REPORT FOR THE HEARING
in Joined Cases C-72/91 and C-73/91 *

I — Facts and procedure

The dispute in the main proceedings

1. Sloman Neptun Schiffahrts AG (hereinafter 'Sloman Neptun') is a shipping company.

With a view to engaging, in accordance with the Gesetz zur Einführung eines zusätzlichen Schiffregisters für Seeschiffe unter der Bundesflagge im internationalen Verkehr (Internationales Seeschiffahrtsregister — ISR) [Law on the introduction of an additional shipping register for ships flying the Federal German flag in international trade (International Shipping Register — ISR), hereinafter 'the ISR Law'], a radio officer and five other Filipino seafarers at home country rates of pay, Sloman Neptun sought under Paragraph 99 of the Betriebsverfassungsgesetz (Law on industrial relations) the consent of the Seebetriebsrat (Seafarers' Committee, represented by Bodo Ziesemer) to the engagement of the seafarers in question for employment on one of its vessels, registered in the ISR.

The Seebetriebsrat refused to give its consent to the engagement of the Filipino seafarers on the ground that the workers concerned are at a disadvantage as a result of their low rate of pay (20% of the rate paid to German seafarers) and that their conditions of employment are generally less favourable. It considers that the recruitment of workers engaged at low home country rates disrupts the peaceful working climate at Sloman Neptun and contravenes the principle of equality. According to the Seebetriebsrat, the ISR Law is unconstitutional and is incompatible with Articles 92 and 117 of the EEC Treaty.

According to Sloman Neptun, the differential remuneration relied upon is justified since the meaning and purpose of the ISR Law is precisely to enable a shipowner to employ foreign crew members on an ISR-registered ship under foreign law and subject to foreign conditions.

Having regard to the foregoing considerations, the Arbeitsgericht Bremen decided, by orders of 9 October 1990, to stay the proceedings in order to request the Court to give a preliminary ruling on the question whether:

'It is compatible with Articles 92 and 117 of the EEC Treaty that Article 1(2) of the Gesetz zur Einführung eines zusätzlichen Schiffregisters für Seeschiffe under der Bundesflagge im internationalen Verkehr (Internationales Seeschiffahrtsregister — ISR) (Law on the introduction of an additional shipping register for ships flying the Federal German flag in international trade (International Shipping Register — ISR)) of

* Language of the case: German.

23 March 1989, BGBl I, p. 550, makes it possible for foreign seafarers with no permanent abode or residence in the Federal Republic of Germany not to be covered by German collective agreements and thus to be employed at lower "home country" rates and on less favourable working conditions than comparable German seafarers.'

Article 1(2) of the ISR Law supplemented Paragraph 21 of the Flaggenrechtsgesetz (Law relating to the right to fly the flag) by adding a fourth subparagraph thereto, which is worded as follows:

'For the purposes of Article 30 of the Introductory Law to the Bürgerliches Gesetzbuch (Civil Code) and subject to the provisions of Community law, the contracts of employment of crew members of a merchant ship registered in the ISR who have no permanent abode or residence in Germany shall not be governed by German law merely on account of the fact that the ship is flying the Federal German flag. If, in respect of the contracts of employment referred to in the first sentence, collective agreements are entered into by foreign trade unions, they shall have the effects provided for in the Law on collective agreements only if it has been agreed that they are to be subject to the wage bargaining rules applicable within the field of application of the Grundgesetz and that jurisdiction should be conferred on the German courts. In case of doubt, wage bargaining agreements entered into after the entry into force of this subparagraph shall relate to the contracts of employment mentioned in the first sentence hereof only if expressly provided for therein. The provisions of German social insurance law shall remain unaffected.'

In the grounds of its order for reference, the Arbeitsgericht refers in the first place to the Court's judgment in Case 173/73 (*Italy* v *Commission* [1974] ECR 709), according to which the partial reduction of public charges devolving upon undertakings in a particular sector of industry constitutes an aid within the meaning of Article 92 of the EEC Treaty if such a measure is intended partially to exempt those undertakings from the financial burdens arising from the normal application of the general system of compulsory contributions imposed by law. According to the order for reference, partial dispensation from the provisions of German labour law and social law in connection with foreign workers employed on sea-going vessels registered in the ISR constitutes an unlawful aid within the meaning of Article 92(1) of the EEC Treaty. That dispensation relieves shipowners who register ships in the ISR of certain financial burdens, in particular higher social insurance contributions payable in respect of seafarers employed at German rates of pay. In that regard, the Arbeitsgericht points out that, under the Gesetz zur Änderung von Vorschriften der See-Unfallversicherung in der Reichsversicherungsordnung (Law amending the rules on insurance against accidents at sea in the National Insurance Code) of 10 July 1989 (BGBl I, p. 1383), home country rates of pay are not to be taken into account in determining average rates, in order to ensure that the benefit claims by German seafarers on all branches of social security do not diminish in relation to their income levels, and that the claims made by foreign seafarers correspond to the rates of

pay received by them, since their contributions and benefits are calculated on the basis of remuneration actually paid.

