version prior to the version at issue in the present case. The Commission had considered, in the light of the judgment in *Factortame*,⁹ that those earlier regulations were contrary to the principle of freedom of establishment.

18. The Kingdom of the Netherlands subsequently amended its national regulations on the subject.

⁹ — Case C-221/89 *Factortame and Others* [1991] ECR I-3905.

19. The Commission considered that the new regulations were still contrary to the principle of freedom of establishment, as guaranteed by Articles 43 and 48 EC, and called on the Member State to submit its observations. The Commission was not convinced by the observations submitted by the Kingdom of the Netherlands and invited the Member State, on 27 January 2000, to take the necessary measures to fulfil the obligations arising from Articles 43 and 48 EC within two months of its notification.

20. The draft law designed to remedy the failure to fulfil the obligations in question not having been adopted, the Commission brought the present action by application lodged with the Registry on 23 August 2002.

21. The Commission submits two pleas in support of its action.

22. The first plea relates to the conditions for the registration of sea-going vessels concerning the nationality of the shareholders and directors of companies owning the said vessels.

23. The second plea consists of two limbs. The first limb relates to the conditions for the registration of sea-going vessels concerning the nationality of the natural persons responsible for the day-to-day management of the establishment from which, in that Member State, the shipping business concerning such vessels is conducted. The second limb relates to the nationality and residence conditions applicable to the exercise of the functions of director of a company owning sea-going vessels.

A — The first plea as to the conditions for the registration of sea-going vessels concerning the nationality of the shareholders and directors of the companies owning the vessels

1. Arguments of the parties

24. By its first plea, the Commission claims that the Kingdom of the Netherlands has infringed Articles 43 and 48 EC by making the registration of sea-going vessels subject, in that Member State, to conditions concerning the nationality of the shareholders and directors of the companies owning the said vessels.

25. The Commission recalls that, according to the judgment in *Factortame*, the condi-

tions laid down for the registration of vessels must not form an obstacle to freedom of establishment.¹⁰

26. The Commission claims, in that connection, that the conditions laid down in Article 311(3) of the *Wetboek van Koophandel* concerning the nationality of the shareholders and directors of companies owning sea-going vessels constitute further conditions in addition to those contained in Article 48 EC for according a company freedom of establishment.

27. It follows that companies owning sea-going vessels which do not meet those further conditions will be unable to register such vessels in the Netherlands and thus to establish themselves there even if they meet the conditions laid down in Article 48 EC and should enjoy freedom of establishment in that Member State.

28. According to the Commission, the requirement to meet those further conditions imposes a restriction on the said companies' freedom of establishment in the Netherlands, especially if they should wish to set up a secondary establishment there and the Member State in whose territory they are established imposes no such requirement. In

that case, the said companies would be obliged to alter the composition of their board of directors and their shareholders in order to be able to register their sea-going vessels in the Netherlands.

29. The Netherlands Government denies that the national regulations at issue constitute an obstacle to freedom of establishment. It points out, in this connection, that the nationality requirements imposed by the Netherlands regulations cannot be compared with the conditions called into question in the judgment in *Factortame* since they refer to the nationality of a Member State of the Community or a State Party to the EEA Agreement and not to the nationality of the Member State concerned. The Netherlands Government adds that the contested nationality requirements might affect the exercise of the right to set up a secondary establishment but the effect was so uncertain and indirect that it would be wrong to speak of an obstacle.

30. Moreover, even if there were a real obstacle, it would be justified by the need to guarantee a genuine link between sea-going vessels and the State in which they are registered, so that that State can effectively exercise its jurisdiction and control over ships flying its flag, in accordance with the provisions of the Montego Bay Convention.

¹⁰ — *Factortame and Others*, paragraphs 22 and 23.

31. According to the Netherlands Government, the justified and proportionate nature of any alleged obstacle to freedom of establishment is confirmed by the fact that comparable nationality requirements had been considered with regard to maritime transport, were imposed under a number of inland waterway and air transport regulations currently in force, and were being considered again with regard to air transport.

