Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 10 June 2021 [1]

Case C-71/20

Anklagemyndigheden
v
VAS Shipping ApS (formerly formerly Sirius Shipping ApS)

(Request for a preliminary ruling from the Østre Landsret (High Court of Eastern Denmark))

(Reference for a preliminary ruling – Articles 49 and 54 TFEU – Freedom of establishment – Obligation under national law for third-country crew members of vessels flying the flag of that Member State to obtain a work permit – Exception for vessels in international traffic which do not enter ports of the Member State more than 25 times in a year – Vessel owned by a national of another Member State – Non-discriminatory – Concept of 'restriction' – Overriding reasons in the general interest – Stability of labour market – Proportionality)

I. Introduction

1. The present request for a preliminary ruling by the Østre Landsret (High Court of Eastern Denmark), dated 10 February 2020 and which was lodged at the Registry of the Court on 12 February 2020, concerns the interpretation of Article 49 TFEU on the freedom of establishment. It poses the conceptually difficult question of whether legislation governing the labour market, which applies generally and without distinction, can be regarded as a restriction of the freedom of establishment pursuant to Article 49 TFEU.

2. That request was made in criminal proceedings brought by the Anklagemyndigheden (Public Prosecutor, Denmark) against the Danish limited liability company VAS Shipping ApS (formerly Sirius Shipping ApS), which is wholly owned by the Swedish company Sirius Rederi AB. Given that Danish law requires that a managing owner be selected for a vessel owned by part-owners, VAS Shipping is the managing owner of four part-owned shipping companies established in Sweden. The four part-owned Swedish shipping companies registered four vessels in the Danish International Register of Shipping ('the DIS') for the purpose of their activities in Denmark.

3. In accordance with the provisions of Danish law applicable at the relevant time, a third-country national must have a work permit to take up employment in Denmark, including employment on a Danish vessel which, as part of its regular services, calls regularly at Danish ports. Any person who employs such foreign nationals without a work permit is liable for a fine or a term of imprisonment.

1 Original language: English.

Third-country nationals working on Danish cargo vessels in international traffic which entered Danish ports on no more than 25 occasions, calculated continuously over the previous year,[2] were exempted from the requirement to have a work permit. A work permit was however required where such vessels entered Danish ports on more than 25 occasions over the previous year.

4. VAS Shipping is charged with having breached Paragraph 59(4), in conjunction with Paragraphs 59(5) and 61, of the Udlændingeloven (Law on foreign nationals)[3] in the period from 22 August 2010 to 22 August 2011, by entering Danish ports on more than 25 occasions with four vessels registered in the DIS, with crew members from third countries,[4] who did not hold a work permit or were not exempted from the requirement to hold such a permit under Paragraph 14 of the Law on foreign nationals. VAS Shipping was found guilty of the offence in question by the first-instance court and was fined 1 500 000 Danish kroner (DKK).

5. The court in question considered that the work permit requirement constituted a non-discriminatory restriction of the freedom of establishment pursuant to Article 49 TFEU, together with Article 54 TFEU, but that the restriction was justified in order not to undermine the Danish labour market. VAS Shipping appealed against that judgment before the referring court.

6. By its request for a preliminary ruling, the referring court asks in essence whether Article 49 TFEU on the freedom of establishment precludes legislation of a Member State such as that in question in the main proceedings which requires third-country crew members of a vessel flagged in that Member State and owned by a shipowner who is a national of another EU Member State to have a work permit, unless the vessel enters ports of the Member State where the vessel is flagged on at most 25 occasions calculated continuously over the last year.

7. It would appear that the parties to the main proceedings initially agreed that the Danish measures in question constituted a restriction pursuant to Article 49 TFEU. The parties then appear to have focused on whether the measure could be justified by overriding reasons in the public interest. In its written submissions, however, the Commission subsequently queried that position.

8. It is thus necessary to examine in detail the concept of a 'restriction of the freedom of establishment' pursuant to Article 49 TFEU and examine how that concept might be applied by the referring court in the context of the main proceedings before it.

9. Prior to examining this question, it is first necessary to set out the relevant EU and national legislative texts and the facts in the main proceedings as presented by the referring court.

II. Legal framework

A. International law

10. The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 ('the UNCLOS'), entered into force on 16 November 1994. It was approved on behalf of the European Community by Council Decision 98/392/EC 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).

2 Irrespective of the calendar year.

3 As consolidated by Law No 1061 of 18 August 2010.

4 Countries outside the European Union and the European Economic Area (EEA).

11. Article 91(1) of the UNCLOS states as follows:

'Every 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. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.'

12. Under the heading 'Status of ships', Article 92 of the UNCLOS provides, in paragraph 1 thereof, as follows:

'Ships shall sail under the flag of one State only and, …, shall be subject to its exclusive jurisdiction on the high seas. …'

13. Article 94 of the UNCLOS, headed 'Duties of the flag State', states as follows:

'1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

…

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.'

B. Danish law

1. Law on foreign nationals

14. Paragraph 13 of the Law on foreign nationals provides:

'1. A foreign national shall have a work permit to take paid or unpaid employment, to be a self-employed person or in order to provide services for consideration or otherwise in Denmark. A work permit shall also be required for employment on a Danish vessel or aircraft which, as part of regular services or otherwise, calls regularly at Danish ports or airports. However, reference is made to Paragraph 14.

2. The Minister for Refugee, Immigration and Integration Affairs shall lay down more detailed provisions on the extent to which work permits are required to work in territorial waters or on the continental shelf.'

15. Paragraph 14 of the Law on foreign nationals provides:

'The following foreign nationals shall be exempted from the work permit requirement:

(1) Foreign nationals who are nationals of another Nordic country within the meaning of Paragraph 1.

(2) Foreign nationals covered by EU rules within the meaning of Paragraphs 2 and 6.

(3) Foreign nationals with a permanent residence permit.

…

2. The Minister for Refugee, Immigration and Integration Affairs may determine that other foreign nationals are to be exempted from the work permit requirement.'

16. Paragraph 59 of the Law on foreign nationals provides:

'…

4. Any person who employs a foreign national without the required work permit or in breach of the conditions laid down for a work permit shall be liable to a fine or a term of imprisonment of up to two years.

5. The fact that the infringement was committed deliberately or as a result of gross negligence, that a financial gain was obtained or sought by the infringement for the person concerned himself or for others, or that the foreign national does not have the right to be resident in Denmark shall be regarded as an aggravating circumstance in determining the penalty under subparagraph 4.'

17. Paragraph 61 of the Law on foreign nationals provides:

'Criminal liability may be attributed to companies etc. (legal persons) under the rules laid down in Chapter 5 of the Criminal Code.'

2. Regulation on foreign nationals

18. At the time when the circumstances which gave rise to the prosecution occurred, Paragraph 33 of bekendtgørelse nr. 270 af 22. marts 2010 om udlændinges adgang her til landet (Regulation No 270 of 22 March 2010 on foreign nationals' access to Denmark; 'the Regulation on foreign nationals) stated as follows:

'The following foreign nationals shall be exempted from the work permit requirement:

…

(4) Personnel on Danish cargo vessels in international traffic which enter Danish ports on no more than 25 occasions, calculated continuously over the previous year, irrespective of the calendar year, where a work permit is required for that purpose, under the second sentence of Paragraph 13(1) of the Law on foreign nationals.

…'[5]

3. Søloven (Law on shipping)

19. Paragraph 103 of the Søloven (Law on shipping; most recently consolidated by Law No 1505 of 17 December 2018) provides:

'A managing owner shall be selected for a ship owned by part owners.

5 The referring court also stated, 'as is clear, Paragraph 14(1) of the [Law on foreign nationals] lists a number of categories of foreign nationals who are exempted from the work permit requirement under Paragraph 13(1) thereof. The provision was supplemented at the material time by Paragraph 33 of the Regulation on foreign nationals, which also refers to various categories of foreign nationals who are exempted from the work permit requirement, including the category referred to in Paragraph 33(1)(4). Paragraph 33(1)(4) of the Regulation on foreign nationals specifies the criterion "regularly" in the second sentence of Paragraph 13(1) of the [Law on foreign nationals] so that a work permit is required only if a Danish vessel enters Danish ports on more than 25 occasions, calculated continuously over the previous year'.

2. A person, a limited company or a responsible company may be selected as managing owner, provided that party meets the conditions laid down in Paragraph 1(2) and 1(3) respectively.'

20. Paragraph 104 of the Law on shipping provides:

'In relation to third parties, the managing owner shall, by virtue of his or its capacity, be entitled to conclude any legal transactions normally concluded by a shipping company. The managing owner may therefore engage, dismiss and instruct the master, take out ordinary insurance, and receive monies paid to the shipping company. The managing owner shall not, without special authorisation, sell or mortgage the vessel or charter out the vessel for more than one year.'

