Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 1 April 2014 [1]

Case C-83/13

Fonnship A/S
v
Svenska Transportarbetareförbundet,
Facket för Service och Kommunikation (SEKO)
and
Svenska Transportarbetareförbundet
v
Fonnship A/S

(Request for a preliminary ruling from the Arbetsdomstolen (Sweden))

(Request for a preliminary ruling — Additional question asked by a party but not raised by the referring court — Regulation (EEC) No 4055/86 — Scope — Provision of maritime transport services — Maritime transport provided to a Member State by a vessel owned by a company with its head office in a State party to the Agreement on the European Economic Area (EEA), flying the flag of a third State which is not a member of the EEA — Abuse of rights — Collective action initiated in a port of a Member State which led the company that owns the ship to sign a collective agreement — Fair competition)

I – **Introduction**

1. By this request for a preliminary ruling, the Arbetsdomstolen (Sweden) essentially asks whether a company, with its head office in a State that is a party to the Agreement on the European Economic Area of 2 May 1992 ('the EEA Agreement'), [2] which owns a vessel flying the flag of a third State, falls within the scope of the freedom to provide services, as it applies to maritime transport pursuant to Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, [3] a regulation which itself is incorporated into the EEA Agreement. [4]

1 — Original language: French.

2 — OJ 1994 L 1, p. 3.

3 — OJ 1986 L 378, p. 1, as the regulation was amended by Council Regulation (EEC) No 3573/90 of 4 December 1990 (OJ 1990 L 353, p. 16, 'Regulation No 4055/86').

4 — See Annex XIII to the EEA Agreement (OJ 1994 L 1, p. 422).

2. This question is raised in the context of proceedings between Fonnship A/S, a Norwegian company ('Fonnship'), and Svenska Transportarbetarförbundet (Swedish Transport Workers' Federation, 'ST') and Facket för Service och Kommunikation (Service and Communication Workers' Union, 'SEKO'), two Swedish associations, concerning industrial action taken in 2001 and 2003 that allegedly disrupted — within the European Economic Area (EEA) — the services provided by a vessel owned by Fonnship (the *Sava Star*), which is registered and flagged in a third country, Panama. [5]

3. More specifically, ST considered that the wages paid to the Fonnship-employed crew of the *Sava Star* — which, at the time of the facts in the main proceedings, was entirely made up of third country nationals [6] — fell below what could be regarded as a reasonable wage for a vessel operating mainly in Europe. Therefore, in 2001, at a port of call in Sweden, ST took industrial action in order to prevent the unloading and loading of the *Sava Star*, due to Fonnship's refusal to sign a collective agreement approved by the International Transport Workers' Federation ('ITF'). [7] Although it was clearly bound by a Russian collective agreement, Fonnship none the less agreed to sign the collective agreement approved by the ITF following the industrial action and to pay the fees and contributions requested by ST, thereby enabling the *Sava Star* to leave port.

4. Following the expiry of the collective agreement signed in 2001, similar action was taken by SEKO when the *Sava Star* again called at a port in Sweden. Not without protest, Fonnship signed the collective agreement approved by the ITF, as requested by SEKO, and paid the fees and contributions required under that agreement, which allowed the *Sava Star* to continue its voyage.

5. By two separate actions, Fonnship brought proceedings against ST and SEKO before the referring court seeking, in particular, an order against those associations to pay compensation for the loss allegedly suffered as a result of the unlawfulness of the industrial action taken and the invalidity of the collective agreements it was forced to sign. ST, for its part, brought proceedings against Fonnship before the referring court seeking an order that the latter pay the former damages on the ground that Fonnship had failed to pay the wages provided for in the collective agreement signed in 2001.

6. The referring court considers that the question of the lawfulness of the industrial action is of decisive importance for the outcome of the main proceedings and that it falls to it to rule on whether Swedish law on industrial action is compatible with the rules of European Union (EEA) law on the freedom to provide services. However, in the light of the Court's earlier case-law in *Viking Line* and *Laval un Partneri*, [8] the referring court does not consider it necessary to ask the Court about these issues, contrary to the arguments put to it by Fonnship.

5 — It is apparent from the documents before the Court and the observations of Fonnship that the *Sava Star* was a bulk carrier providing tramp services mainly within the EEA. Article 1(3)(a) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4) defines (international) tramp services as 'the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand'. It is mostly the unscheduled transport of one single commodity which fills a vessel — also see paragraph 11 of the Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (OJ 2008 C 245, p. 2).

6 — At the time of the facts in the main proceedings, the crew comprised four Polish officers and two Russian sailors.

7 — As the Court held in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* ('*Viking Line*') [2007] ECR I-10779, paragraphs 7 and 8, the ITF groups together transport workers' unions and one of its main policies is its campaign against 'flags of convenience'. The primary objectives of this policy are, on the one hand, to establish a genuine link between the flag of the ship and the nationality of the owner and, on the other, to protect and enhance the conditions of seafarers on ships flying under flags of convenience. The ITF considers that a vessel is registered under a flag of convenience where the beneficial ownership and control of the vessel is found to lie in a State other than the State of the flag.

8 — Case C-341/05 *Laval un Partneri* [2007] ECR I-11767.

7. By contrast, the referring court is of the view that the question — which was also discussed before it but which has not yet been examined by the Court — whether EEA law applies in a situation such as that in the present case, where a vessel is registered in a third country and the relations on board are, as a rule, governed by the law of the flag State, requires the proceedings to be stayed and the following question to be referred for a preliminary ruling:

'Is the rule in the EEA Agreement on free movement of services, maritime transport services — which rule has an equivalent in the EC Treaty — applicable to a company with its head office in a State of the European Free Trade Association (EFTA) as regards its activity in the form of transport services to an European Community Member State or an EFTA State using a vessel which is registered and flagged in another country outside the European Community and/or the EEA?'

8. The parties to the main proceedings, the Swedish and Greek Governments, the EFTA Surveillance Authority and the European Commission submitted written observations on this question. These interested parties were also heard during the hearing held on 28 January 2014.

II – **Analysis**

A – *Preliminary remarks on the scope of the request for a preliminary ruling*

9. As indicated in point 6 above, the referring court clearly refused to ask the Court about the compatibility of the industrial action with EEA law, considering that, in the light of *Viking Line* and *Laval un Partneri*, it falls to it — where the EEA rules on the freedom to provide services apply to situations such as those at issue in the main proceedings — to decide on whether such action was necessary and appropriate. However, it does not mention how it intends to resolve that issue.

10. Before the Court, Fonnship devoted a significant proportion of its observations to criticising the referring court for having confined the request for a preliminary ruling to the question of the applicability of EEA law, by refusing to ask the Court about the compatibility with that law of the Swedish legal provisions permitting industrial action of the kind taken by ST and SEKO against the *Sava Star*.

11. Without expressly asking the Court to include in its reply to the request for a preliminary ruling reflections on the compatibility and proportionality of the industrial action with the freedom to provide services should it answer the question referred in the affirmative, Fonnship considers that, in view of the discussions that took place before the referring court, the latter was under an obligation to refer to the Court all of the questions on EU law of relevance for deciding on the main proceedings. Should the Court find that the freedom to provide services applies in situations such as those at issue in the main proceedings, the inclusion in the request of the question of the compatibility of the industrial action with the freedom to provide services would, in Fonnship's view, serve to avoid — given the uncertainty of EEA law in that respect — a situation whereby an action that has been pending for over 10 years must again be referred for a preliminary ruling to the Court or, failing that, a situation whereby Fonnship is required to bring an action for liability against the Kingdom of Sweden.