States must be exercised consistently with Community law.¹²

34. The Court has held that the conditions laid down by the Member States for the registration of vessels must not form an obstacle to freedom of establishment (in the case of vessels which are used to pursue an economic activity) or freedom of movement for persons (in the case of vessels which are not used to pursue an economic activity).¹³

2. Assessment

32. In the judgment in *Factortame* the Court observed that, as Community law stands at present, competence to determine the conditions for the registration of vessels is vested in the Member States.¹¹ This is still the case with regard to sea-going vessels, since there are as yet no provisions of secondary Community law on the subject.

35. In the present case, it is common ground that the Netherlands regulations at issue must be assessed in the light of freedom of establishment, not freedom of movement for persons. The vessels covered by the Netherlands regulations are instruments for the pursuit of an economic activity involving a permanent establishment in the Netherlands¹⁴ so that, in accordance with the judgment in *Factortame*, their registration

33. Nevertheless, it is settled case-law that powers which are retained by the Member

12 — See, in particular, on the registration of vessels, *Factortame and Others*, paragraph 14; *Commission v United Kingdom*, paragraph 12; Case C-334/94 *Commission v France* [1996] ECR I-1307, paragraph 14; Case C-151/96 *Commission v Ireland* [1997] ECR I-3327, paragraph 12; and Case C-62/96 *Commission v Greece* [1997] ECR I-6725, paragraph 18.

13 — On this distinction, see *Factortame and Others*, paragraphs 21 and 22; *Commission v United Kingdom*, paragraphs 22 and 23; *Commission v France*, paragraphs 12 and 20 to 22; *Commission v Ireland*, paragraphs 12 and 13; and *Commission v Greece*, paragraphs 18 to 20.

14 — The Netherlands Government has explained that the national regulations in question concern the registration of merchant vessels (rejoinder, paragraph 2).

11 — Paragraphs 13 and 17. See also Case C-246/89 *Commission v United Kingdom* [1991] ECR I-4585, paragraphs 11 and 15.

cannot be dissociated from the exercise of the freedom of establishment.¹⁵

36. In my view, there is no doubt that the nationality requirements imposed by the Netherlands regulations for the registration of sea-going vessels in the Netherlands restrict the freedom of establishment of companies owning such vessels.

37. Where those companies fulfil the conditions laid down in the first paragraph of Article 48 EC, that is to say where they are formed in accordance with the law of a Member State and have their registered office, central administration or principal place of business within the Community, they are in principle entitled to enjoy freedom of establishment in accordance with Article 43 EC et seq.¹⁶

15 — See *Factortame and Others*, paragraph 22, and *Commission v United Kingdom*, paragraph 23.

16 — The location of the registered office, central administration or principal place of business of companies or firms serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. These alternative criteria reflect differences in the Member States' law on the subject. See, in particular, to this effect the judgments in Case 270/83 *Commission v France* [1986] ECR 273, paragraph 18; Case 79/85 *Segers* [1986] ECR 2375, paragraph 13; Case 81/87 *Daly Mail and General Trust* [1988] ECR 5483, paragraphs 19 to 21; Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 20; and Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 20.

38. It must be emphasised in this connection that, in the case of companies, freedom of establishment may not be made to depend on their satisfying further conditions concerning the nationality of their shareholders and directors.

39. Such conditions are implicitly but necessarily precluded under the first paragraph of Article 48 EC, inasmuch as they are associated with a criterion for determining the connection, the 'criterion of control', which was not adopted by the authors of the EC Treaty.¹⁷

40. The rejection of the criterion of control and the nationality requirements associated with it was confirmed in the General Programme for the abolition of restrictions on freedom of establishment, adopted by the Council on 18 December 1961.¹⁸

17 — The criterion of control means that a company's link with the legal system of a particular State is determined by the nationality of the persons who have certain powers within the company, such as members of the company, persons holding managerial or supervisory posts in the company, and holders of the capital. The authors of the Treaty adopted a different criterion, the 'criterion of incorporation'. On that criterion, a company is connected with the Member State under whose law it was constituted and in whose territory it has its registered office, even if its real seat (that is to say its central administration or principal place of business) is situated in another Member State.