4. Rules governing the Danish International Shipping Register (DIS)

21. The rules governing the DIS, at the time at which the circumstances which gave rise to the prosecution occurred, are set out in Law No 273 of 11 April 1997, as amended by Law No 460 of 31 May 2000, Law No 526 of 7 June 2006 and Law No 214 of 24 March 2009. Paragraph 10 of Law No 273, as amended, provides:

'Collective agreements on pay and working conditions for crew on ships entered in this register shall expressly state that they apply only to such employment.

2. Collective agreements as referred to in subparagraph 1, which are entered into by a Danish trade union, can cover only persons who are resident in Denmark or who, under EU law or other international obligations entered into, are to be treated in the same way as persons deemed to be resident in Denmark.

…'

III. The facts of the main proceedings and the reference for a preliminary ruling

22. VAS Shipping is charged with having, in the period from 22 August 2010 to 22 August 2011, entered Danish ports on more than 25 occasions with four vessels registered in the DIS, with crew members from third countries who did not hold a work permit or were not exempted from the requirement to hold such a permit under Paragraph 14 of the Law on foreign nationals.

23. VAS Shipping is the managing owner within the meaning of Paragraph 103 of the Law on shipping of four part-owned shipping companies. The part-owners are Swedish limited liability companies.

24. VAS Shipping, which is registered in Denmark, is wholly owned by the Swedish company Sirius Rederi AB. VAS Shipping was formed on 16 March 2010 and is managed by a director resident in Sweden and three board members, two of whom are resident in Denmark. According to the information provided, all the company's board meetings are held in Denmark and all the meetings of the part-owned shipping companies have been held in Denmark since the four vessels in question were registered in the DIS.

25. The four part-owned shipping companies chose to carry on their shipping business in Denmark by having the four vessels in question registered in the DIS and designating VAS Shipping as managing owner. By virtue, therefore, of Paragraph 104 of the Law on shipping, VAS Shipping had mandatory authority to conclude any legal transactions normally concluded by a shipping company.

26. According to the referring court, the part-owner shipping companies pursue economic activity in Denmark by means of the four vessels in question and their registration in the DIS cannot therefore be separated from the exercise of the freedom of establishment. [6] VAS Shipping stated that no seaman who is a third-country national leaves the vessel at any time during entries into Danish ports and that all work on land is performed by Danish land-based personnel employed by the port of call. [7]

27. On 4 May 2018, the Retten i Odense (Odense District Court, Denmark) found that VAS Shipping had infringed the provisions of the Law on foreign nationals. It also held that the provisions of the Law on foreign nationals constituted a restriction on freedom of establishment under Article 49 TFEU, in conjunction with Article 54 thereof, but that the restriction was justified by overriding reasons in the public interest and did not go further than was necessary. According to that court, the rules of the Law on foreign nationals governing third-country crews were justified in order not to undermine the Danish labour market, since third-country national labour has a competitive advantage over Danish labour on account of wage levels. The work permit requirement is an effective means of ensuring the stability of the labour market and thus avoiding disruption to the national labour market. Consequently, the Retten i Odense (Odense District Court) found that the restrictions were lawful and ordered VAS Shipping to pay a fine of DKK 1 500 000 on the basis of Paragraph 59(4) of the Law on foreign nationals, in conjunction with Paragraphs 59(5) and 61 thereof. [8]

28. The referring court notes that it is common ground between the parties that the work permit requirement laid down in Paragraph 13(1) of the Law on foreign nationals, in conjunction with Paragraph 33(4) of the Regulation on foreign nationals, may constitute a restriction on freedom of establishment within the meaning of Article 49 TFEU. The objective of ensuring the stability of the labour market and thereby avoiding disruption to it can, in principle, justify restrictions on freedom of movement. [9] The referring court states that in a number of judgments the Court ruled on the factors which, under the FEU Treaty, are to be included in an assessment of the proportionality of restrictions on an employer's freedom to choose workers. However, that case-law mainly concerns the relationship with rules on services. Consequently, the earlier decisions of the Court do not provide reliable guidance for assessing the relationship between the Danish rules at issue and Article 49 TFEU on the freedom of establishment. The referring court therefore considers that a ruling on whether Article 49 TFEU precludes rules similar to the Danish rules imposing a work permit requirement on third-country nationals working on vessels flagged in Denmark and owned by nationals of another EU Member State is necessary to enable it to give a ruling in the present case.

29. In those circumstances, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 49 TFEU preclude legislation of a Member State which requires third-country crew members on a vessel flagged in a Member State and owned by a shipowner who is a national of another EU Member State to have a work permit, unless the vessel enters ports of the Member State on at most 25 occasions calculated continuously over the previous year?'

6 Judgment of 25 July 1991, *Factortame and Others* (C-221/89, EU:C:1991:320).

7 The referring court noted that the facts of the case, including whether and how many third-country nationals were on board the four vessels, the period during which they were present, and on how many occasions the vessels concerned entered Danish ports, are disputed.

8 When setting the penalty, the Retten i Odense (Odense District Court) found that there were aggravating factors as foreign seafarers are paid less than Danish seafarers and financial gain is obtained. It concluded that the infringement was deliberate and committed by several vessels and that the foreign nationals concerned did not have the right to be resident in Denmark. It noted however that there was some uncertainty as to the number of seafarers who were on board and the extent to which the vessels entered Danish ports. It also observed, inter alia, that the duration of the proceedings was extremely long on account of the complicated nature of the case and issues of EU law therein, and the fact that there were contacts between various departments and the Public Prosecutor and the prosecuted party's lawyer.

9 Judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904).

IV. Procedure before the Court

30. Written observations were submitted by VAS Shipping, the Danish and Netherlands Governments and the European Commission.

31. Despite the statement of the referring court that it is common ground between the parties that the work permit requirement may constitute a restriction on freedom of establishment within the meaning of Article 49 TFEU, in its observations the Commission has queried whether the requirement under Danish legislation that third-country crew members on a vessel flagged in a Member State and owned by a shipowner who is a national of another EU Member State have a work permit, unless the vessel enters ports of the Member State on at most 25 occasions calculated continuously over the previous year constitutes a restriction of the freedom of establishment.

32. On the 15 December 2020, the Court decided on the basis of Article 61(1) of the Rules of Procedure of the Court of Justice to invite the parties or interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union, other than the Commission, to adopt a position in writing on the latter's contention, in its written observations, that the Danish legislation at issue in the main proceedings does not constitute a 'restriction' within the meaning of Article 49 TFEU.

33. VAS Shipping and the Danish and Netherlands Governments submitted further or additional observations in that regard. While VAS Shipping maintains its position that the national measures in question constitute a restriction of its freedom of establishment, the Danish and Netherlands Governments now consider that those measures do not constitute a restriction of the freedom of establishment pursuant to Article 49 TFEU.[10] It is against this background that we may turn to consider the issues thereby raised.

V. Analysis

A. The existence of a restriction pursuant to Article 49 TFEU

1. Applicability of Article 49 TFEU

34. In its reference for a preliminary ruling, the referring court seeks an interpretation of Article 49 TFEU and the rules on freedom of establishment. That court has not sought an interpretation of Article 56 TFEU on the freedom to provide services or indeed any other provision of the FEU Treaty. In addition, the referring court has not sought, for example, an interpretation of Article 79(5) TFEU which provides that Article 79 TFEU 'shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'. Moreover, no observations have been submitted by the parties and interested persons in that regard save for the Netherlands Government. In addition, no question has been referred in relation to the rights of the seafarers, for example, their rights of movement within the European Union and their rights and obligations when crossing its external borders.[11]

10 In paragraph 11 of its initial observations, the Danish Government stated that, in general, the requirement that nationals of third countries hold a work permit in the present circumstances constitutes a restriction of the freedom of establishment pursuant to Article 49 TFEU. While the Netherlands Government initially accepted, on the basis of the statement of the referring court, that the Danish measures in question constituted a restriction of the freedom of establishment, that government did however query in its initial observations whether Article 49 TFEU is indeed relevant given that Article 79(5) TFEU authorises the Kingdom of Denmark to require work permits once crew members enter the Danish work market and thus regulate the number of nationals from third countries working on its territory.

11 See, in that regard, judgment of 5 February 2020, *Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the port of Rotterdam)* (C-341/18, EU:C:2020:76).

35. Article 49 TFEU requires the elimination of restrictions on freedom of establishment of nationals of a Member State in the territory of another Member State. That provision, read in conjunction with Article 54 TFEU, extends the benefit of freedom of establishment to companies or firms formed in accordance with the legislation of a Member State and having their registered office, their central administration or principal place of business within the European Union. [12]

36. Given that the freedom of establishment is intended to allow an EU national to participate, on a stable and continuing basis, in the economic life of a Member State other than his or her State of origin and to profit therefrom, the concept of 'establishment' within the meaning of the FEU Treaty provisions on freedom of establishment thus involves the actual pursuit of an economic activity through a fixed establishment in that State for an indefinite period. According to the Court, that freedom presupposes the actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there. [13]

37. The Court has stated that the registration of a vessel does not necessarily involve establishment within the meaning of the FEU Treaty, in particular where the vessel is not used to pursue an economic activity or where the application for registration is made by or on behalf of a person who is not established, and has no intention of becoming established, in the Member State concerned. However, where the vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment. [14]

38. It would accordingly appear from the facts outlined by the referring court that Articles 49 and 54 TFEU are applicable in the present case. In that regard, the four part-owned Swedish companies have registered four vessels in the DIS and have designated VAS Shipping, a company established in Denmark and wholly owned by a Swedish company, as the managing owner of the vessels. In addition, the four vessels in question are used to pursue an economic activity by the four part-owned shipping companies.