12. I am not entirely unmoved by Fonnship's implicit invitation to include in the examination of the issue submitted to us, even in the alternative, considerations on the necessity and proportionality of the industrial action in the light of the relevant EEA provisions, particularly in the interests of procedural organisation and given that the referring court must rule at last instance. However, in the present case that approach would require the Court to alter significantly its current case-law on the interpretation of Article 267 TFEU.

13. As we know, that case-law acknowledges that the referring court alone has the right to determine the questions to be brought before the Court [9] and the subject-matter of the questions it proposes to refer, [10] and the Court cannot be compelled by a party to the main proceedings to entertain a question [11] or to change its tenor. [12]

14. That case-law is based, first, on the textual argument that Article 267 TFEU establishes direct cooperation between the Court of Justice and the national courts by way of a non-contentious procedure excluding any initiative of the parties [13] and, second, on the duty on the Court to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the Statute of the Court of Justice of the European Union, bearing in mind that under that provision only the order of the referring court is notified to the interested parties. [14]

15. Thus, the Court generally refuses to answer additional questions posed by the parties to the main proceedings or the interested parties which go beyond the scope of that referred by the national court [15] or, in the context of the assessment of the validity of a European Union measure, to extend that examination to cover grounds not mentioned by the referring court. [16]

16. The fact remains that there seems to be some tension between those decisions and a line of case-law of the Court which tends to favour the need to provide a helpful answer to the referring court.

17. In numerous judgments, the Court has not hesitated — despite the referring court's delimitation of the reference for a preliminary ruling — to review, having regard to the facts and arguments submitted during the proceedings, whether a provision of EU law which was not covered by the request for a preliminary ruling is nevertheless capable of applying to the proceedings, [17] or, in order to provide a helpful reply to the national court, to rule on whether the arguments put forward by a party to the main proceedings on the applicability of a provision not included in the reference for a preliminary ruling are well founded, [18] or even to reformulate the questions raised so as to include in the interpretation of EU law one or more provisions mentioned by a party, even on its own initiative, with the same aim of providing a helpful answer to the national court. [19]

9 — See, for example, Joined Cases C-134/91 and C-135/91 *Kerafina-Keramische und Finanz-Holding and Vioktimatiki* [1992] ECR I-5699, paragraph 16; Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 23; and Case C-316/10 *Danske Svineproducenter* [2011] ECR I-13721, paragraph 32.

10 — See, inter alia, Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249, paragraph 21 and the case-law cited, and Case C-657/11 *Belgian Electronic Sorting Technology* [2013] ECR, paragraph 28.

11 — Case 44/65 *Singer* [1965] ECR 965, p. 970.

12 — Idem (p. 970) and, inter alia, *Kerafina-Keramische und Finanz-Holding and Vioktimatiki*, paragraph 16; Case C-412/96 *Kainuun Liikenne and Pohjolan Liikenne* [1998] ECR I-5141, paragraph 23; and Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889, paragraph 21.

13 — See, in particular, *Singer*, p. 971; Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, paragraph 9; Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraph 29; Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 90; Case C-196/08 *Acoset* [2009] ECR I-9913, paragraph 34; and Case C-136/12 *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato* [2013] ECR, paragraph 28.

14 — See, inter alia, *Kainuun Liikenne and Pohjolan Liikenne*, paragraph 24; *Hochtief and Linde-Kca-Dresden*, paragraph 22; and *Danske Svineproducenter*, paragraph 32.

15 — See, for example, *Kainuun Liikenne and Pohjolan Liikenne*, paragraph 24; *Kersbergen-Lap and Dams-Schipper*, paragraph 22; Joined Cases C-42/10, C-45/10 and C-57/10 *Vlaamse Dierenartsenvereniging and Janssens* [2011] ECR I-2975, paragraphs 42 to 45; Case C-148/10 *DHL International* [2011] ECR I-9543, paragraphs 25, 28 and 30; and *Danske Svineproducenter*, paragraph 33.

16 — See, in particular, *ATB and Others*, paragraphs 28, 30 and 31; Case C-305/05 *Ordre des barreaux francophones et germanophones and Others* [2007] ECR I-5305, paragraph 19; and Case C-390/06 *Nuovo Agricast* [2008] ECR I-2577, paragraph 44.

17 — See, inter alia, Case C-302/88 *Hennen Olie* [1990] ECR I-4625, paragraph 20, and Case C-181/12 *Welte* [2013] ECR, paragraphs 16 and 27.

18 — See, for example, Case C-569/08 *Internetportal und Marketing* [2010] ECR I-4871, paragraphs 27 to 30.

19 — See, for example, Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 44; Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 39; Case C-321/03 *Dyson* [2007] ECR I-687, paragraph 26; Case C-342/12 *Worten* [2013] ECR, paragraphs 30 and 31; and Case C-267/12 *Hay* [2013] ECR, paragraph 23.

18. Although the case-law of the Court does not seem to be unequivocal, I do not think it is necessary in these proceedings to examine any further the possible criteria enabling those decisions to be read in a coherent fashion.

19. In my view, this case falls under at least one of the possible situations in which the Court is automatically precluded from altering or extending the subject-matter of the request for a preliminary ruling beyond the limits defined by the national court. This is the situation when the referring court has, expressly or by implication, refused to refer to the Court an additional question on the interpretation of EU law expressly raised by a party to the main proceedings. [20]

20. In the present case, it is true that — in contrast to the cases in which the Court has taken a specific decision on this point — the referring court must rule at last instance and has accepted that the question raised by Fonnship is relevant, should the Court reply to the question referred to it in the affirmative. [21]

21. Furthermore, an objective reading of the third paragraph of Article 267 TFEU might suggest that when a question on the interpretation of EU law 'is raised' in a pending case before a court ruling at last instance, that court 'shall' bring the matter before the Court.

22. Such an interpretation of the third paragraph of Article 267 TFEU could be put to particularly effective use in cases where the court ruling at last instance suggests — in support of its refusal to refer an additional question to the Court — a manifestly incorrect interpretation of EU law or sets out its question on the basis of a clearly false legal premiss, which would then enable the Court, following the observations of the interested parties and the Opinion of the Advocate General, to reconsider whether the proposed interpretation or legal premiss is correct. [22] In my view, it is inconceivable — particularly in the light of the need to ensure that EU law is interpreted uniformly — that the Court might consciously refrain from correcting such errors committed by a court of last instance, to the detriment of individuals, depriving them, de facto, of any real opportunity to sue the Member State where that court is located for infringing EU law.

23. None the less, these considerations do not apply in the present case, particularly on account of the fact that the referring court does not supply any information making it possible to ascertain, inter alia, how it would resolve the question of the need for and proportionality of the industrial action in the light of the rules in the EEA Agreement on the freedom to provide services.

20 — See Case 247/86 *Alsatel* [1988] ECR 5987, paragraphs 7 and 8, and *DHL International*, paragraphs 25 and 30. To that effect, also see Case C-30/93 *AC-ATEL Electronics* [1994] ECR I-2305, paragraphs 19 and 20, and Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraphs 30 and 31. See also point 25 of the Opinion of Advocate General Lenz in *AC-ATEL Electronics*; point 46 of the Opinion of Advocate General Kokott in Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755; and point 18 of my Opinion in *Belgian Electronic Sorting Technology*.

21 — In paragraph 30 of *DHL International*, the Court made it clear that the referring court had accepted 'neither the need nor the relevance' of the additional questions on the interpretation of EU law put to it by the applicant in the main proceedings.