18 — OJ English Special Edition, Second Series, IX, p. 7 (hereinafter the 'General Programme'). To quote a widely used expression, the General Programme provides useful guidance for the implementation of the relevant provisions of the Treaty. See, in particular, to that effect Case 71/76 *Thieffry* [1977] ECR 765, paragraph 14; Case 197/84 *Steinhauser* [1985] ECR 1819, paragraph 15; *Segers*, paragraph 15; Case 305/87 *Commission v Greece* [1989] ECR I 461, paragraphs 22 and 25; and Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, paragraph 17.

41. In the case of companies or firms where only their registered office is within the Community (their central administration or principal place of business being situated outside the Community), the General Programme made the freedom to set up a secondary establishment subject to the further condition that their activity must show 'a real and continuous link with the economy of a Member State' but it expressly stated that such a link must not be one of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital.¹⁹

42. It follows that the fact that a company is controlled by directors or shareholders who are nationals of third States which are not in the Community or the EEA has no bearing on its freedom to set up a secondary establishment. In other words, a company which meets the conditions laid down in the first paragraph of Article 48 EC cannot be denied the freedom to set up a secondary establishment merely because it does not satisfy the conditions concerning the nationality of its shareholders or directors. The same consideration applies in respect of the freedom to establish a principal place of business.

43. By making the registration of sea-going vessels in the Netherlands subject to conditions concerning the nationality of the shareholders and directors of companies owning such vessels, the Netherlands regulations at issue tend to reduce the personal scope of the right of establishment as defined in Article 48 EC. Moreover, as the Commission points out, those national regulations are liable to hamper or to render less attractive the exercise of freedom of establishment in that Member State, whether in the form of a principal place of business or a secondary establishment. Unlike the Netherlands Government, I do not think that such restrictive effects are so uncertain and indirect that the national regulations at issue cannot be considered to be such as to form an obstacle to freedom of establishment.

44. If companies seeking to register sea-going vessels in the Netherlands do not meet the national conditions at issue (which is highly likely in the case of companies constituted in another Member State where no such conditions apply) those companies have no alternative, if they wish to proceed with the registration, but to change the structure of their company capital or their board of directors.

45. It goes without saying that such changes may cause considerable upheavals within the

19 — See the fourth indent in Title I of the General Programme, 'Beneficiaries'. The expression 'a real and continuous link with the economy of a Member State', used in these provisions, was not specifically defined in the General Programme. See, in particular, in this connection Aussant, G., Fornasier, R., Louis, J.-V., Séché, J.-C., Van Raepenbusch, S., *Commentaire Mégret*, volume 3, 2nd ed., 1990, p. 38, point 6; Loussouarn, Y., 'Le rattachement des sociétés et la Communauté économique européenne', in *Études de droit des Communautés européennes, Mélanges offerts à Pierre Teitgen*, Paris, 1984, p. 247; Schapira, J., Le Tallec, G., Blaise, J.-B., Idot, L., in *Droit européen des affaires*, volume 2, PUF, 5th ed., 1999, pp. 571 and 572, and the Opinion of Advocate General La Pergola in *Centros*, cited in footnote 16 above.

company and involve the completion of numerous formalities with the attendant financial implications. This prospect is likely seriously to deter the companies concerned from exercising the right of establishment conferred on them under Articles 43 and 48 EC, especially where it is merely a question of setting up a secondary establishment since, as the Court observed in its judgment in *Daily Mail and General Trust*, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries.²⁰

46. It follows that the Netherlands regulations at issue constitute a restriction on freedom of establishment, contrary to Articles 43 and 48 EC.