According to the Arbeitsgericht, exemption from the costs corresponding to the difference between the contribution payable on home country rates of pay and that payable on average German rates can also lead to a distortion of competition since traders continue to benefit from the goodwill of the German flag without, however, incurring the costs connected therewith.

Secondly, the Arbeitsgericht considers that the differential treatment of seafarers on board ISR-registered vessels may also be incompatible with Article 117 of the EEC Treaty. In that regard, the national court states that in accordance with the economic objective of that provision, namely the elimination of competitive disadvantages suffered by undertakings in Member States with higher standards of social protection and correspondingly higher labour costs, workers from non-member countries are also covered. The dual objective of Article 117 of the EEC Treaty not only requires the influx of such workers to be supervised in order to prevent 'wage dumping' and other disturbances on the labour market but also calls for measures to be adopted which ensure that such workers share in social progress when they are employed within the Community.

Thirdly, the national court considers it necessary to take Article 48 of the EEC Treaty into account. It refers to the absolute nature of the prohibition of discrimination under Article 48(2) of the EEC Treaty, as laid down by the Court in its case-law (see the judgment in Case 167/73 *Commission* v *France* [1974] ECR 359), in emphasizing the serious disadvantages suffered by German seafarers as a result of the introduction of the ISR Law. In the absence of reliable figures with regard to the effects of the ISR Law on the German sector, the Arbeitsgericht points out that in Norway, which has had an international shipping register since 1 July 1987, the proportion of Norwegian crew members has steadily declined since that date from 61% to 39%.

Finally, the Arbeitsgericht refers to the fact that the Court of Justice has held in connection with Article 118 of the EEC Treaty (see the judgment in Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany and Others* v *Commission* [1987] ECR 3203, paragraph 16 et seq.) that this article also covers policy towards nationals of non-member countries. According to the Court, 'the employment situation and, more generally, the improvement of living and working conditions within the Community are liable to be affected by the policy pursued by the Member States with regard to workers from non-member countries' and 'it is important to ensure that the migration policies of Member States in relation to non-member countries take into account both common policies and the action taken at Community level, in particular within the framework of Community labour market policy'. Finally, the image of social order which transpires from the general provisions of Article 118 of the EEC Treaty precludes competition by cutting wage costs and engaging in 'social dumping', the Community institutions and the Member States being required to ensure (the latter in accordance with Article 5 of the EEC Treaty) that no such competition occurs on the labour market.

According to the Arbeitsgericht, therefore, the situation in this case is incompatible with Article 119 of the EEC Treaty.

Procedure before the Court

2. The orders for reference were received at the Court Registry on 22 February 1991.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Sloman Neptun Schiffahrts AG, the plaintiff in the main proceedings, represented by Hans-Georg Friedrichs, of the Bremen Bar; by the German Government, represented by Ernst Röder, Regierungsdirektor, and Joachim Karl, Oberregierungsrat at the Federal Ministry for Economic Affairs, acting as Agents; by the Danish Government, represented by Jørgen Molde, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; by the Belgian Government, represented by Louis van de Vel, Director-General at the Ministry for Communications and Infrastructure, acting as Agent; and by the Commission of the European Communities, represented by Ingolf Pernice, of its Legal Service, acting as Agent.

By order of 20 March 1991 the Court decided, in accordance with Article 43 of the Rules of Procedure, to join the two cases for the purposes of the written procedure, the oral procedure and the judgment.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. According to *Sloman Neptun*, the questions submitted by the Arbeitsgericht Bremen for a preliminary ruling do not fall within the jurisdiction of the Court since the dispute pending before the Arbeitsgericht relates to the conflict rules of Article 1(2) of the ISR Law on individual employment contracts and collective labour agreements for foreign seafarers serving on board German vessels.

Sloman Neptun considers that it is not therefore a question of deciding whether the introduction of the International Shipping Register is contrary to Articles 92 and 117 of the EEC Treaty but of ascertaining whether national provisions of private international law, according to which contracts of employment for seafarers serving on board vessels flying the flag of a Member State are not necessarily governed by the law of the flag, may be regarded as aid within the meaning of Article 92 of the EEC Treaty or, on the contrary, as constituting an obstacle to the harmonization of the social systems of the Member States within the meaning of Article 117 of the EEC Treaty.