22 — That was also the approach proposed, in practice, by Advocate General Léger in point 46 of his Opinion in Case C-262/97 *Engelbrecht* [2000] ECR I-7321 and Advocate General Bot in points 34 and 35 of his Opinion in Case C-409/06 *Winner Wetten* [2010] ECR I-8015, so as to provide a helpful reply to the national courts. That approach was also accepted by the Court in Case C-515/07 *Vereniging Noordelijke Land- en Tuinbouw Organisatie* [2009] ECR I-839, paragraphs 29 and 40, following my Opinion in support of it (see, in particular, point 56 of the Opinion). The reasons for the rejection of the first two propositions and the acceptance of the third are not apparent from the grounds of the judgments. However, it is interesting to note that only *Vereniging Noordelijke Land- en Tuinbouw Organisatie*, was raised by a national court ruling at last instance.

24. More generally, in *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato*, the Court - upon a reference from a court of last instance, namely the Consiglio di Stato (Italy), concerning its power to choose and reformulate the questions proposed by one of the parties to the main proceedings - rejected the existence of an unconditional obligation to refer for a preliminary ruling a question on the interpretation of EU law raised by a party to the main proceedings,[23] recalling that responsibility for determining and formulating the questions to be put to the Court lies with the national court alone.[24]

25. In those circumstances, I consider that the Court should confine itself to answering the question referred to it, which concerns the applicability of the rules in the EEA Agreement on the freedom to provide services. Accordingly, it should not examine the question raised by Fonnship before the referring court — a question that the court expressly rejected — concerning the possible compatibility of the industrial action with the freedom to provide services.

B – *The request for a preliminary ruling and the interpretation of Regulation No 4055/86*

26. Although the national court referred generically to the rules in the EEA Agreement on the freedom to provide services in the question it submitted for a preliminary ruling, the Court's answer should, in my view, be confined to the provisions of Regulation No 4055/86, as suggested by the parties to the main proceedings and the other interested parties that submitted observations to the Court.

27. It is not in dispute that the freedom to provide transport services is governed by the Treaty provisions on transport and that, as regards sea transport more specifically, it was for the Council of the European Union to decide — in accordance with Article 84(2) of the EEC Treaty — whether appropriate provisions could be laid down in that sector, which it indeed found to be the case and implemented by adopting Regulation No 4055/86 of 22 December 1986, as originally worded, applying the principle of freedom to provide services to maritime transport, which came into force on 1 January 1987. Since, as mentioned above, Regulation No 4055/86 was incorporated into the EEA Agreement, the question referred should therefore be reformulated by limiting it to the interpretation of that measure.

28. In view of the documents in the case and the observations of the interested parties, the question referred can be further limited to clarification of the scope *ratione personae* of Regulation No 4055/86, as set out in Article 1 thereof, in order to ascertain whether a company established in the EEA, in this case Norway, which owns a vessel providing maritime transport services within the EEA but flying the flag of a third country, in this case Panama, falls within the scope of this measure and is able, theoretically, to rely on the freedom it confers.

1. Scope *ratione personae* of Regulation No 4055/86

29. At first sight, the wording of Article 1 of Regulation No 4055/86 and the case-law of the Court seems to suggest that this question should be answered in the affirmative.

23 — See *Consiglio nazionale dei geologi et Autorità garante della concorrenza e del mercato*, paragraph 34. It should be noted that, in paragraph 25 of the judgment, the Court states that a court whose decisions are not open to appeal is, '*in principle*, obliged to make a reference to the Court of Justice under the third paragraph of Article 267 TFEU where a question relating to the interpretation of the TFEU is raised before it' (emphasis added).

24 — Idem, paragraph 29.

30. According to paragraph 1 of that provision, the freedom to provide maritime transport services between Member States and between Member States and third countries applies in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended, while, by virtue of the reference in paragraph 3 thereof to, inter alia, Article 58 of the EEC Treaty (now Article 48 EC), companies established in the European Union (EEA) are to be treated in the same way as natural persons who are nationals of Member States.

31. Thus, in the context of a company established in a Member State which operates a regularly-scheduled liner service to a destination in another Member State, but whose vessels are registered in and fly the flag of Panama, the Court has inferred from the wording of Article 1(1) of Regulation No 4055/86 that it 'refers to nationals of Member States who are established in a Member State other than that of the person for whom the services are intended, and *does not mention the regiSava Staration of or the flag flown by the vessels operated by the transport undertakings*'. [25]

32. The immaterial nature of the registration and/or flagging of the vessels for the purpose of establishing the scope of Article 1(1) of Regulation No 4055/86 is borne out, a contrario, by paragraph 2 of that article. Paragraph 2 provides that the measure also applies to nationals of Member States established outside the European Union and to shipping companies established outside the European Union and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

33. As the EFTA Surveillance Authority pointed out in its written observations, the clarification provided in Article 1(2) of Regulation No 4055/86 reflects what is commonly known as 'the Greek exception'. [26] Since, under Greek law, Greek nationals established in third countries are permitted to register their vessels in the ship registry of that Member State, failure to take account of that situation would have removed from the scope of the regulation a significant proportion of the total tonnage belonging to nationals of EEA States. [27]

34. It is therefore beyond doubt that the EU legislature did not intend to make the application of Article 1(1) of Regulation No 4055/86 subject to a condition relating to the place of registration of the vessels.

35. However, in contrast to ST and SEKO's assertions in their written observations, the fact that nationals of EEA States falling within the scope of that provision may register their vessels in a third country does not mean that those nationals are no longer established in an EEA State.

36. Furthermore, the reasoning set out above cannot be rebutted by ST and SEKO's argument that, since the main proceedings concern the employment conditions of a ship's crew, which are governed by the law of a third country, the provisions of Regulation No 4055/86 do not apply or, at the very least, are conditional on there being a sufficient connecting factor between the employment relationship and European Union (EEA) territory and that this connection is lacking in the present case.

25 — Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 29 (emphasis added). The fact that the vessels operated by that company were registered in and flew the flag of Panama is apparent from paragraph 8 of that judgment. Also see Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 3.

26 — In this respect see, inter alia, Bredima-Savopoulou, A., and Tzoannos, J., *The Common Shipping Policy of the EC*, North Holland, Amsterdam, 1990, p. 176, and Baena Baena, P.J., *La politica comunitaria de los transportes maritimos*, Marcial Pons, Madrid, 1995, p. 127.

27 — According to one writer, this situation covers 85% of the fleet of Greek-flagged vessels. See, Martinez Lage, S., 'El régimen comunitario del transporte marítimo y el Real Decreto 990/1986 sobre ordenación del transporte marítimo en España', *Gaceta Jurídica de la CEE*, No 10, 1988, p. 408.