47. It is true that, as the Commission has pointed out, those regulations apply equally to Netherlands companies and to companies constituted under the legal system of other Member States (within the meaning of the first paragraph of Article 48 EC). The said regulations therefore differ in that respect from those examined in *Factortame*, since the regulations at issue in that case discriminated against companies connected with a Member State other than the Member State concerned by the national regulations in question in each case.²¹

48. However, in its judgment in *Kraus*,²² the Court held that 'Articles 48 and 52 [now, after amendment, Articles 39 and 43 EC] preclude any national measure ... where that measure, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals ... of fundamental freedoms guaranteed by the Treaty'.²³ The Court added that 'the situation would be different only if such a measure pursued a legitimate objective compatible with the Treaty [or] was justified by pressing reasons of public interest ... [and] application of the national rules in question [is] appropriate for ensuring attainment of the objective they pursue and [does not] go beyond what is necessary for that purpose'.²⁴

49. It must therefore be examined whether, as the Netherlands Government contends, the restriction imposed by the national regulations in question may be justified to a certain extent by reference to a relevant provision of Community law derived from rules of international law on the registration of ships.

20 — Paragraph 17.

21 — On the conditions concerning the nationality of directors and holders of the capital, see *Factortame and Others*, paragraph 30; *Commission v United Kingdom*, paragraph 31; Case C-334/94 *Commission v France*, paragraph 17; *Commission v Ireland*, paragraph 12; and Case C-62/96 *Commission v Greece*, paragraphs 18 and 27.

22 — Case C-19/92 [1993] ECR I-1663.

23 — Paragraph 32.

24 — *Idem*. See, in particular, to the same effect, on the subject of freedom of establishment, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Centros*, paragraph 34.

50. I note that, according to the Netherlands Government, it was necessary to impose the contested nationality requirements in order to ensure, in accordance with Article 91 of the Montego Bay Convention, that a genuine link exists between the Kingdom of the Netherlands and ships flying the Netherlands flag. It is necessary to verify that these requirements are met when ships are registered, in order to guarantee, as far as possible, that the Netherlands authorities effectively exercise their jurisdiction and control over the said ships, in accordance with Article 94 of the said Convention.

51. This argument advanced by the Netherlands Government is based on a certain interpretation of Article 91(1) of the Montego Bay Convention. However, I am not convinced that, as the Netherlands Government contends,²⁵ Article 91(1) of the Montego Bay Convention makes the registration of ships dependent on the existence of a genuine prior link between the flag State and the ship concerned.

52. That interpretation of Article 91(1) of the Montego Bay Convention appears to have been rejected by the International Tribunal for the Law of the Sea (hereinafter 'ITLOS') in its judgment of 1 July 1999 in the *M/V Saiga II* case brought by St. Vincent

and the Grenadines against Guinea, following the arrest by the Guinea authorities of a vessel flying the St. Vincent and Grenadines flag.²⁶ Those were the terms in which legal commentators spoke of that judgment.²⁷

53. The ITLOS concluded that 'the purpose of the provisions of the [Montego Bay] Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States'.²⁸

54. This conclusion suggests that the requirement that there be a genuine link between a ship and its flag State relates to the implementation of the duties to be discharged by the flag State rather than to a necessary precondition for the registration of a ship.

26 — *Reports of Judgments, Advisory Opinions and Orders*, vol. 3, 1999.

27 — See, in particular, Kamto, M., 'La nationalité des navires en droit international', in *Mélanges offerts à L. Lucchini et J.-P. Quéneudec*, ed. La mer et son droit, A. Pédone, October 2003 (p. 347 et seq., in particular points 29 and 31). This author casts a critical eye on the interpretation of the concept of a 'genuine link' adopted by the ITLOS in its judgment in the *M/V Saiga II* case, according to which the existence of a genuine link is not a necessary precondition for the grant of nationality to a ship.

28 — Judgment in the *M/V Saiga II* case, paragraph 83.

25 — Rejoinder, paragraph 18.