39. Despite the statement in the request for a preliminary ruling on the existence of a restriction of the freedom of establishment, [15] it is now opportune to examine whether such a restriction exists. I shall first outline the observations presented to the Court, followed by the case-law on the concept of 'restriction'. I then propose to examine that concept within the context of the present case.

2. Concept of 'restriction'

(a) Arguments

40. I propose to summarise first the observations of the Commission on this matter. It was, after all, these observations that gave rise to a written question by the Court and thus the observations of the other parties and interested persons on the matter.

12 Judgment of 25 October 2017, *Polbud – Wykonawstwo* (C-106/16, EU:C:2017:804, paragraph 32).

13 See, to that effect, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraphs 53 and 54).

14 Judgment of 25 July 1991, *Factortame and Others* (C-221/89, EU:C:1991:320, paragraphs 21 and 22).

15 In the procedure laid down by Article 267 TFEU for cooperation between national courts and the Court, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before. To that end, the Court may have to reformulate the question referred to it or, as in this case, to provide the national court with all the guidance for the interpretation of Article 49 TFEU for the purposes of deciding the case before it. See, by analogy, judgment of 21 September 2000, *Michaïlidis* (C-441/98 and C-442/98, EU:C:2000:479, paragraphs 20 and 21).

41. The Commission considers that the question which must be asked in order to assess whether a national measure constitutes a restriction of the freedom of establishment is whether an obligation pursuant to national law imposed on new operators – in this case a work permit for third-country nationals – creates obstacles to access to the market and whether it would deprive them of the opportunity to compete effectively with established operators.[16] According to the Commission, a measure does not necessarily constitute a restriction within the meaning of Article 49 TFEU merely because the economic advantage and the incentive to engage in an economic activity are less than if the measure did not apply. Member States, in the absence of harmonisation, are in principle competent to regulate the exercise of economic activities on their territory and if a measure does not discriminate in law or in fact, it should only be considered a restriction of the freedom of establishment if it affects access to the market.[17] In that regard, the Commission cites the judgment of 14 July 1994, *Peralta* (C-379/92, EU:C:1994:296, paragraph 34), in which the Court stated that in the absence of harmonisation, a Member State may impose, directly or indirectly, technical rules which are specific to it and which are not necessarily to be found in the other Member States. According to the Court 'the difficulties which might arise for those undertakings from that situation do not affect freedom of establishment … Fundamentally, those difficulties are no different in nature from those which may originate in disparities between national laws governing, for example, labour costs, social security costs or the tax system'.

42. In its initial observations, VAS Shipping stated that given that the Danish rules in question relate only to ships flying the Danish flag, those rules impede or render less attractive the exercise by Union nationals of their right of freedom of establishment guaranteed by the FEU Treaty. It claims that a national measure which imposes, on pain of criminal penalties, a maximum limit on the number of calls that may be made each year in a port of that Member State by a ship registered there and which is owned by persons established in another Member State and crewed by third-country nationals cannot be dissociated from the conditions of registration of a ship in that Member State. This is particularly true where the national rule applied only to ships registered in the Member State in question, whereas ships not registered there may call at the ports of the latter freely and without restrictions regardless of the nationality of the crew members.

43. VAS Shipping considers that the restriction imposed by the second sentence of Paragraph 13(1) of the Law on foreign nationals together with Paragraph 33(1)(4) of the Regulation on foreign nationals is equivalent to the restriction found by the Court in its judgment of 14 October 2004, *Commission* v *Netherlands* (C-299/02, EU:C:2004:620), as those provisions imply that shipowners established in Sweden who intend to register their ship in the DIS, and to carry out a maritime shipping activity in Denmark by calling at Danish ports more than 25 times a year, have no other option than to adapt their hiring policy in such a way as to exclude from the ship's crew all nationals of countries outside the European Union and the EEA. This would result in a radical and substantial change in their hiring policy , entailing a significant disadvantage and economic interference.

44. In its initial observations and in its response to the question posed by the Court, VAS Shipping submits that the net wages paid by it to third-country nationals comply with the rules set by Danish law in respect of a vessel registered in the DIS and that they are not lower than those set by collective agreement.

45. In its response to the question posed by the Court, VAS Shipping notes that the Swedish part-owners of the vessels in question operate in many other Member States including Sweden. Moreover, VAS Shipping considers that the Commission's observations on the existence of a restriction and its justification are based on a fundamentally erroneous understanding of

16 See paragraph 45 of the Commission's observations. In paragraph 49 of its observations, the Commission stated that the question is whether an obligation for a *new operator* to respect local rules, in this case a work permit for third-country nationals, would deprive *newcomers* of the possibility of competing effectively with established operators.

17 See paragraphs 49 and 50 of the Commission's observations.

Paragraph 33(1)(4) of the Regulation on foreign nationals. Thus, VAS Shipping stresses that registration in the DIS or indeed any other Danish shipping register is not relevant for the purpose of the 25-call rule pursuant to Paragraph 33(1)(4) of the Regulation on foreign nationals. In accordance with that provision, only vessels in *international traffic* may benefit from the 25-call rule, irrespective of their registration in the DIS. A vessel is not classified as being in international traffic by virtue of its registration in the DIS.

46. According to VAS Shipping, a vessel in international traffic is defined, inter alia, by the fact that it crosses international borders on a regular basis and there can therefore be no de facto 'place of work in Denmark', nor can there be any assimilation to shore-based employment in Denmark. Given that the vessel is classified as being in international traffic, the navigation pattern is, by definition, not exclusively Danish, so that there is no reason to consider that there is a stable or lasting link with Denmark. Thus, assuming that the vessels remain classified as operating in international traffic, the connecting link for each call would be temporary. Moreover the 25-call rule does not apply to national traffic.

47. VAS Shipping considers that in accordance with judgment of 14 October 2004, *Commission* v *Netherlands* (C-299/02, EU:C:2004:620, paragraphs 19 and 32), the concept of a 'restriction of the freedom of establishment' extends beyond the moment of registration of a vessel, as claimed by the Commission. Obstacles affecting the on-going management of a vessel may also constitute a restriction.

48. The Danish Government, in its initial observations, considers that the question in the present case extends beyond the mere application of Article 49 TFEU and relates to whether Member States can require third-country nationals to obtain a work permit when they work in the home State on a lasting basis. According to that government, the number and frequency of calls by a ship established in Denmark to Danish ports is of considerable importance in assessing the extent to which the ship's crew members are working in Denmark. If this is rarely the case, it cannot be assumed that this has a significant impact on the Danish labour market. On the other hand, when the ship's crew members regularly perform tasks such as loading and unloading goods during calls in Danish ports, the fact that the crew members are third-country nationals is likely to affect the stability of the Danish labour market. The requirement of a work permit arises as a result of the number of times each vessel calls at Danish ports rather than from the number of times each crew member who is a third-country national is on board a vessel calling at Danish ports. This is because the number of times the vessel with third-country crew members calls has an impact on when the vessel acquires a sufficiently stable and regular connection to the Danish labour market as a place of work and thus to require that the employees on that vessel have a work permit in accordance with Danish law. In addition, the verification of the number of calls to port of crew members who may have worked on different vessels during the course of a year would require extensive and useless registration. That government considers that a minimum threshold of 25 port calls in a one-year period represents a balanced delimitation of when a ship calls at Danish ports on such a regular basis that its crew members, who are third-country nationals, may be deemed to be attached on a sufficiently stable basis to the Danish labour market and thus subject to the requirement of a work permit.

49. The Danish Government, in its answer to the question posed by the Court, agrees with the position adopted by the Commission outlined in point 41 of this Opinion. Moreover, it considers that the judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraph 12) could be interpreted as requiring a *serious obstacle* to the pursuit of activities affecting access to the market in order to find a restriction of the freedom of establishment. Thus, according to that government, given that Member States are, in principle, competent to regulate the exercise of an economic activity on their territory, if a measure is not discriminatory in law or in fact, it should only be considered as an obstacle to the freedom of establishment if it affects access to the market. The Danish Government considers that the judgment of 29 March 2011, *Commission* v *Italy* (C-565/08, EU:C:2011:188) concerning maximum tariffs charged by lawyers demonstrates that national rules that do not affect

the possibility of competing do not constitute a restriction of the freedom of establishment pursuant to Article 49 TFEU. According to that government, if an operator *has had*[18] access to the market, it must operate under the same conditions as other operators. Once an operator has had access to the market, it can be protected only against direct and indirect discrimination.[19] The Danish Government therefore considers that the national measure in question in the main proceedings does not prevent new entrants from competing effectively with Danish maritime companies and that it does not constitute a restriction pursuant to Article 49 TFEU.