37. That argument must be rejected at the outset because, from a procedural perspective, it seeks, in short, by relying on a list of Court judgments on the freedom of movement for workers,[28] to dispute the relevance of the question referred by the national court from the standpoint of the provision of services, while, according to the case-law, as a rule that court alone has the power to define the subject-matter of its questions and to determine both the need for and relevance of them in the light of the particular circumstances of the case brought before it.[29]

38. ST and SEKO's arguments must also be rejected because the scope of Regulation No 4055/86 is determined by the provisions contained therein and is not dependent on the law applicable to the employment relations between a vessel's crew and the provider of maritime transport services who may be covered by that regulation. This is demonstrated by the fact that Regulation No 4055/86 does not, for example, contain any reference to the criteria for determining the law applicable to crew members' individual employment contracts, particularly as regards how that measure should relate to Article 6 of the Convention on the law applicable to contractual obligations, signed in Rome on 19 June 1980 ('the Rome Convention').[30]

39. Finally, a further reason why the argument under consideration cannot succeed is that although it can be conceded — as ST and SEKO submit — that the employment relations aboard a vessel on the high seas are governed by the law of the flag State, pursuant to Articles 91 and 94 of the United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 ('the Montego Bay Convention'),[31] which is also recognised by the case-law of the Court,[32] it is by no means apparent from Regulation No 4055/86 that the EU legislature wished to restrict the scope of that regulation to nationals operating maritime transport services using vessels on board which the crew's employment relations are governed by the law of a Member State (or of an EEA State).[33]

40. Making the scope of Regulation No 4055/86 subject to an additional condition of that kind could undermine the objective of the regulation, which is to extend the freedom to provide services to maritime transport between Member States and between Member States and third countries so as progressively to abolish existing restrictions and prevent the introduction of new restrictions.[34]

28 — In paragraphs 79 and 80 of their written observations, ST and SEKO refer — in support of their arguments — to Case 237/83 *Prodest* [1984] ECR 3153, paragraph 6; Case 9/88 *Lopes da Viega* [1989] ECR 2989, paragraph 15; Case C-60/93 *Aldewereld* [1994] ECR I-2991, paragraph 14; and Case C-214/94 *Boukhalfa* [1996] ECR I-2253, paragraph 15. All of these cases involve the interpretation of the provisions of the Treaty or of secondary legislation on the freedom of movement for workers.

29 — See, to that effect, inter alia, *Kersbergen-Lap and Dams-Schipper* (paragraph 21) and *Danske Svineproducenter* (paragraph 32).

30 — OJ 1980 L 266, p. 1. I recall that Article 6 of the Rome Convention, entitled 'Individual employment contracts', essentially provides that, in a contract of employment, a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of that article in the absence of choice. According to paragraph 2, a contract of employment shall be governed (a) by the law of the country in which the employee habitually carries out his work in performance of the contract, or (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated. These criteria shall apply unless it is clear from all of the circumstances that the employment contract is more closely connected with another country, in which case the law of that other country shall apply. On the application of and relationship between these criteria for determining the applicable law in the context of the dismissal of a ship's crew member, see Case C-384/10 *Voogsgeerd* [2011] ECR I-13275.

31 — Articles 91 and 94 are contained in Part VII of the Montego Bay Convention, entitled 'High Seas'. Article 91 provides, in particular, that ships have the nationality of the State whose flag they are entitled to fly and that there must exist a genuine link between the State and the ship. Article 94 provides, inter alia, that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag and, in particular, shall assume jurisdiction under its internal law over the master, officers and crew in respect of administrative, technical and social matters concerning the ship.

32 — See Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraphs 18 and 22.

33 — To that effect, see, by analogy, Case C-323/03 *Commission* v *Spain* [2006] ECR I-2161, paragraph 26, concerning the Court's refusal to equate the terms used in 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) to those used in the Montego Bay Convention, which would have limited the scope of that regulation.

34 — See the penultimate recital of Regulation No 4055/86. For similar reasoning, see *Commission* v *Spain*, paragraph 24.

41. By contrast, a more delicate question — which was also discussed by the interested parties before the Court — is that of determining the precise extent of the persons enjoying the freedom to provide maritime transport services, as referred to in Article 1(1) of Regulation No 4055/86, in particular whether the mere owner of a vessel falls within the scope of that provision on account of his residence/establishment in an EEA State.

42. This question arises from the disagreement between the parties to the main proceedings regarding the identity and place of establishment of the entity responsible for the management and operation of the *Sava Star*. ST and SEKO argue that those activities had been transferred to a company established in Panama, while Fonnship claims that, during the relevant period, it was responsible for all of the *Sava Star*'s commercial operations from Norway.

43. For obvious reasons, it is not for the Court — within the framework of the cooperation provided for by Article 267 TFEU — to resolve this factual dispute, which is a matter for the national court to decide on, even though, according to the wording of the question referred for a preliminary ruling, the national court seems to have started from the premiss that during the relevant period Fonnship carried on an 'activity in the form of transport services' and certain information produced by that company at the request of the Court and during the hearing reinforced that impression.

44. However, if we leave this factual dispute to one side and concern ourselves with the interpretation of Article 1(1) of Regulation No 4055/86, with a view to providing a helpful answer to the referring court, it should first be recalled that this provision defines the persons enjoying the freedom to provide maritime transport services between Member States and between Member States and third countries in terms which are substantially the same as those used in Article 49 EC,[35] namely natural and legal persons established in the territory of a European Union (EEA) Member State providing or receiving, for consideration, cross-border services within the EEA.[36]

45. On the basis of that general premiss, the Court has held that the following fall within the scope *ratione personae* of Article 1(1) of Regulation No 4055/86: a company incorporated under Dutch law which equipped sea-going ships,[37] a shipping agent with its head office in a Member State, which operated a vessel it did not own providing a liner service between the ports of two Member States,[38] Greek shipowners who chartered their boats to tour operators for day trips between a Member State and a third country[39] and the Italian master of a vessel providing maritime transport services between two Member State ports.[40]

46. These decisions suggest a flexible interpretation of the scope *ratione personae* of Article 1(1) of Regulation No 4055/86, which is certainly in line with the aim of ensuring that as many economic activities as possible that do not fall within the scope of the free movement of goods, capital or persons do not, by virtue of being so excluded, fall outside the scope of the EC Treaty (or EEA Agreement).[41]

35 — See Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 39; Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 10; and Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paragraph 30.

36 — As regards Article 36 of the EEA Agreement (freedom to provide services), see the judgment of the EFTA Court in Case E-13/11 *Granville Establishment* [2012] EFTA Ct. Rep. 403, paragraphs 38 and 39.

37 — See *Sea-Land Service and Nedlloyd Lijnen*, paragraphs 16 and 26 to 29. It should be noted that although the Court left it to the national court to determine whether the situations at issue in the main proceedings did in fact fall within the scope *ratione personae* of Regulation No 4055/86, upon reading points 63 to 76 of the Opinion of Advocate General Alber in that case this is in all probability due to the fact that the other maritime transport company involved in the main proceedings (Sea-Land Service) was established in the USA and the referring court had not supplied sufficient information on whether the conditions laid down in Article 1(2) of that regulation had been met.

38 — See *Corsica Ferries*, paragraphs 8 and 30, and point 2 of the Opinion of Advocate General van Gerven in that case. Also see *Corsica Ferries France*, paragraph 3. As previously mentioned, the vessels flew the Panamanian flag.

39 — See Case C-435/00 *Geha Naftiliaki and Others* [2002] ECR I-10615, paragraphs 5 and 6, and points 5 and 6 of the Opinion of Advocate General Alber in that case.

40 — *Peralta*, paragraph 42. The shipowner was Italian and the vessel flew the Italian flag.

41 — To that effect, see Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, paragraph 35.

47. The fact remains, however, that they do not offer any clear insight into the question whether the mere owner of a vessel may be regarded as a provider of maritime transport services.

48. In my opinion, some useful lessons — suggesting that this question should be answered in the negative — can be drawn from the case-law of the Court concerning other methods of transport.

49. It is apparent from that case-law, particularly *Cura Anlagen*,[42] *Jobra*,[43] and *Waypoint Aviation*,[44] that although the owner of a vehicle can easily be classed as a service provider covered by Article 49 EC when he offers such a vehicle for hire (in short, in issue is the provision of hire services), the Court has never gone so far as to consider that person to be a provider of *transport services*.