55. According to the ITLOS, this conclusion is not put into question by the United Nations Convention on Conditions for the Registration of Ships of 7 February 1986.²⁹ On the contrary, it claims that this interpretation of Article 91 of the Montego Bay Convention is further strengthened by two United Nations Agreements on fisheries dating from 1982 and 1993, neither of which is in force, since those agreements limit themselves to setting out detailed obligations to be discharged by the flag State but do not deal with the conditions to be satisfied for the registration of a vessel.³⁰

'there is nothing in the Convention to support the contention that the existence of a genuine link between a ship and a State is a necessary precondition for the grant of nationality to the ship'.³²

57. In my view, the guidance provided in that ITLOS judgment is such as to refute the interpretation proposed by the Netherlands Government of Article 91(1) of the Montego Bay Convention (the content of which is identical to that of Article 5(1) of the Geneva Convention).

56. To the same effect, the ITLOS added that Guinea had not cited any provision of the Montego Bay Convention which lent support to its contention that 'a basic condition for the registration of a ship is that the owner or operator of the ship is under the jurisdiction of the flag State'.³¹ That observation tends to support the claim, by St. Vincent and the Grenadines, that

58. This case-law coincides with and supports the earlier analysis of Advocate General Tesouro in his Opinion in Case C-62/96 *Commission v Greece*. He considered that the concept of a 'genuine link', for the purposes of the Geneva and Montego Bay Conventions, means effective control and jurisdiction which the State is bound to exercise over ships flying its flag. In other words, in his view, far from being a condition for the grant of nationality, the 'genuine link' amounts primarily to a duty of supervision resulting from the grant of nationality.³³

29 — *Ibidem*, point 84. This Convention (published in *International Transport Treaties*, suppl. 12, May 1988) has not yet entered into force.

30 — Judgment in the *M/V Saiga II* case, paragraph 85, referring to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks opened for signature on 4 December 1995 and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993.

31 — Judgment in the *M/V Saiga II* case, paragraph 84.

32 — *Ibidem* (point 77).

33 — Point 13 of the Opinion.

59. It is interesting to note, in this connection, that Advocate General Tesauro was at pains to point out that it is precisely the definitive version of Article 5 of the Geneva Convention, as compared with the document prepared by the International Law Commission of the United Nations, which refutes the idea of making the grant of nationality in respect of a ship dependent on the ship's being owned preponderantly by citizens of the flag State.³⁴

60. Moreover, in any event, irrespective of which interpretation should be adopted on the question of the need for a genuine link between ship and State, within the meaning of the Geneva and Montego Bay Conventions, I find it difficult to understand why, as the Netherlands Government contends, the nationality requirements imposed by the national regulations at issue should be considered necessary to enable the Kingdom of the Netherlands, as the flag State, to exercise its control and jurisdiction over ships flying its flag in accordance with the requirements laid down in Article 94 of the Montego Bay Convention.

61. Admittedly, the objectives of ensuring safety at sea and preventing, reducing and controlling marine pollution, pursued by the

provisions of Article 94 of the Montego Bay Convention,³⁵ to which the Community has acceded, may be thought to constitute imperative reasons of public interest, within the meaning of the case-law of the Court, or even grounds of public policy, within the meaning of Article 46(1) EC.³⁶

62. However, the fact that a ship is owned preponderantly by one or more companies whose directors or the holders of whose capital consist essentially of citizens of third States does not prevent a Member State, as the flag State, from effectively exercising its jurisdiction and control over the ship. That circumstance has little bearing on the adoption of measures to ensure that the ship is surveyed,³⁷ measures to ensure that the particulars of the ship are entered in a register,³⁸ measures with regard to the labour conditions and the training of the crew,³⁹ and the obligation to cause an

35 — The objective of ensuring safety at sea is expressly referred to in Article 94(3) of the Montego Bay Convention. The objective of preventing, reducing and controlling marine pollution is expressly referred to in Article 94(4)(c) and Article 211(2) of that convention.