50. The Netherlands Government in its answer to the question posed by the Court also agrees with the position of the Commission on the existence of a restriction pursuant to Article 49 TFEU. In its original observations the Netherlands Government considered that Article 79(5) TFEU authorised Denmark to require work permits once crew members enter the Danish labour market – that is, that they arrive regularly at Danish ports – and this controls the number of third-country nationals on their territory. Given that the requirement of a work permit for the activity in question is governed by national law, the Netherlands Government queries whether an examination under Article 49 TFEU is appropriate.

(b) Preliminary remarks

51. I would like to stress at the outset that the present case does not concern tax law, which clearly follows somewhat different rules concerning the concept of 'restriction of the freedom of establishment' pursuant to Article 49 TFEU. I refer to this line of case-law as the Commission noted in its observations[20] that at times the Court does not refer to the test laid down in its judgments of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32), and of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraph 11), but rather compares the effects of measures on national and non-national operators. As it happens, however, most taxation measures consist (in one sense at least) of restrictions on establishment since by definition the existence of even a generally applicable taxation measure impacts on the capacity of an undertaking to do business in that Member State. To that extent, therefore, the taxation cases may be regarded as *sui generis* so far as freedom of establishment is concerned.

18 This emphasis was added by the Danish Government.

19 See, to that effect, judgment of 13 February 2014, *Airport Shuttle Express and Others* (C-162/12 and C-163/12, EU:C:2014:74, paragraph 47).

20 See paragraph 37.

52. While there is currently no equivalent in the field of freedom of establishment to the 'rule of reason' approach adopted by the Court in its judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905)[21] in respect of the free movement of goods – which distinguishes between rules affecting the goods themselves and those affecting their selling arrangements[22] – certain distinctions relating to the concept of 'restriction' can nonetheless be found in the case-law of the Court on freedom of establishment depending on the nature of the rules in question.

53. In that regard, the Court has stated that in the current state of harmonisation of EU tax law, Member States enjoy a certain degree of autonomy. Fiscal autonomy means that the Member States are, for example, at liberty to determine the conditions and the level of taxation for different types of establishments chosen by national companies or partnerships operating abroad, on condition that those companies or partnerships are not treated in a manner that is *discriminatory* in comparison with comparable national establishments.[23]

(c) Measures which hinder or render less attractive the exercise of the freedom of establishment

54. In fields other than taxation, it is settled case-law that Article 49 TFEU precludes any national measure which, although applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU citizens of the freedom of establishment guaranteed by the FEU Treaty.[24]

55. It is the scope of the term 'measures which hinder or render less attractive' the exercise of the freedom of establishment and their practical application in the context of the present proceedings that is queried by the Commission and the Danish Government in particular.

21 In paragraphs 16 and 17 of that judgment the Court stated that the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements does not hinder trade between Member States so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. In such circumstances, the rules on the sale of products from another Member State are deemed not prevent their access to the market and thus fall outside the scope of Article 34 TFEU. The rule of reason approach developed in the field of free movement of goods is not however 'set in stone' and some rare exceptions exist in the case-law which temper that approach. See, for example, judgment of 26 June 1997, *Familiapress* (C-368/95, EU:C:1997:325). In that case, the Court found that even though the relevant national legislation was directed against a method of sales promotion (and thus a selling arrangement), it nevertheless affected the actual content of the products. The Court, however, has not adopted a similar rule of reason approach in the field of freedom to provide services in accordance with which a particular type or category of national measure is deemed, in principle, not to impede access to the market. A case-by-case, rather than a more formalistic approach, which identifies or singles out particular categories of measures has, thus, consistently been adopted. See, judgment of 10 May 1995, *Alpine Investments* (C-384/93, EU:C:1995:126, paragraphs 33 to 38). In the latter judgment, the Court stated that the reason why legislation imposing certain selling arrangements in respect of goods falls outside the scope of Article 34 TFEU is that it does not prevent the access of imported products to the market of a Member State or impede them any more than it impedes the access of domestic products. In that case however, the prohibition of cold calling potential clients in another Member State imposed on financial intermediaries who offered off-market commodities futures was held to be a restriction of the freedom to provide services. Despite the fact that I may think that cold calling is a quintessential selling method/arrangement, the Court found that no analogy could be drawn with the judgment of 24 November 1993, *Keck and Mithouard* (C-267/91 and C-268/91, EU:C:1993:905) as the prohibition of cold calling in question directly affected access to the market in services.

22 See, for example, judgment of 14 September 2006, *Alfa Vita Vassilopoulos and Carrefour-Marinopoulos* (C-158/04 and C-159/04, EU:C:2006:562, paragraphs 17 and 18).

23 See to that effect, judgments of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraphs 51 and 53), and of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraph 29). In her Opinion in *Tesco-Global Áruházak* (C-323/18, EU:C:2019:567, points 43 and 44), Advocate General Kokott noted that it is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment are restrictions on that freedom and that this in principle covers cases of discrimination, but also non-discriminatory restrictions. However, taxes and duties constitute a burden per se and thereby reduce the attractiveness of establishment in another Member State. According to Advocate General Kokott, an examination based on non-discriminatory restrictions would therefore make all national taxable events subject to EU law and thereby seriously call into question the sovereignty of the Member States in tax matters. She noted that the Court has thus ruled on a number of occasions that Member States' rules on the conditions and the level of taxation are subject to fiscal autonomy, provided that the treatment of the cross-border situation is not discriminatory compared with the domestic situation. See also, by analogy, my Opinion in *Société Générale* (C-565/18, EU:C:2019:1029, points 34 to 36) dealing with the free movement of capital.

24 See, judgments of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32), and of 30 November 1995, *Gebhard* (C-55/94, EU:C:1995:411, paragraph 37). See more recently, judgments of 5 December 2013, *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraph 30 and the case-law cited), and of 27 February 2020, *Commission* v *Belgium (Accountants)* (C-384/18, EU:C:2020:124, paragraph 75 and the case-law cited). I will refer to this line of case-law as the 'Kraus test'.

56. It must be stressed at the outset that the rules of a Member State do not constitute a restriction within the meaning of the FEU Treaty *solely* by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules in their territory.[25] Moreover, in the absence of harmonisation of the activities at issue in the main proceedings, Member States remain, in principle, competent to define the exercise of those activities. Member States must nonetheless, when exercising their powers in this area, respect the basic freedoms guaranteed by the FEU Treaty.[26]

57. The Court has stated that the concept of 'restriction' pursuant to Article 49 TFEU covers, *in particular*, measures taken by a Member State which, although applicable without distinction[27] *affect access to the market*.[28] The question which must be asked in the present case, particularly in the light of the observations of the Danish Government and the Commission,[29] is whether only measures which hinder or impede *initial access or access by new entrants* to the market or which are discriminatory constitute a restriction on the freedom of establishment.

58. Obvious fetters to the freedom of establishment – and indeed access to any market – are requirements provided for under national law to obtain authorisation to establish in a Member State or to pursue a particular activity. In that regard, it is settled case-law that a national rule which makes the establishment of an undertaking from another Member State conditional upon the issue of prior authorisation constitutes a restriction of the freedom of establishment pursuant to Article 49 TFEU, since it is capable of hindering the exercise by that undertaking of freedom of establishment by preventing it from freely pursuing its activities through a fixed place of business.[30] I would note that such requirements may equally affect nationals or legal persons from the Member State of establishment. The Court in such cases, however, has not required the existence of discrimination in any form in order to find a restriction for this purpose.[31]

25 See to that effect, judgment of 28 April 2009, *Commission* v *Italy* (C-518/06, EU:C:2009:270, paragraph 63 and the case-law cited). See also, judgment of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraphs 31 and 32). In that case the Court stated that freedom of establishment cannot be understood as meaning that a Member State is required to alter its legislation on the basis of legislation in another Member State in order to ensure, in all circumstances, that any disparities arising from national rules are removed.

26 Judgment of 22 October 2009, *Commission* v *Portugal* (C-438/08, EU:C:2009:651, paragraph 27 and the case-law cited).

27 For a discriminatory measure based on nationality, see, judgment of 10 September 2015, *Commission* v *Latvia* (C-151/14, EU:C:2015:577), in which the Court held that by imposing a nationality requirement for access to the profession of notary, the Republic of Latvia had failed to fulfil its obligations under Article 49 TFEU.

28 Judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraph 12).

29 I would note that there seems to be a certain contradiction in the position adopted by the Commission in its observations in this case and its statements in the Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment (COM(2018) 547 final). In the section headed 'EU law protects all EU cross-border investments throughout their lifecycle', the Commission, after the subsection headed 'Access to the market', stated in the sub-section 'Operating on the market' that 'once EU investors start operating a business in another Member State or carry out another type of investment, EU law, as interpreted by the Court …, continues to apply. It protects them, in general, against public measures that would *deprive the investors of the use of their property or that would limit the business activity in which they have engaged, even where such measures equally apply to national operators*'. Emphasis added.