50. Thus, in order to be classed as a provider of transport services, the owner must pursue transport activities itself, in this case maritime transport activities as a result of operating its vessels.

51. This classification is consistent with the definition of 'Community shipowner' set out in Article 2(2)(a) of Regulation No 3577/92, which refers to 'nationals of a Member State … *pursuing shipping activities*'.[45]

52. I also think that it is in line with the definition of 'shipowner' found in, for example, Clause 2 of the Annex to Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST),[46] which states 'the owner of the ship or any other organisation or person, such as the manager or bareboat charterer, who has assumed the responsibility for the operation of the ship from the shipowner and who on assuming such responsibility has agreed to take over all the attendant duties and responsibilities'. It is clear from that definition that the ownership of a vessel is not codeterminous with the responsibility for its operation.

53. Thus, in my view only the owner of a vessel who assumes the responsibility for its operation can be regarded as providing maritime transport services. By contrast, if the owner entrusts that responsibility to other parties, then the latter will provide the services.

54. The question whether the owner of a vessel can be classed as a provider of maritime transport services if he only assumes some of the activities related to the operation of the vessel is nevertheless a delicate one and undoubtedly depends on all of the factual circumstances of each case.

42 — Case C-451/99 [2002] ECR I-3193, paragraph 18. This case concerned the obligation to register in the Member State of use vehicles leased from an undertaking established in another Member State.

43 — Case C-330/07 [2008] ECR I-9099, paragraph 22. This case involved the refusal of a Member State's authorities to grant an investment premium to a company that leased out lorries which were primarily used in other Member States.

44 — Case C-9/11 [2011] ECR I-9697, paragraphs 17 and 20. This case essentially concerned the prohibition on the transfer of a right to use an aircraft to a company not established in the Member State that had granted a tax advantage in order to fund the purchase of the aircraft.

45 — Emphasis added.

46 — OJ 1999 L 167, p. 33. That directive applied at the time of the facts in the main proceedings, including in the EEA, pursuant to Decision No 66/2000 of the EEA Joint Committee of 2 August 2000 amending Annex XI (telecommunication services) to the EEA Agreement (OJ 2000 L 250, p. 48). The requirements of that directive were extended by Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports (OJ 2000 L 14, p. 29) to cover all ships calling at European Union ports (that directive was itself incorporated into the EEA Agreement by Decision No 94/2000 of the EEA Joint Committee of 27 October 2000 amending Annex XIII (transport) to the EEA Agreement (OJ 2001 L 7, p. 19)). However, under Article 11 of Directive 1999/95, the requirements imposed only applied to vessels flying the flag of third States from 10 January 2003, when the 1996 Protocol of the Merchant Shipping (Minimum Standards) Convention No 147 of the International Labour Organisation came into force, in other words, a few weeks before the collective action carried out by SEKO. So far as concerns instruments which postdate the facts of the main proceedings in their entirety, it should also be noted that a similar definition is set out in Article 2(j) of the Maritime Labour Convention, 2006, which was adopted under the auspices of the ILO and came into force on 20 August 2013. That most recent definition was reproduced in the Annex to Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC (OJ 2009 L 124, p. 30).

55. However, I think that some general reflections can be set out on this point, provided that they are kept simple given the complexity of the organisation of international maritime transport activities.

56. Thus, when the owner of a vessel charters it out for a specified term (time charter) or for a given voyage (voyage charter), it can be presumed that he will, as a rule, retain responsibility for the crew of the vessel. Although it is the charterer who provides the transport service to his customers, that operator will use the vessel's crew as employed and made available by the owner. In such circumstances, although the owner of the vessel remains directly responsible for its crew, I think that both the charterer and the owner can be regarded as providing the same maritime transport services. Therefore, the presumption that both fall within the scope *ratione personae* of Regulation No 4055/86 holds good.[47]

57. By contrast, in the case of a bareboat charter, namely when a vessel is chartered without crew, I am inclined to exclude the owner of the vessel from the natural or legal persons able to claim the status of provider of maritime transport services, as his position is ultimately no different from that of the owners of other means of transport which are rented out, who have never before been considered by the Court to fall within the ranks of providers of transport services.

58. In those circumstances, it is for the referring court, having regard to all of the information before it, to determine whether, during the relevant period, Fonnship assumed the operation of the *Sava Star* so as to provide maritime transport services within the meaning of Article 1(1) of Regulation No 4055/86.

59. Assuming that to be the case, there remains to be examined whether the application of Regulation No 4055/86 could nevertheless be precluded — as argued by ST and SEKO and by the Swedish Government — by the fact that the EEA rules are not intended to protect maritime transport undertakings that have decided to bypass the law of an EEA State as well as internationally recognised fair conditions on employment and pay by registering their vessels in third countries, such as Panama at the time of the facts in the main proceedings, which issue flags of convenience.

2. Possible abuse of rights

60. In novel circumstances to which I shall return at a later stage, the argument of these interested parties undoubtedly refers to the judge-made prohibition preventing traders from abusively invoking EU law provisions in order to evade their national law or gain advantages in a manner that conflicts with the purposes and aims of those same provisions.[48]

61. In the light of the delimitation of the request for a preliminary ruling, the examination of a possible 'abuse of rights' is not free from procedural difficulties, so much so that, during the hearing, the EFTA Surveillance Authority considered that it would actually be tantamount to analysing the question that the national court ultimately refused to refer to the Court.

62. Although the EFTA Surveillance Authority has not expanded on its position further, I think that it can be understood if we view the notion of abuse of rights as a rule or principle[49] permitting the restriction of the exercise of a (subjective) right conferred by the provisions of European Union (EEA) law and not as a rule capable of defining the scope of those provisions.

47 — To all appearances, that was the situation at issue in *Geha Naftiliaki and Others*.

48 — To that effect, see point 63 of the Opinion of Advocate General Poiares Maduro in Case C-255/02 *Halifax and Others* [2006] ECR I-1609.

49 — I recall that, in Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 38, the Court held that the prohibition on the abuse of rights was a general EU law principle.

63. In this case, classifying the notion of abuse of rights as a rule restricting the exercise of a right conferred by European Union (EEA) law results in the admission that Regulation No 4055/86 applies and shifts the analysis to the relationship between the right granted to Fonnship by that measure and the industrial action of ST and SEKO, a question which the referring court refused to submit to the Court.

64. Conversely, accepting that the notion of abuse of rights operates as a rule allowing the scope of European Union (EEA) law to be defined would, in this case, enable the examination of a possible abusive practice to be linked to the question referred to the Court for a preliminary ruling, which concerns the scope *ratione personae* of Regulation No 4055/86.

65. In its case-law, the Court does not seem to have made a definite choice in favour of either of these classifications of abuse of rights.

66. Thus, it has stated that '[i]t is settled case-law that *the scope* of European Union regulations *must not be extended to cover* abuses on the part of a trader',[50] thereby suggesting that the notion of abuse (of rights) is a rule that defines the scope of EU law provisions.[51] On the other hand, the Court has found that 'any abusive use of the rights granted by the [European Union] legal order under the provisions relating to freedom of movement for workers *presupposes that the person concerned falls within the scope ratione personae of that Treaty* because he satisfies the conditions for classification as a worker'.[52] In addition, the Court has examined action to counteract abusive practices under public interest grounds capable of justifying restrictions on the freedoms of movement,[53] which also presupposes that the situations at issue indeed fall within the scope of those freedoms.