36 — In the inland transport sector, it is settled case-law that road traffic safety is among the imperative reasons of public interest which may justify a restriction on fundamental freedoms guaranteed by the Treaty. See Case C-55/93 *Van Schaik* [1994] ECR I-4837, paragraph 19; Case C-314/98 *Snellers* [2000] ECR I-8633, paragraph 55; Case C-246/00 *Commission v Netherlands* [2003] ECR I-7485, paragraph 67. In the maritime transport sector, the Court has held, with regard to mooring or nautical services, that the maintenance of public security in coastal waters as well as in ports could be justified by considerations of public security within the meaning of Article 46(1) EC. See Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraphs 60 and 61, and joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraphs 41 and 42.

37 — Article 94(3)(a) and Article 94(4)(a) of the Montego Bay Convention.

38 — Article 94(2)(a) of the Montego Bay Convention.

39 — Article 94(3)(b) and Article 94(4)(b) and (c) of the Montego Bay Convention.

34 — *Idem*.

inquiry to be held in the event of a marine casualty or incident of navigation on the high seas.⁴⁰

63. On the other hand, it may be necessary in this connection to require, as the Netherlands regulations do,⁴¹ that a ship flying the Netherlands flag must be managed primarily from the Netherlands.⁴² The Court has admitted such a condition for the registration of ships in regard to freedom of establishment.⁴³

64. In my view, contrary to the Netherlands Government's contention, the nationality requirements at issue do not therefore appear to be necessary to enable the Kingdom of the Netherlands to fulfil its obligations, as the flag State, in accordance with Article 94 of the Montego Bay Convention.

65. It follows from these considerations that the nationality requirements imposed by the Netherlands regulations at issue are not justified by reference to any of the rules of international law on the registration of ships, as laid down in the Geneva and Montego Bay Conventions.

40 — Article 94(7) of the Montego Bay Convention.

41 — Article 311(1)(b) of the *Wetboek van Koophandel*.

42 — See in particular, to the same effect, point 13 of Advocate General Tesaura's Opinion in Case C-62/96 *Commission v Greece*.

43 — See *Factortame and Others*, paragraphs 34 to 36.

66. In the light of the foregoing considerations, I am inclined to conclude that the first plea submitted in support of the application is well founded.

67. However, I consider that, in the light of the documents submitted to the Court, there is some doubt as to the claim that the contested nationality requirements are not justified.

68. As the Netherlands Government rightly points out, comparable nationality requirements are imposed in the inland waterway and air transport sectors under a number of regulations currently in force.

69. In the inland waterway transport sector, such requirements are imposed under Council Regulation (EEC) No 2919/85 of 17 October 1985 laying down the conditions for access to the arrangements under the Revised Convention for the navigation of the Rhine relating to vessels belonging to the Rhine Navigation,⁴⁴ Council Regulation (EEC) No 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or

44 — OJ 1985 L 280, p. 4. Article 3(1)(c)(cc), Article 2 and Article 4 of the Annex to Regulation No 2919/85.

passengers by inland waterway within a Member State,⁴⁵ and Council Regulation (EC) No 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services.⁴⁶ In the air transport sector, such requirements are imposed under Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers.⁴⁷

70. Admittedly, the fact that, within the framework of the common transport policy (essentially in the context of freedom to provide services), all those regulations impose nationality requirements comparable to those at issue in the present case cannot in itself justify a Member State's imposing such conditions unilaterally (in the context of freedom of establishment) in transport sectors other than those covered by the regulations in question.⁴⁸

71. That being so, it would be strange, to say the least, to decide that the contested national provisions are not justified by reference to any relevant provision of Community law in the maritime transport sector, when comparable provisions are laid down in various Community regulations now in force in other transport sectors, unless it is considered that the air and inland waterway transport sectors meet requirements that are fundamentally different from the requirements of maritime transport, or unless there are doubts as to the legality of the said regulations with regard to the provisions in question.⁴⁹

72. The Commission has offered little by way of explanation in this connection. I therefore conclude that it has not provided sufficient evidence to show that the restric-

45 — OJ 1991 L 373, p. 1. Article 2(1)(b)(ii) of Regulation No 3921/91.