30 Judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraph 54 and the case-law cited). See also, judgments of 16 December 2010, *Commission* v France (C-89/09, EU:C:2010:772, paragraphs 44 to 49); of 26 September 2013, *Ottica New Line* (C-539/11, EU:C:2013:591, paragraphs 25 to 32); and of 5 December 2013, *Venturini and Others* (C-159/12 to C-161/12, EU:C:2013:791, paragraphs 30 to 36). See also, Chapter III, entitled 'Freedom of establishment for providers', of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

31 See, judgment of 24 March 2011, *Commission* v *Spain* (C-400/08, EU:C:2011:172, paragraphs 62 to 71), in which the Court found a restriction of the freedom of establishment despite the fact that the Commission was unable to prove that the Spanish legislation in question was discriminatory in law or in fact. In its judgment of 8 May 2019, *PI* (C-230/18, EU:C:2019:383, paragraph 60), the Court found that 'national legislation … providing that an administrative authority may decide to close a commercial establishment with immediate effect, on the ground that it suspects that [a professional activity] is practised in that establishment without the authorisation required under that legislation, could have negative consequences on the turnover and continuation of that professional activity, in particular as regards the rapport with customers receiving the services concerned. Consequently, that legislation is liable to prevent or dissuade nationals of other Member States who wish to establish themselves [in another Member State]' and thus constitutes a restriction on the freedom of establishment. See also, judgment of 8 September 2016, *Politanò* (C-225/15, EU:C:2016:645, paragraph 38) on the obligation to acquire a concession in order to conduct an activity.

59. The judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586), which has been cited by the Commission and the Danish Government, is instructive on the concept of 'restriction' in the field of freedom of establishment. [32]

60. In that case, the Court held that the prohibition on the remuneration of sight accounts [33] laid down by French law constituted, for companies from other Member States, a *serious obstacle* to the pursuit of their activities via a subsidiary in France and thus *affected their access to the market*. According to the Court, the prohibition hindered subsidiaries of foreign companies in raising capital from the public, by *depriving them of the possibility of competing more effectively*, by paying remuneration on sight accounts, with the credit institutions traditionally established in the Member State of establishment, which have an extensive network of branches and therefore greater opportunities than those subsidiaries for raising capital from the public. The prohibition accordingly constituted a restriction within the meaning of Article 49 TFEU as it deprived credit institutions from another Member State seeking to enter the market of a Member State of the possibility of competing by means of the rate of remuneration paid on sight accounts, which constituted one of the most effective methods to that end. [34] This measure was condemned because it effectively operated in practice in a manner which was to the disadvantage of new entrants to the market from other Member States.

61. I consider that the Court, relying on its traditional case-law, [35] examined whether the national rules in question impeded or hindered establishment in the Member State in question. Such an impediment or hindrance will necessarily be found where an undertaking cannot compete effectively with incumbents due to measures imposed by the Member State in question which create a serious obstacle to access to the market. [36]

62. Nevertheless, in my view, it is clear from the case-law of the Court that, even in the absence of de facto or *de jure* discrimination, the concept of 'restriction' is not limited to measures which hinder access to the market by new entrants. I therefore respectfully disagree with the observations, in particular, of the Danish Government and the Commission in that regard. The judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586) is a specific application based on the circumstances in that case [37] of the broad test on the concept of 'restriction' referred to in point 53 of this Opinion and laid down by the Court most clearly in its judgment of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32). I see no cogent reason, however, to depart from that test.

32 See also, Opinion of Advocate General Tizzano in *CaixaBank France* (C-442/02, EU:C:2004:187) in which the existing case-law on the concept of restriction of the freedom of establishment is extensively examined. In point 78 of his Opinion, Advocate General Tizzano considered, inter alia, that 'it is necessary to establish whether [the French measure] places those subsidiaries in a *less favourable de facto position* by comparison with competitors traditionally established and operating in the French market; or … whether in any case it constitutes a *direct obstacle to access* to the banking market in view of its *effects*'.

33 This consisted in practice in a prohibition on paying interest on certain deposit accounts held at banks.

34 See to that effect, judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraphs 13 to 16). This judgment is rather reminiscent of the case-law of the Court on the advertising of goods. See, judgment of 9 July 1997, *De Agostini and TV-Shop* (C-34/95 to C-36/95, EU:C:1997:344, paragraphs 42 to 44). While rules limiting the advertising of goods are selling arrangements and thus come under the rule of reason approach in respect of goods, they often have a disparate impact on imports as they prevent or hinder those goods gaining a foothold in another Member State. They are thus, in my view, de facto discriminatory.

35 See judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraph 11) which states that 'all measures which prohibit, impede or render less attractive the exercise of [the freedom of establishment] must be regarded as … restrictions'.

36 See, for example, judgment of 12 December 2013, *SOA Nazionale Costruttori* (C-327/12, EU:C:2013:827, paragraphs 56 and 57) which concerned national rules which prohibited undertakings supplying certification services from derogating from the minimum tariffs provided for by law. The Court stated that those rules were liable to make it less attractive for undertakings established in other Member States to exercise the freedom of establishment on the market for those services. According to the Court, the prohibition deprived undertakings established in another Member State and fulfilling the conditions provided for by the national legislation of the possibility, by requesting fees lower than those set by the national legislature, of competing more effectively with undertakings established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning customers than undertakings established in another Member State. See also, Article 15(2)(g) and (3) of Directive 2006/123 and judgment of 4 July 2019, *Commission* v *Germany* (C-377/17, EU:C:2019:562).

37 And perhaps the most common and obvious application of that test outside cases dealing with prior authorisation requirements or discriminatory measures.

63. Thus, while the judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586) relates specifically to the question of access to the market of a Member State by a new entrant,[38] the concept of 'restriction' is a dynamic concept which extends beyond gaining an initial foothold in the market of a Member State and relates also to the actual pursuit of an activity.[39] The Court in its judgment of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32) laid down a single, broad and dynamic test for the concept of 'restriction' which extends to all aspects and phases[40] of establishment in another Member State.[41]

64. I believe that the Court should thus be wary of following the invitation[42] to apply what are essentially two different tests[43] in respect of the concept of 'restriction' depending on the phase of establishment in question. In that regard, I consider that the line between initial access to a market, the pursuit of an activity in the market and expansion in the market is conceptually blurred and any attempt to distinguish them will be difficult in practice – they may all fall under the umbrella term 'access to the market' or, better still, 'establishment'.[44]

65. In addition, the existence of an impediment to effective competition is not a necessary criterion under Article 49 TFEU. Thus in its judgment of 27 February 2019, *Associação Peço a Palavra and Others* (C-563/17, EU:C:2019:144, paragraphs 55 to 62), the Court held that the requirement to maintain a principal place of business in the Member State concerned constituted a restriction to the freedom of establishment of a company incorporated under the legislation of a Member State. In that case, the Court – rather than finding a limitation of the possibility of competing (more) effectively – considered that the freedom of establishment encompasses the right to transfer the principal place of business of the company to another Member State, which requires, if that transfer entails the conversion of the company into a company subject to the law of the latter Member State and the loss of its nationality of origin, compliance with the conditions for incorporation laid down in the legislation of the Member State of relocation.

38 See, paragraph 14 of that judgment. See also, judgment of 11 March 2010, *Attanasio Group* (C-384/08, EU:C:2010:133, paragraph 45), where it is specifically the initial access to the market by a new entrant that is in question.

39 In its judgment of 21 April 2005, *Commission* v *Greece* (C-140/03, EU:C:2005:242, paragraph 28), the Court held that a measure prohibiting qualified opticians from *operating more than one optician's shop* amounted to a restriction on the freedom of establishment of natural persons within the meaning of Article 49 TFEU. I would note that the non-discriminatory measure in question did not concern an authorisation requirement as it was a simple prohibition. Moreover, on a particular analysis, the measure did not necessarily concern initial access to the market, but rather the degree of expansion in the market.

40 See, for example, the judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraphs 54 and 55) which concerned the possibility to make collective redundancies and scale down activities. The Court highlighted the fact that the national legislation in question, which limited the possibility to make collective redundancies, constituted a significant interference in certain freedoms which economic operators generally enjoy. The Court thus stated that the exercise of the freedom of establishment entails the freedom to take on workers in the host Member State, the freedom to determine the nature and the extent of the economic activity to be carried out in the host Member State and thus the *freedom to scale down that activity or give up its activity and establishmen*t. Judgment of 21 December 2016, *AGET Iraklis* (C-201/15, EU:C:2016:972, paragraph 53). As regards the extent of economic activity, in its judgment of 26 January 2006, *Commission* v *Spain* (C-514/03, EU:C:2006:63, paragraph 48), the Court found that the requirement under Spanish law in respect of the minimum number of persons employed by security undertakings constituted an impediment to freedom of establishment as it made the formation of secondary establishments or subsidiaries in Spain *more onerous*.