67. I am inclined towards the Court's latter approach, rather than viewing the notion of abuse of rights as a principle defining the scope of the provisions of European Union (EEA) law.

68. There are several reasons underpinning my conclusion.

69. First, a straightforward semantic reason, which can be summarised as follows: a right can only be subject to an abusive use if it has first been acknowledged. My view is that by frequently referring to the need to prevent the 'abuse of rights', 'abusive conduct' or 'abusive practices' by individuals or traders, the Court clearly intends to assign to these different expressions the function of limiting the

50 — Case C-434/12 *Slancheva sila* [2013] ECR, paragraph 27 and the case-law cited (emphasis added). For similar wording, also see *Halifax and Others*, paragraph 69, and Case C-456/04 *Agip Petroli* [2006] ECR I-3395, paragraph 20 and the case-law cited.

51 — Relying on a number of earlier judgments of the Court — including, in particular, Case 39/86 *Lair* [1988] ECR 3161, paragraph 43, and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 57 and paragraph 2 of the operative part of the judgment — this classification of the notion of abuse (of rights) was also upheld by Advocate General Poiares Maduro in point 69 of his conclusions in *Halifax and Others*.

52 — Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 31 (emphasis added). To that effect, also see Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 18, and Case C-123/11 *A* [2013] ECR, paragraph 27, in which the Court stated that '[t]he question of the *application*' of the Treaty articles governing the freedom of establishment is '*different* from the question whether a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade national legislation by having recourse to the possibilities offered by the Treaty' (emphasis added).

53 — As regards freedom of establishment, see Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 55; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 74 and 80; Case C-105/07 *Lammers & Van Cleeff* [2008] ECR I-173, paragraph 29; and the judgment of the EFTA Court in Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 88. As regards freedom to provide services, see *Jobra*, paragraph 35, and Case C-318/10 *SIAT* [2012] ECR, paragraph 50.

subjective rights that EU law provisions confer on such individuals or traders, particularly the freedoms of movement guaranteed under EU law. Since those rights are also conferred by the EEA Agreement,[54] there is nothing to prevent that approach to the notion of abuse of rights from being adopted.

70. Second, to consider the prohibition on the abuse of rights to be a principle defining the scope of EU law provisions is, in my view, tantamount to conferring on it — in relation to the fundamental freedoms of movement — a status similar to that of a rule of reason, which I think is incorrect and inappropriate. An acknowledgement of that kind would mean establishing, in all cases, that a given situation does not involve an abuse of rights before that situation could be considered to fall within the scope of EU law. Such a relationship between the abuse and the right, favouring the examination of the abuse over that of the right, would, to my mind, significantly undermine the effectiveness of the freedoms of movement guaranteed by the EC Treaty and the EEA Agreement.

71. Furthermore, the fact that the Court describes the prohibition on the abuse of rights as a general EU law principle[55] (a status that could also be admitted in the framework of the EEA Agreement, should the case arise[56]) which, if infringed, may lead to the restriction or denial of the benefit of the EU law provisions relied on, supports the idea that the function of that notion goes beyond that of a rule for interpreting EU law.[57]

72. Finally, as demonstrated by the judgment in *Halifax and Others*, which was delivered in the field of value added tax (VAT), the case-law shows that, in any event, the transactions involved in an abusive practice do not fall outside the scope of EU law provisions. That, by contrast, would be the result of finding that an abuse of rights had occurred if the function of such abuse was to define the scope of EU law. As is apparent from that judgment, the fact that transactions involved in an abusive practice must be redefined so as to re-establish the situation that would have prevailed in the absence of those transactions means that the abuse of rights operates as a principle limiting the subjective rights of individuals conferred by EU law. This approach, on the one hand, enables the trader concerned to exercise his rights appropriately[58] and, on the other, operates as a proportionality test for abusive conduct and the measures designed to prevent it.

54 — This is confirmed by the twofold finding that 'one of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States' (see Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 29, and Case C-431/11 *United Kingdom* v *Council* [2013] ECR, paragraph 50) and that the provisions of the articles of the EEA Agreement on the freedoms of movement have the same legal scope as the substantially identical provisions of the articles of the EC Treaty guaranteeing those freedoms. See, for example, as regards Article 36 of the EEA Agreement (free movement of services), Case C-153/08 *Commission* v *Spain* [2009] ECR I-9735, paragraph 48. As regards the *sui generis* nature of the EEA Agreement and the rights conferred on individuals and traders, see the judgment of the EFTA Court in Case E-9/97 *Eva María Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 58 and 59, as well as Baudenbacher C., 'L'individu, principal protagoniste de l'accord EEE', in *Le droit à la mesure de l'homme: Mélanges en l'honneur de Philippe Léger*, Pedone, Paris, 2006, p. 335.

55 — See *Kofoed*, paragraph 38. The prohibition on the abuse of rights is now also enshrined in Article 54 of the Charter of Fundamental Rights of the European Union. The Charter did not have binding force at the time of the facts in the main proceedings.

56 — The nature of the EEA Agreement does not prevent general principles of EEA law from being identified, by way of interpretation, from its objectives (such as the principle of uniform interpretation of provisions which are substantially the same as those of the EC Treaty) and its provisions. As regards the principle of effective judicial protection, see the judgment of the EFTA Court in Case E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, paragraph 86, in which the EFTA Court refers both to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and to Article 47 of the Charter of Fundamental Rights of the European Union. Also see, as regards respect for legal certainty, the judgment of the EFTA Court in Case E-9/11 *EFTA Surveillance Authority* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 99, and, as regards legitimate expectations, the judgment of the EFTA Court in Case E-7/12 *DB Schenker* v *EFTA Surveillance Authority* [2013] EFTA Ct. Rep. 117.

57 — To that effect, also see, in particular, Ionescu, R.N., *L'abus de droit de l'Union européenne*, Bruylant, Brussels, 2012, p. 428.

58 — See *Halifax and Others*, paragraphs 94 to 97.

73. In the light of the national court's delimitation of the question referred for a preliminary ruling, the procedural consequence, in this case, of the proposition that the function of abuse of rights is comparable to a rule limiting the subjective rights conferred on individuals by EU law might simply be that any abuse of rights is not examined, because such an examination would risk encroaching on the question — which was deliberately not referred by the national court — concerning the exercise of the freedom to provide maritime transport services under Regulation No 4055/86 and the restrictions that can legitimately be imposed on such exercise. I favour that view.

74. If the Court does not agree with that approach, particularly on the ground that the function of the abuse of rights concept is to define the scope of EU law, I would like to bring the following observations to the Court's attention with a view to placing it in the best possible position to deliver its judgment.

75. First of all, I recall that the Court has repeatedly held that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of EU law. [59]

76. The recognition that Member States have a legitimate interest in combating the improper circumvention of their national legislation plainly does not arise in the situation at issue in the main proceedings.

77. The documents before the Court and the observations of the parties to the main proceedings clearly show that the actions of the Swedish trade unions against Fonnship, assuming that such actions are treated in the same way as actions of the authorities of a Member State, [60] did not pursue the objective of preventing that company — by taking advantage of the provisions of Regulation No 4055/86 generally applicable to vessels flying the flag of a third country — from putting the employment contracts of the crew of the *Sava Star* beyond the reach of Swedish law or, at least, the mandatory rules of Swedish law. [61]

78. According to the pleadings of ST and SEKO, these proceedings were raised to prevent Fonnship from bypassing Norwegian employment law or 'internationally recognised fair conditions on employment and pay'.