46 — OJ 1996 L 175, p. 7. Article 2, fourth indent, of Regulation No 1356/96 (which refers to the conditions laid down in Article 2 of Regulation No 3921/91).

47 — OJ 1992 L 240, p. 1. Article 4(2) of Regulation No 2407/92.

48 — It must be emphasised, in this connection, that the general rules of the Treaty apply to the transport sector — including the maritime transport sector — whether or not a common policy has been introduced in that sector (subject to the express derogation contained in Article 51(1) EC with regard to the freedom to provide services). See, to that effect, Case 167/73 *Commission v France* [1974] ECR 359, paragraphs 21 to 33, with regard to the rules on freedom of movement for persons laid down in the Treaty, and Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraphs 37 to 39, with regard to the competition rules laid down in the Treaty. It follows that, in the maritime transport sector, Member States are required to comply with the general rules on freedom of establishment contained in the Treaty.

49 — When the Council adopts acts of secondary legislation within the framework of the common transport policy, it is required to apply the general rules of the Treaty, including the rules on freedom to provide services. The Court observed, in Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 62, that Article 51(1) EC provides that freedom to provide services in the field of transport is to be governed by the provisions of the Title relating to transport. It concluded from this that '[a]pplication of the principles governing freedom to provide services, as established in particular by Articles 59 [now, after amendment, Article 49 EC] and 60 [now Article 50 EC] of the Treaty, must ... be achieved, according to the Treaty, by introducing a common transport policy and, more particularly, by laying down common rules applicable to international transport and the conditions under which non-resident carriers may operate transport services, the rules and conditions of which are referred to in Article 75(1)(a) and (b) [now, after amendment, Article 71(1)(a) and (b) EC] and necessarily affect freedom to provide services'. See also, to this effect, *Asjes and Others*, paragraph 37, and Case C-49/89 *Corsica Ferries France* [1989] ECR I-4441, paragraph 11.

tion on freedom of establishment imposed by the Netherlands regulations at issue is not justified. It is settled case-law that, when the Commission requests the Court to declare that a State has failed to fulfil its obligations under the Treaty, it is for the Commission itself to adduce evidence of the alleged infringement.⁵⁰

73. I therefore take the view, on the basis of the documents submitted to the Court, that the first plea is unfounded.

B — The second plea as to the conditions concerning the nationality of the natural persons responsible for the day-to-day management of the establishment from which the shipping business is conducted in the Netherlands and the nationality and residence of the directors of shipping companies

1. Arguments of the parties

74. As I have already observed, this second plea consists of two limbs. The first limb, like

the first plea, relates to certain conditions to which the registration of sea-going vessels is subject in the Netherlands, namely conditions concerning the nationality of the natural persons responsible for the day-to-day management of the establishment from which the shipping business is conducted in that Member State. The second limb relates to the nationality and residence conditions applicable to the exercise of the functions of director of a company owning sea-going vessels.

75. By this second plea, taken as a whole, the Commission claims that the Kingdom of the Netherlands has infringed Articles 43 and 48 EC on the ground that the contested national conditions constitute an unjustified restriction on the freedom of establishment of companies established in another Member State.

76. It claims that, if the companies in question do not comply with the said conditions, they are not entitled under the Netherlands regulations either to have any sea-going vessel which they own registered in the Netherlands and thus conduct shipping business there, or to form or manage in that Member State a shipping company to

⁵⁰ — See, in particular, Case 96/81 *Commission v Netherlands* [1982] ECR 1791, paragraph 6; Case C-249/88 *Commission v Belgium* [1991] ECR I-1275, paragraph 6; Case C-210/91 *Commission v Greece* [1992] ECR I-6735, paragraph 22; and Case C-300/95 *Commission v United Kingdom* [1997] ECR I-2649, paragraph 31.

handle sea-going vessels already entered in the Netherlands register.

contain no comparable nationality requirements.

77. It adds that, contrary to the Netherlands Government's contention, the contested national conditions are not justified by any of the rules of international law on the obligations of the flag State.