41 In its judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157, paragraph 62), the Court held that national legislation under which rights of usufruct which have previously been created over agricultural land and the holders of which do not have the status of close relation of the owner of that land are extinguished by operation of law and are, consequently, deleted from the property registers was a restriction of the free movement of capital. It is clear from paragraph 54 et seq. of that judgment that its ratio also applies to freedom of establishment. Moreover, while the Court ultimately found that the measure in question was also indirectly discriminatory, this served merely to limit the scope of possible justifications of the measure rather than call into question that it constituted a restriction absent such discrimination.

42 Most clearly made by the Danish Government and, to a lesser extent, by the Commission.

43 In accordance with my interpretation of the observations submitted, the first test would apply the settled case-law of the Court as laid down in judgment of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32) to initial access to the market (whatever that may be) and the second test of *de jure* and de facto non-discrimination would apply once initial access to the market is achieved.

44 Thus for example, in its judgment of 7 March 2013, *DKV Belgium* (C-577/11, EU:C:2013:146, paragraphs 34 and 35), the Court held that a measure which required insurance companies to seek and obtain authorisation in order to introduce premium rate increases constituted a restriction on the freedom of establishment as it obliged undertakings having their head office in another Member State, which sought to comply with the measure, not only 'to change their terms and rates to meet the requirements imposed by that system, [but also] to determine their premium positioning and, therefore, their commercial strategy when they first set their premiums, with the risk that future premium rate increases will be insufficient to cover the costs with which they will be faced'.

66. Moreover, despite the reference in the judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraph 12), to the fact that the national measure which prohibited the remuneration of sight accounts constituted a 'serious obstacle' to the pursuit of activities,[45] the Court has, in my view, shied away from adopting a *de minimis* approach in the field of free movement whereby a restriction would be required to produce a certain specified impact or attain a particular threshold in order to be of relevance.

67. One must, however, underscore the fact that a measure will not constitute a restriction of the freedom of establishment where its effects on that freedom[46] are too uncertain, indirect, vague, remote or hypothetical in nature.[47] Moreover, it must be recalled that the freedom of establishment does not apply to purely internal matters.[48]

(d) Application of the case-law on restrictions to the present case

(1) Preliminary remarks

68. It would appear from the file before the Court, subject to verification by the referring court, that in accordance with Paragraph 13(1) of the Law on foreign nationals, read in conjunction with the Paragraph 33(1)(4) of the Regulation on foreign nationals, if a Danish cargo vessel – and thus a cargo vessel registered on a Danish maritime registry[49] – in international traffic calls at a port in Denmark more than 25 times calculated continuously over the previous year, third-country personnel on board are no longer exempt from the requirement to have a work permit. In that regard, the fact that individual crew members from third countries have not been on such a vessel during the 25 calls to port in question seems to be irrelevant. The rule would thus appear to be focused on, and criminal penalties are triggered by, the entry into Danish ports on a particular number of occasions of

45 In that regard, it was common ground that the taking of deposits from the public and the granting of credits represented the *basic activities* of credit institutions. Judgment of 5 October 2004, *CaixaBank France* (C-442/02, EU:C:2004:586, paragraph 16).

46 In addition, it must be stressed that in order for a measure to fall within the scope of Article 49 TFEU, it must affect trade between Member States. I would submit that the threshold applied by the Court for finding such an effect is low but not inexistent. In addition, it must be noted that despite the fact that in many preliminary reference cases it is obvious from the facts of a given case that there is no effect on trade between Member States – as it is a purely internal matter where all aspects of the case are confined to one Member State – the Court, in order to assist the referring court, will often answer the question referred in the event that trade between Member States would be affected. See to that effect, judgment of 1 June 2010, *Blanco Pérez and Chao Gómez* (C-570/07 and C-571/07, EU:C:2010:300, paragraphs 39 and 40). In that case, despite the fact that all aspects of the cases were confined to Spain, the Court considered that 'it is far from inconceivable that nationals established in Member States other than the Kingdom of Spain have been or are interested in operating pharmacies in the Autonomous Community of Asturias'. By contrast, see, judgment of 13 February 2014, *Airport Shuttle Express and Others* (C-162/12 and C-163/12, EU:C:2014:74, paragraphs 43 to 49) in which the Court refused to apply Article 49 TFEU to activities which had no factor linking them with any of the situations governed by EU law and which were confined in all relevant respects within a single Member State as there was nothing to indicate how the particular individual decision which was challenged, rather than a general scheme, might affect economic operators coming from other Member States.

47 In the fields of free movement of workers and freedom of establishment respectively, see, for example, judgments of 27 January 2000, *Graf* (C-190/98, EU:C:2000:49, paragraph 25), and of 20 June 1996, *Semeraro Casa Uno and Others* (C-418/93 to C-421/93, C-460/93 to C-462/93, C-464/93, C-9/94 to C-11/94, C-14/94, C-15/94, C-23/94, C-24/94 and C-332/94, EU:C:1996:242, paragraph 32). See also, judgment of 12 July 2012, SC *Volksbank România* (C-602/10, EU:C:2012:443, paragraphs 79 to 81) relating to the freedom to provide services. In the light, for example, of that case, it may very well be possible in a specific case after examining the criteria proposed by the Danish Government and the Commission and in the absence of any other relevant circumstances to find that the effect of a contested national measure is too uncertain and indirect for such a measure to be regarded as liable to hinder intra-Union trade. The test for the existence of a restriction nonetheless remains, in my view, the test laid down for example in the judgment of 31 March 1993, *Kraus* (C-19/92, EU:C:1993:125, paragraph 32). As regards services, it is clear from Article 15(2)(g) of Directive 2006/123 that fixed minimum and/or maximum tariffs with which the provider of services must comply are considered restrictions. The Court, however, in its judgment of 29 March 2011, *Commission* v *Italy* (C-565/08, EU:C:2011:188, paragraph 53) found that national measures which oblige lawyers to comply with maximum tariffs did not constitute a restriction as it had not been demonstrated that the measures in question adversely affected access to the Italian market for the services in question under conditions of normal and effective competition. The Court noted, in particular, that the Italian system of fees was characterised by a flexibility which appeared to allow proper remuneration for all types of services provided by lawyers.

48 In my view, there was no restriction of the freedom of establishment found in the judgment of 14 July 1994, *Peralta* (C-379/92, EU:C:1994:296) as there the matter was purely internal to one Member State and the alleged restriction was too indirect or remote.

49 Subject to verification by the referring court this would appear to include, but not be limited to, the DIS.

Danish-registered vessels in international traffic, which have third-country national crew members aboard who do not hold Danish work permits.[50] In that regard, in its request for a preliminary ruling, the referring court noted that according to the Retten i Odense (Odense District Court), 'as the rules are administered, it was solely the entry of the vessels that was decisive'.

69. Moreover, while VAS Shipping has gone to great lengths in its observations to the Court to demonstrate that the net wages paid on board the four vessels in question are not inferior to those paid in accordance with collective agreements on pay and working conditions in respect of vessels registered in the DIS,[51] there appears, in my view and subject to verification by the referring court, to be no *direct connection* between wage levels and the requirement for third-country nationals to hold work permits in certain circumstances pursuant to Paragraph 13(1) of the Law on foreign nationals, read in conjunction with Paragraph 33(1)(4) of the Regulation on foreign nationals.[52]

70. There is no indication in the file before the Court that maritime companies such as VAS Shipping are required to have recourse to any particular labour force.[53] The effect of the measures in question was, however, that such companies were required in certain circumstances to refrain from contracting or employing third-country crew members who do not hold work permits. Such a requirement would, in my view, potentially increase operating costs, not least because of the administrative burden involved.

71. Finally, the term 'in international traffic' appears in Paragraph 33(1)(4) of the Regulation on foreign nationals. No explanation, however, as to its meaning is provided in the file before the Court. I can only surmise, subject to verification by the referring court, that it relates somewhat to the concept referred to in Article 3(1)(e) of the OECD Model Tax Convention on Income and on Capital with respect to taxes on income and on capital[54] which states that 'the term "international traffic" means any transport by a ship … except when the ship … is operated solely between places in a Contracting State and the enterprise that operates the ship … is not an enterprise of that State'.[55]

50 Moreover, the rules do not relate to the embarking and disembarking of third-country crew members in Danish ports nor indeed to work carried out by them in Danish ports or any other part of Danish territory. In that regard, the referring court in its request for a preliminary ruling also outlined the visa rules laid down in the Regulation on foreign nationals.

51 This may result from the fact that the referring court in its request for a preliminary ruling noted that the Retten i Odense (Odense District Court) found that 'in the present case there are aggravating factors in the prescription of the penalty. Foreign seafarers are paid less than Danish seafarers, that is to say a financial gain is obtained. It may be concluded that the infringement was deliberate and committed by several vessels and that the foreign nationals concerned did not have the right to be resident in Denmark'.