79. However, in order to accept that the premiss of the 'improper circumvention by certain nationals of their national legislation' within the meaning of the case-law applies in the main proceedings, not only must the actions of the trade unions be treated in the same way as those of a Member State, but it must also be acknowledged that an EEA State may legitimately combat attempts by traders

59 — See, in particular, *Centros*, paragraph 24; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 35; and Case C-286/06 *Commission* v *Spain* [2008] ECR I-8025, paragraph 69.

60 — An assumption which I nevertheless rejected in points 136 and 137 of my Opinion in *Laval un Partneri*.

61 — That would have been conceivable in theory if, first, the trade unions had considered that, in the light of, for example, the routes, anchorage and ports of call of the *Sava Star*, the crew members habitually carried out their work in Sweden and, second, the parties' choice of applicable law had led to those employees being deprived of the protection afforded to them by the rules of the law of the country where they habitually carried out their work, in accordance with Article 6(2)(a) of the Rome Convention. It follows from *Voogsgeerd* that the Court prefers the linking factor set out in Article 6(2)(a) of the Rome Convention over the law of the vessel's flag State if the latter leads to the employee being deprived of the protection he would have received under the mandatory provisions of the law which would have applied to him in the absence of a choice by the parties.

established in another EEA State to circumvent the employment legislation of that other State and even, according to ST and SEKO, 'internationally recognised fair conditions on pay', without those conditions being fleshed out further and without there being, at EEA level, a harmonisation of laws on minimum pay, particularly as regards seafarers. [62]

80. In any event, even if the Court were prepared to take that step, it is also apparent from the case-law that although the national courts are entitled, case by case, to take account — on the basis of objective evidence — of abuse on the part of the persons concerned in order to deny them the benefit of the provisions of EU law on which they seek to rely, they must assess such conduct in the light of the objectives pursued by those *provisions*. [63]

81. The Court has also held that evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of *those rules* has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by creating artificially the conditions laid down for obtaining it. [64]

82. If, in accordance with the case-law mentioned in point 80 of this Opinion, we simply examine the objective pursued by the provision in question, namely Article 1(1) of Regulation No 4055/86, that objective is, as stated above, to grant nationals of EEA States the freedom to provide maritime transport services between EEA States and between EEA States and third countries, irrespective of the place of registration of or the flag flown by the vessels operated by those nationals.

83. Therefore, the mere fact that a national established in an EEA State operates a vessel flying the flag of a third country does not, in itself, constitute an abusive use of the freedom to provide services laid down in Article 1(1) of Regulation No 4055/86.

62 — As stated above (see footnote 46), Directive 1999/63 applied at the time of the facts in the main proceedings. That directive sought to implement the Agreement between European social partners on the organisation of working time of seafarers and was extended by Directive 1999/95 to all vessels calling at ports of the European Union, regardless of their flag, with effect from 10 January 2003. Article 1(2) of Directive 1999/95 provides that Member States shall take appropriate measures to ensure that ships not flying their flag comply with Clauses 1 to 12 of the Agreement annexed to Directive 1999/63, namely essentially the clauses on working time and rest time on board ships, but not those on the health and safety protection of seafarers (Clause 15) or the duration of paid leave (Clause 16), which contain requirements going beyond those set out in the Seafarers' Hours of Work and the Manning of Ships Convention No 180 of the ILO, which was adopted on 22 October 1996 and came into force on 8 August 2002.

63 — See, in particular, *Centros*, paragraph 25; *Agip Petroli*, paragraph 21; and Case C-186/10 *Oguz* [2011] ECR I-6957, paragraph 25.

64 — See, in particular, Case C-364/10 *Hungary* v *Slovakia* [2012] ECR, paragraph 58, and Case C-456/12 *O. and B.* [2014] ECR, paragraph 58. It is clear from those judgments, as well as from Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraphs 52 and 53, that those conditions are relevant even in cases where the acts of secondary legislation of the European Union make no reference to them.

84. Furthermore, there is no abusive use if such a national operates a vessel flying a flag of convenience of a third country, that is — although there is no official definition of this concept — a vessel which has no 'genuine link' with the State whose flag it flies, within the meaning of Article 91(1) of the Montego Bay Convention,[65] it being registered in that State by or on behalf of a foreign owner for reasons of expediency, mainly in order to take advantage of confidentiality safeguards, the legislation on the taxation of income and the application of local rules on social and safety matters, including environmental matters.[66]

85. While it is not disputed that Panama was one of the world's main issuers of flags of convenience,[67] at least up to the time of the facts in the main proceedings, the Court did not express any reservations in *Corsica Ferries* and *Corsica Ferries France* when accepting that Article 1(1) of Regulation No 4055/86 applied to transport undertakings operating vessels flying the flag of that third country.

86. However, in view of the case-law mentioned in point 81 of this Opinion, evidence of an abusive practice also requires that account be taken of the objective pursued not only by the provisions in question, but also, more generally, by the *rules* referred to, in this case Regulation No 4055/86 itself.

87. It should be noted that the sixth and seventh recitals of that regulation stress that, as regards companies operating in the field of bulk and tramp shipping, the European Union aims, inter alia, to maintain a regime of 'fair and free competition' in that field, and that such companies, in particular, should not be prevented from operating 'as long as they adhere to the principle of fair competition on a commercial basis'.

65 — The requirement for there to be a genuine link between a ship and the State whose flag it flies, set out in Articles 91 and 94 of the Montego Bay Convention, is to secure more effective implementation of the duties of the flag State, especially the duties relating to the effective exercise of its jurisdiction and control in administrative, technical and social matters. See the judgment of the International Tribunal for the Law of the Sea of 1 July 1999, *Saint Vincent and the Grenadines* v *Guinea*, the M/V 'Saiga' (No 2) Case, Reports of Judgments, Advisory Opinions and Orders, vol. 3, 1999, paragraphs 81 to 83, and Case C-299/02 *Commission* v *Netherlands* [2004] ECR I-9761, paragraph 23, which refers back to points 51 to 59 of the Opinion of Advocate General Léger in that case. It is also apparent from these judgments that the absence of such a link between a vessel and the flag State does not permit other States to challenge the validity of that vessel's registration (on this issue and the measures that would be permitted, also see: Takei, Y., 'International legal responses to the flag State in breach of its duties: possibilities for other States to take action against the flag State', *Nordic Journal of International Law*, No 2, 2013, p. 283). There is no doubt that Saint Vincent and the Grenadines — which brought the M/V 'Saiga' case, heard before the International Tribunal for the Law of the Sea — is one of the States that issue flags of convenience. See, for examine, Mandaraka-Sheppard, A., *Modern Maritime Law and Risk Management*, 2nd ed., Routledge-Cavendish, London New York, 2007, p. 279.

66 — The first official occurrence of the expression 'flag of convenience' is found in the preamble to the Merchant Shipping (Minimum Standards) Convention No 147 of the ILO, which was adopted on 29 October 1976 and came into force on 28 November 1981. However, it does not contain a definition of that expression. On the definition and characteristics of flags of convenience, also see Unterm, http://unterm.un.org/DGAACS/unterm.nsf; Mandaraka-Sheppard, A., op. cit., pp. 278 and 279; Masutti, A., 'Genuine link e bandiere ombra', in Antonini, A., *Trattato breve di diritto marittimo*, vol. I., Giuffrè, Milan, 2007, pp. 430 and 431; and Slim, H., 'Les pavillons de complaisance', in *Le Pavillon*, Actes du colloque tenu les 2 et 3 mars 2007 à l'Institut océanographique de Paris, Pedone, Paris, 2007, p. 93.