80. Like the conditions for the registration of sea-going vessels concerning the nationality of the shareholders and directors of companies owning such vessels, referred to in the first plea, the conditions referred to in the first limb of the second plea are liable to hamper or to render less attractive the exercise of freedom of establishment in the Netherlands, whether in the form of a principal place of business or a secondary establishment. Companies seeking to register their vessels in that Member State, in the exercise of freedom of establishment, have no alternative, if they wish to do so, but to change their recruitment policy so as to prevent any national of a third State which is not in the Community or the EEA from serving in the capacity specified in the Netherlands regulations at issue.

2. Assessment

78. I consider that this plea is well founded in respect of both limbs.

79. As to the first limb of this plea, relating to the conditions for the registration of sea-going vessels concerning the nationality of the natural persons responsible for the day-to-day management of the establishment from which the shipping business is conducted in the Netherlands,⁵¹ I refer largely to my observations on the first plea, noting in this connection that Regulations Nos 2919/85, 3921/91, 2407/92 and 1356/96

81. Such a restriction on freedom of establishment, even if it applies equally to Netherlands companies and to companies constituted under the legal system of a Member State other than the Kingdom of the Netherlands, is contrary to Articles 43 and 48 EC, since it is not justified by reference to a relevant provision of Community law derived in particular from the rules of international law I examined earlier. The fact that the day-to-day management of the establishment from which a company owning sea-going vessels conducts shipping

⁵¹ — These conditions are contained in Article 311(1)(c) of the *Wetboek van Koophandel*.

business in the Netherlands is conducted wholly or partly by nationals of third States which are not in the Community or the EEA does not prevent that Member State, as the flag State, from effectively exercising its control and jurisdiction over the said vessel in accordance with Article 94 of the Montego Bay Convention.

82. I therefore conclude that the second plea is well founded in respect of its first limb.

83. As to the second limb of the second plea,⁵² the same considerations apply in this case as in the case of the conditions concerning the nationality of the directors of companies owning sea-going vessels registered in the Netherlands. That nationality requirement is liable to hamper or to render less attractive the constitution or management, in that Member State, of companies owning the said vessels. Such a restriction, even if it applies without discrimination, is not justified by reference to a relevant provision of Community law derived in particular from the rules of international law cited above and it should

be noted in this connection that Regulations Nos 2919/85, 3921/91, 2407/92 and 1356/96 contain no comparable nationality requirements.

84. As to the condition concerning the place of residence of directors of companies owning sea-going vessels, I agree with the Commission that it is likely to deter companies established in a Member State other than the Netherlands (within the meaning of Article 48 EC) from entering into an association with similar companies established in Netherlands territory. If companies established in another Member State wish to enter into such an association and their directors are not, or are no longer, resident in a Member State of the Community or the EEA, they have no alternative but to change their directors, unless their directors change their place of residence. It follows that the contested residence requirement constitutes a restriction on freedom of establishment. That restriction, even if it applies without discrimination, is contrary to Articles 43 and 48 EC inasmuch as it is not justified by reference to a relevant provision of Community law derived in particular from the rules of international law cited above.

85. I therefore conclude that the second plea is well founded in respect of both its limbs.

⁵² — The nationality and residence conditions referred to in the second limb of the second plea are set out in Article 8:169 of the *Burgerlijk Wetboek*.

IV — Conclusion

86. I therefore propose that the Court should:

- (1) declare that the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 43 EC and 48 EC:
 - by adopting regulations making the registration of sea-going vessels in that Member State subject to the condition that the natural persons responsible for the day-to-day management of the establishment from which, in the Netherlands, the shipping business concerning such vessels is conducted must be nationals of a Member State of the European Community or the European Economic Area, and
 - by adopting regulations making the exercise of the functions of director of a company owning sea-going vessels subject to the condition that the person concerned must be a national of, and reside in, a Member State of the European Community or the European Economic Area;
- (2) dismiss the remainder of the application;
- (3) order the Kingdom of the Netherlands to pay its own costs and the costs incurred by the Commission of the European Communities.