52 This would appear to be the case despite the fact that the referring court noted in its request for a preliminary ruling that the Retten i Odense (Odense District Court), after finding that the measures in question constituted a restriction pursuant to Article 49 TFEU, considered that 'given the context in which the rules of the [Law on foreign nationals] governing third-country crews were introduced, it is justified not to undermine the Danish labour market, since [third-country] labour has a competitive advantage over Danish labour on account of wage levels, and it may be regarded as … justified by overriding reasons in the general interest and does not go beyond what is necessary for attaining that object. The work permit requirement is an effective means of ensuring the stability of the labour market and thus avoiding disruption to the national labour market'.

53 In that regard, it is settled case-law that legislation of a Member State which obliges undertakings from other Member States that wish to establish themselves in that Member State in order to carry out port activities there to have recourse only to dockers recognised as such in accordance with that legislation, prevents such an undertaking from using its own workers or from recruiting other non-recognised workers and, therefore, is liable to prevent or disincentivise the establishment of that undertaking in the Member State concerned. Judgment of 11 February 2021, *Katoen Natie Bulk Terminals and General Services Antwerp* (C-407/19 and C-471/19, EU:C:2021:107, paragraphs 59 and 60). See also, judgment of 11 December 2014, *Commission* v *Spain* (C-576/13, not published, EU:C:2014:2430, paragraphs 37 and 38).

54 Version of 21 November 2017. This Convention provides a model for double taxation agreements between States.

55 Pursuant to Article 8(1) of the Model Convention, 'profits of an enterprise of a Contracting State from the operation of ships … in international traffic shall be taxable only in that State'. In addition, Article 15(3) of the Model Convention provides that '… remuneration derived by a resident of a Contracting State in respect of an employment, as a member of the regular complement of a ship …, that is exercised aboard a ship … operated in international traffic, other than aboard a ship … operated solely within the other Contracting State, shall be taxable only in the first-mentioned State'.

(2) Analysis

72. It must be noted that VAS Shipping has not claimed that the measures in question are directly or indirectly discriminatory in any manner. In that regard, those measures appear to apply irrespective, for example, of the nationality of the owners or the managing owner of the vessels. Rather, VAS Shipping considers that the effect of the measures in question is that Swedish-based shipowning companies intending to register their ships in the DIS and to carry out shipowning activities in Denmark including calling at Danish ports more than 25 times in the course of a year have no other option but to adjust their employment policy.

73. VAS Shipping does not call into question the registration process *itself* in respect of the inclusion of the four vessels in question in the DIS.

74. In that regard, it is settled case-law that when exercising their power to determine the conditions which must be fulfilled in order for a vessel to be entered in their registers and granted the right to fly their flag, Member States must comply with the rules of EU law.[56] In that regard, in its judgment of 25 July 1991, *Factortame and Others* (C-221/89, EU:C:1991:320, paragraph 23), the Court stated that the conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment. In that case, the Court held that a condition which stipulates that the owners or charterers of a vessel must, where they are natural persons, be of a particular nationality or, where they are a company, the shareholders and directors must be of that nationality is contrary to Article 49 TFEU.

75. VAS Shipping considers, however, that the measures in question cannot be dissociated from the conditions relating to the registration of a vessel in a maritime registry of a Member State and the continued exploitation of the vessel in that State. This is particularly evident, according to VAS Shipping, as those measures concern only vessels registered in a maritime registry of the Member State in question, while vessels registered in other Member State can freely call at Danish ports and the question whether their crew includes third-country nationals is irrelevant. VAS Shipping thus considers that the measures in question constitute a restriction of the freedom of establishment pursuant to Article 49 TFEU.

76. In my view, and subject to verification by the referring court, the registration of a vessel in the DIS ensures that that vessel acquires Danish nationality and flies the Danish flag only. The vessel and its crew are thus subject to Danish jurisdiction,[57] in particular, in the field of labour law and social conditions, including the rules applicable to the contracting and employment of third-country nationals.

56 Judgments of 25 July 1991, *Factortame and Others* (C-221/89, EU:C:1991:320, paragraph 17), and judgment of 27 November 1997, *Commission* v *Greece* (C-62/96, EU:C:1997:565, paragraph 22). See also, judgment of 7 March 1996, *Commission* v *France* (C-334/94, EU:C:1996:90, paragraph 17). In its observations, VAS Shipping has sought to rely on the judgment of 14 October 2004, *Commission* v *Netherlands* (C-299/02, EU:C:2004:620, paragraph 19). In that judgment, the Court held, inter alia, that the Dutch rules which required, before a vessel could be registered, the shareholders, directors and local representatives of a Union shipowner to be a Union or EEA national were contrary to Articles 49 and 52 TFEU. According to the Court, 'when shipowner companies wishing to register their ships in the Netherlands do not satisfy the conditions in issue, their only course of action is to alter the structure of their share capital or of their boards of directors; and such changes may entail serious disruption within a company and also require the completion of numerous formalities which have financial consequences. Likewise, shipowners must adjust their recruitment policies in order to ensure that their local representatives are not nationals of a State which is not a Member State of the Community or of the EEA'. Given that no question has been raised with respect to the registration of the four vessels in the DIS, the case in question in not of particular relevance to the present case, in that regard. It must be noted, however, that the scope of that judgment extended beyond the registration of vessels and concerned issues relating to the management of vessels. In that regard, the Court also stated that EU nationals wishing to operate in the form of a shipping company with a director who was a national of or was resident in a non-member country were prevented from doing so and that the measures thus constituted a restriction of the freedom of establishment. In my view, no parallel can be drawn between that judgment and the present case. The national measures in question in the present case do not impose a nationality requirement, they merely have the effect of requiring third-country nationals to have work permits in certain circumstances and impose penalties on their employers if those requirements are not met.

57 There is no indication in the file before the Court, subject to verification by the referring court, that Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p .7) is applicable in the present case. See, in particular Article 3 thereof which contains rules on manning and the jurisdiction.

77. Indeed, the Court in its judgment of 25 February 2016, *Stroumpoulis and Others* (C-292/14, EU:C:2016:116, paragraph 65) recalled that in accordance with Article 94(1) and (2)(b) of the UNCLOS, every State is to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag and that every State is to assume, in particular, jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

78. In other contexts, the Court has, of course, followed ordinary public international law precepts and regarded the law of the flag state as decisive. Thus, for example, in its judgment of 5 February 2004, *DFDS Torline* (C-18/02, EU:C:2004:74, paragraph 44), the Court held that where a wrongful act had occurred on board a Danish vessel which had been registered (like the vessels at issue in the present case) in the DIS, then 'the flag state must necessarily be regarded as the place where the harmful event caused damage' for the purposes of Article 5(3) of the Brussels Convention – the predecessor to the Brussels Regulation).[58] The same line of reasoning is equally applicable by analogy so far as employment contracts and work permits are concerned inasmuch as Danish law follows the flag.

79. Moreover, it would appear, subject to verification by the referring court, that the third-country crew members are deemed to enter the Danish labour market and thus require a work permit as a result of their employment on board the four vessels in question, if those vessels call regularly at Danish ports.[59]

80. In the absence of harmonisation and in accordance with Article 79(5) TFEU, Member States remain competent to determine the volumes of admission of third-country nationals coming from third countries to their territory in order to seek work.

81. I therefore consider that Denmark is, in principle, entitled pursuant to Article 79(5) TFEU to require that third-country crew members employed on vessels flying the Danish flag and under its jurisdiction which, as part of regular services or otherwise, call regularly at Danish ports to hold work permits. In effect, those crew members appear, subject to verification by the referring court, at that point to enter the Danish labour market.[60] But the mere fact that these third-country nationals are working on a Danish-registered ship which is flying the Danish flag is *in itself* sufficient to trigger the entitlement – in principle, and subject to verification by the referring court – of that Member State to require that general Danish employment law, working standards and the requirement to hold a work permit be applied to those employees. This would be so even if those third-country nationals had never navigated the Kattegat or seen sight of the Øresund in the course of their employment with that Danish-registered vessel.

82. While Paragraph 33(1)(4) of the Regulation on foreign nationals, which imposed the 25-call rule on vessels in international traffic, is framed as an exemption to the requirement laid down by Paragraph 13(1) of the Law on foreign nationals that certain crew members hold work permits, it could also been read as clarifying the scope of the former provision, including in particular the phrase

58 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

59 By contrast, there is no indication in the file before the Court that the present case concerns, for example, the posting of workers by an undertaking established in one Member State to another Member State. See, for example, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1). In any event, it is settled case-law with respect, for example, to the posting of workers who are nationals of non-member countries by a service provider established in a Member State of the European Union, that national provisions which make the provision of services within national territory by an undertaking established in another Member State subject to the issue of an administrative authorisation or work permit constitute a restriction on the freedom to provide services pursuant to Article 56 TFEU. See, judgment of 11 September 2014, *Essent Energie Productie* (C-91/13, EU:C:2014:2206, paragraph 45 and the case-law cited). See also, judgment of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraphs 42 to 45). Moreover, such restrictions are difficult to justify in order to prevent disturbances on the labour market as posted workers *do not gain access to the labour market of the Member State to which they are posted* and there are less restrictive means of ensuring that those workers are used for the provision of the service in question.