67 — According to the study conducted by Slim, H., op. cit. (p. 89), in 2000, Panama and Liberia held the highest share of flags of convenience issued to the world's fleet. Furthermore, according to the report by the French senator Marini, in 1998, almost 30% of seafarers sailed under flags of convenience, the majority of which had been issued by Panama, with 104 000 seafarers. See *Rapport sur les actions menées en faveur de la politique maritime et littorale de la France*, No 345, Paris, 1998, p. 29. Between 2001 and 2003, Panama also appeared on the blacklist of flag issuers covering 'substandard' vessels set out in the Paris Memorandum of Understanding (Paris MoU) on Port State Control (see, Paris MoU, *2003 Annual Report on Port State Control*, Paris, p. 25) — an agreement adopted in 1982 whose organisational structure currently groups together, in its committee, 27 national maritime authorities and the European Commission. The experience acquired under the Paris Memorandum of Understanding as regards the inspection of vessels remains a benchmark for inspections carried out on board vessels calling at European Union ports. See, first, the references to the memorandum and to the inspection criteria and procedures developed under its aegis in Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control) (OJ 1995 L 157, p. 1), and, second, the references in Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ 2009 L 131, p. 57), as amended by Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 (OJ 2013 L 218, p. 1).

88. Although the notion of 'fair competition' is not defined — while it appears not only in the preamble to the EC Treaty [68] but also in numerous acts of secondary legislation of the European Union — the Court has accepted that the 'prevention of unfair competition' on the part of undertakings paying their workers at a rate less than the minimum rate of pay could be considered to be a legitimate objective. [69]

89. In my opinion, the observance of fair competition pursued by Regulation No 4055/86 would be undermined, in particular, if it were shown that a maritime transport undertaking, operating in the field of bulk and tramp shipping between EEA States using a vessel registered in a third country with which that vessel has no genuine link, pays the crew of its vessel at a rate which is significantly lower than the minimum rate of pay or, failing that, than the generally accepted rate of pay in the sector which would, in theory, apply had the vessel been registered in the EEA State where that undertaking is established. [70]

90. Therefore, in that situation, despite formal compliance with the conditions for the application of Regulation No 4055/86, the objective of the regulation to ensure fair competition in the sector for bulk and tramp services in the EEA would not be achieved.

91. According to the case-law, it is for the referring court to establish that that condition is met in the main proceedings, in accordance with the rules on evidence under national law, provided that the effectiveness of EU law is not thereby undermined. [71]

92. As to the subjective element constituting proof of an abusive practice, which must also be established by the referring court, [72] I am of the view that, based on the case-law, two circumstances which are not necessarily cumulative should be checked.

68 — According to the wording of the preamble, the high contracting parties recognise 'that the removal of existing obstacles calls for concerted action in order to guarantee … fair competition'.

69 — See Case C-60/03 *Wolff & Müller* [2004] ECR I-9553, paragraph 41.

70 — Numerous EEA States have not established, in the strict sense, a minimum wage which applies to their territory, the rate of pay generally being set by means of collective agreements. It should also be noted that, in order to counteract the use by European shipowners of flags of convenience, several EEA States have introduced 'international' registers, such as — in the case of the Kingdom of Norway — the Norwegian International Ship Register (NIS), which makes it possible to recruit crew members from among nationals of third States but which ensures compliance with pay conditions deemed to be adequate through the conclusion of collective agreements approved by the ITF (see Masutti, A., op. cit., p. 444). In France, Law No 2005-412 of 3 May 2005 establishing a French International Register (Official Gazette of the French Republic of 4 May 2005, p. 7697), which was found to be compatible with the French Constitution by Decision No 2005-514 DC of the Conseil constitutionnel (Constitutional Council) of 28 April 2005, provides that crew members residing outside of France who are employed on board vessels registered in the French International Register shall benefit from public policy rules, in compliance with Article 6 of the Rome Convention and France's international and Community commitments, and imposes minimum safeguards on pay and social protection. The German and Danish International Registers were the subject-matter of the following cases from the standpoint of State aid law: Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887; Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963; and Case C-646/11 P *Falles Fagligt Forbund (3F)* v *Commission* [2013] ECR. What these international registers — which ensure that undertakings have access to tax and social advantages — have in common is that, unlike flags of convenience, the States retain control of vessels registered in their territory. See Masutti, A., op. cit., p. 444.

71 — To that effect, see, in particular, *Emsland-Stärke*, paragraph 54, and *Agip Petroli*, paragraph 24 and the case-law cited.

72 — The two elements constituting an abusive practice are indeed cumulative. See, inter alia, *Emsland-Stärke*, paragraph 55.

93. First, abusive conduct may be found to exist if there is objective evidence to show that the 'essential aim' pursued by the national of an EEA State, who owns a vessel flying a flag of convenience of a third country, was to avoid the application of the pay conditions of that vessel's crew, conditions which — as a matter of course — would have applied had the vessel been registered in the EEA State where the owner is established,[73] thereby undermining the objective of fair competition as set out in Regulation No 4055/86.[74]

94. Second, the referring court may also have to check whether the national of an EEA State, who owns a vessel flying a flag of convenience of a third country, has 'artificially created' the conditions for the application of the provisions of Regulation No 4055/86 through arrangements by which he only fictitiously operates, in whole or in part, that vessel for the benefit of one or more companies linked to him that are established in a third country.[75] In the latter situation, the national in question should be regarded as the mere owner of the vessel and thus could not, as stated above, legitimately join the ranks of the persons enjoying the freedom to provide maritime transport services, as enshrined in Article 1(1) of Regulation No 4055/86.[76]

III – **Conclusion**

95. In the light of the foregoing considerations, I propose that the Court should reply as follows to the question *referred* by the Arbetsdomstolen:

Article 1(1) of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, as amended by Council Regulation (EEC) No 3573/90 of 4 December 1990 and incorporated into the Agreement on the European Economic Area signed on 2 May 1992 must be interpreted as meaning that the freedom to provide maritime transport services applies to a company established in a State of the European Economic Area (EEA) which owns a vessel flying the flag of a third country and operating maritime transport services between EEA States, provided that the company itself assumes the responsibility for operating the vessel, that being a matter for the referring court to determine.

73 — See, by analogy, *Agip Petroli*, paragraph 23 and the case-law cited.

74 — It should be noted that, following a written question from the Court and during the hearing, Fonnship stated that the *Sava Star* had been registered in Panama for reasons stemming from restrictions on maritime cabotage in Norway, without giving and substantiating more detailed and understandable explanations. It should be recalled that, pursuant to Regulation No 3577/92, which was incorporated into the EEA Agreement (see Decision No 70/97 of the EEA Joint Committee of 4 October 1997 amending Annex XIII (transport) to the EEA Agreement (OJ 1998 L 30, p. 42)), the freedom to provide maritime cabotage services only applies to shipowners of EEA States operating vessels registered in an EEA State and flying the flag of that State. It is therefore difficult to understand the claim that the *Sava Star* was registered in Panama in order to facilitate maritime cabotage in Norway.

75 — As regards the taking into account of links of a legal, economic and/or personal nature between the persons involved in an operation for the purpose of establishing the artificiality of the enjoyment of the conditions for the application of EU legislation, see, by analogy, *Emsland-Stärke*, paragraph 58, and *Slancheva sila*, paragraph 40.

76 — So far as this point is relevant, I would add that this situation does not fall within the scope of Article 1(2) of Regulation No 4055/86 as, at the very least, the vessel does not meet the condition of registration in the EEA State of which the owner of the vessel is a national.