60 This question of fact is disputed by VAS Shipping and the Danish Government and must thus ultimately be decided upon by the referring court.

'calls regularly at Danish ports' which appears in the latter provision. This is ultimately a matter for the referring court to determine. There is, however, no suggestion in the file before the Court, subject to verification by the referring court, that the effect of provisions of Paragraph 13(1) of the Law on foreign nationals or Paragraph 33(1)(4) of the Regulation on foreign nationals is to impose any limitation other that the work permit requirement itself which would hinder the freedom of establishment. [61]

83. In that regard, while VAS Shipping notes that the Swedish part-owners of the vessels in question operate in many other Member States (including Sweden), it did not indicate in its observations before the Court the link between this fact and the requirement that the third-country crew members on board the vessels in question hold Danish work permits. Indeed, there is no indication in the file before the Court that the crew members in question while working on the vessels in question would be subject to a work permit requirement in another Member State. Given that, as I have already indicated, Article 79(5) TFEU expressly envisages that Member States retain the right to control the admission of third-country nationals for employment purposes, the mere fact that there is a requirement, imposed by national law, that a third-country national should hold a work permit in order to work on a vessel flying the flag of that Member State or that it is a criminal offence to employ such a person without the required work permit does not *in itself* constitute a restriction of the freedom of establishment pursuant to Article 49 TFEU.

84. In my view, while the *Kraus* test is very broad in scope, the effect on the freedom of establishment of the requirement under national law that third-country nationals hold a work permit is on its own too indirect as to constitute a restriction of that freedom. I therefore do not consider that the measures in question, which appear, subject to verification by the referring court, to temper or render more flexible those national rules, constitute a restriction of the freedom of establishment in the absence of any evidence in the file before the Court of any additional restrictive effect on establishment resulting from the 25-call rule in particular.

(3) Justification

85. In the event, however, that the Court should consider that the measures in question constitute a restriction of the freedom of establishment, it is necessary to assess whether they can be justified. I propose now to examine separately whether such a measure could be justified.

86. Freedom of establishment may, in the absence of EU harmonisation measures, be limited by national regulations justified by the reasons stated in Article 52(1) TFEU or by pressing reasons in the general interest. Thus, in accordance with Article 52(1) TFEU, where a restriction results from a measure which discriminates on grounds of nationality, it may be justified on grounds of public policy, public security or public health. Where there is no such discrimination, the restriction may also be justified by overriding reasons in the public interest. In that context, it is for the Member States to decide on the level at which they intend to ensure the protection of the objectives set out in Article 52(1) TFEU and of the general interest and also on the way in which that level must be

61 In my view, the 25-call rule which attaches to vessels is somewhat arbitrary and no explanation has been provided by the referring court as to its specific objective in the context of the Danish rules on work permits and international traffic. It may well merely define or clarify the concept of when a Danish vessel 'calls regularly at Danish ports' pursuant to Paragraph 13(1) of the Law on foreign nationals. I can however see, subject to verification by the referring court, that it may be easier for a Member State to monitor vessels flying its flag in international traffic which come into port on a number of occasions over the course of a year and which employ third-country nationals rather than monitor such crew members individually at all times or even when they come into port in order to ensure that they hold a work permit. I also consider, subject to verification by the referring court, that such rules may well be less burdensome on the owners and managers of such vessels than the requirement that all such crew members hold work permits. After all, the 25-call rule is drafted as an exemption to Paragraph 13(1) of the Law on foreign nationals (or is perhaps an interpretative tool for the phrase 'calls regularly at Danish ports').

attained. However, they can do so only within the limits set by the Treaty and, in particular, they must observe the principle of proportionality, which requires that the measures adopted be appropriate for ensuring attainment of the objective which they pursue and do not go beyond what is necessary for that purpose. [62]

87. As regards the objective pursued by the measures in question, there is some dispute on the matter. According to VAS Shipping it is not possible to discern the objective concerning the limit of 25 calls. It states that the rule was introduced at the request of the Danish Shipowners' Federation in order to make Danish ships more competitive. While the rules seem to follow that position, it not objectively possible to determine the objective of the rule in question. If the objective is to make Danish vessels competitive, VAS Shipping observes that economic reasons are not legitimate (relevant) considerations. The Danish and Netherlands Governments and the Commission consider, however, that the measures in question are motivated by a desire to avoid disturbances on the labour market.

88. It is clear from the judgments of 14 November 2018, *Danieli & C. Officine Meccaniche and Others* (C-18/17, EU:C:2018:904, paragraph 48), and of 11 September 2014, *Essent Energie Productie*, C-91/13, EU:C:2014:2206, paragraph 51) that the desire to avoid disturbances on the labour market is an overriding reason in the public interest.

89. While the referring court made a reference to that case-law in paragraph 23 of its request for a preliminary ruling, it does not itself state clearly [63] the objectives of the measures in question. This is thus a matter which must be verified and assessed by the referring court.

90. As regards the question of the appropriateness and the proportionality of the measures for securing the alleged objective of avoiding disturbances on the labour market, VAS Shipping submits that given that the limit of 25 calls per year applies only to vessels registered in the DIS, while vessels registered in other States may enter Danish ports regularly without restriction, regardless of whether their crew consists of third-country nationals or not, it is very difficult to ascertain whether the rule is appropriate in order to protect the Danish labour market. The derogation in respect of third-country nationals where the number of calls is less than 25 exempts those nationals from the requirement to hold a work permit only with respect to work on vessels. The work permit requirement continues to apply to the employees concerned who may work on the quays, in the port area and generally on land, as well as on other Danish ships.

91. VAS Shipping further contends that the work permit rule when the number of calls exceeds 25 is therefore unnecessary, as the alleged objective of ensuring the stability of and avoiding disruption in the labour market is already fully achieved by the general rules on visas, residence permits and work permits. The employees concerned may not leave the vessel and may not stay in Denmark or, in particular, take up employment there. There are thus more appropriate instruments to protect the labour market. VAS Shipping considers that the national measure is disproportionate. Restrictions aimed at safeguarding the national labour market against wage competition have been held by the Court to go beyond what is necessary where the level of remuneration in the Member State sought to be safeguarded by the restrictions bears no relation to the cost of living prevailing in the country to which the restrictions apply. [64]

62 See, to that effect, judgment of 14 October 2004, *Commission* v *Netherlands* (C-299/02, EU:C:2004:620, paragraphs 17 and 18 and the case-law cited).

63 The referring court noted, however, that according to the Retten i Odense (Odense District Court), the measures in question were introduced in order not to undermine the Danish labour market.

64 VAS Shipping cites to this effect judgment of 18 September 2014, *Bundesdruckerei* (C-549/13, EU:C:2014:2235, paragraph 34).

92. In my view, and in the light of Article 79(5) TFEU, the requirement under the national law of a Member State that third-country nationals who enter its labour market hold a work permit in order to prevent disturbances to that market is an appropriate and proportionate measure. I would again stress that by working on a vessel flying the flag of a Member State, third-country nationals come within the jurisdiction of that Member State and are thus subject, in principle, to its rules on labour law and work permits as envisaged by Article 79(5) TFEU. In that regard, it is irrelevant that ships flying the flag of another State are not subject to the 25-call rule – this is simply because they are not subject to Danish law on the matter.

93. Moreover, a third-country crew member does not have to disembark from the vessel in question or work on *terra firma* in the Member State in question in order to be subject to the flag State rules. In addition, while the 25-call rule is triggered by the entry of the vessel (as opposed to the individual crew members) into Danish ports and even though no real explanation has been given by the referring court as to the purpose of that rule, it appears [65] simply to temper the rule [66] that third-country nationals should hold work permits which is, in my view, in itself an appropriate and proportionate rule.

94. Putting all of this another way, Denmark was entitled to impose a work permit requirement in respect of third-country nationals who are employed on vessels flying the Danish flag pursuant to Article 79(5) TFEU. The fact that it created an exception to that rule with the 25-call proviso cannot take from the fact that Denmark is entitled – by virtue of the Danish-registered character of the vessels alone – to impose a requirement of this nature. For the reasons already stated, this measure is not a 'restriction' on the exercise of freedom of establishment for the purposes of Article 49 TFEU and if (contrary to my own view) it is, it is capable of independent justification as an appropriate and proportionate means of safeguarding the Danish labour market as permitted by Article 79(5) TFEU.

VI. Conclusion

95. In the light of the foregoing considerations, I therefore consider that the Court should answer the question referred by the Østre Landsret (High Court of Eastern Denmark) as follows:

Article 49 TFEU, read in the light of Article 79(5) TFEU, does not preclude legislation of a Member State which requires third-country crew members on a vessel flagged in a Member State and owned by a shipowner who is a national of another EU Member State to have a work permit, unless the vessel enters ports of the Member State on at most 25 occasions calculated continuously over the previous year.

65 Subject to verification by the referring court.

66 By requiring a greater or enhanced connection of third-country crew members and the vessels on which they work to the Danish labour market.