According to Sloman Neptun, the conflict rule in Article 1(2) of the ISR Law cannot be regarded as aid granted by a Member State or through State resources within the meaning of Article 92 of the EEC Treaty for the benefit of German shipping. The provisions

of the ISR Law merely guarantee the application to maritime employment contracts of the freedom to choose the law applicable to contracts of employment with a foreign element provided for by Article 6 of the Convention on the law applicable to contractual obligations of 19 June 1980 (OJ 1980 L 266, p. 1, hereinafter 'the Convention of 19 June 1980') and by Article 30 of the Einführungsgesetz zum Bürgerlichen Gesetzbuche (Introductory Law to the Civil Code). That freedom of choice with regard to the law to be applied does not have any effects which distort or threaten to distort competition in trade between Member States, that possibility having been eliminated at the latest when the Convention of 19 June 1980 entered into force in seven Member States. Sloman Neptun also points out that the principle of freedom of choice as regards the law to be applied to contracts of employment lies at the root of the Commission's amended proposal of 27 February 1991 for a Council Regulation (EEC) establishing a Community ship register and providing for the flying of the flag by sea-going vessels (COM(91) 54 final, OJ 1991 C 73, p. 11) and will therefore in principle become a rule of Community law.

The difference in the rates of social contributions for seafarers stems from the possibility of applying to foreign workers a law different from that applicable to German workers, and consequently from the aforesaid freedom of choice as regards the law to be applied. That difference, therefore, is not such as to favour certain undertakings or to distort competition.

Finally, with regard to the compatibility of the conflict rule introduced by the ISR Law with Article 117 of the EEC Treaty, Sloman Neptun considers that the principle of freedom of choice as regards the law to be applied to individual employment contracts and collective labour agreements for seafarers has been an essential element of Community labour and social law since the entry into force of the Convention of 19 June 1980. The harmonization of social systems required by Article 117 of the EEC Treaty is not affected in the case of employment contracts for workers who are nationals of non-member countries. With regard to foreign workers from Member States, they are treated in accordance with the provisions of Community law, and their position is not affected by the ISR Law either.

2. The *German Government* points out that Article 1(2) of the ISR Law was adopted in order to deal with the steady decline in registrations of German vessels, chiefly as a result of the serious drawbacks in terms of costs connected with that flag by comparison with the flags of non-member countries (DM 800 million in 1988, including DM 680 million in staff costs alone), by enabling savings to be made with regard to staff costs and thereby ensuring the competitiveness of German vessels at international level.

Legislation establishing international shipping registers has been adopted or is in the process of being drafted in other Member States (France, the United Kingdom, Denmark, Luxembourg, Spain and Portugal). According to those registers, certain vessels flying different national flags must be accorded specific treatment with regard to costs (tax relief, wider possibilities of recruiting foreign crew members and concluding agreements with foreign trade unions,

specific conditions of employment and the grant of operating aid).

On the question whether Article 92 of the EEC Treaty precludes the application of the national law at issue, inasmuch as it grants aid to German shipowners, the German Government observes first of all that recognition of the incompatibility of aid with the Common Market is a matter for the Commission, subject to review by the Court of Justice, and that individuals cannot therefore rely on Article 92 in order to challenge the compatibility of aid with Community law before the national courts (see the Court's judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, paragraphs 9 and 10).

Next, the German Government points out that Article 92 of the EEC Treaty applies only to State aid granted under national law. On the other hand, the State is free to decide whether its legislation is applicable to certain situations.

Finally, if Article 92 of the EEC Treaty were applicable in this case, it would not preclude the application of the ISR Law.

Hence the recruitment of foreign seafarers at rates of pay below the level provided for in German collective agreements does not constitute aid to shipowners which is prohibited by Article 92 of the EEC Treaty since the resultant reduction in costs is not financed out of public funds. In laying down that the principle of freedom of contract with regard to shipping applies to other traders, and in particular to carriers, the ISR Law merely removes any uncertainty with regard to the application of foreign labour law to German vessels. The German Government also points out that it is not for the State but for the parties to the employment contract and to collective agreements to fix the level of pay.

Nor does the reduction in the employer's costs resulting from payment of lower social contributions as a result of lower rates of pay constitute aid within the meaning of Article 92 of the EEC Treaty, but stems from the application of the general system of social security contributions, according to which the proportion of the contributions to be borne by the employer must always be assessed by reference to pay levels. That system does not provide for a fixed minimum amount — as regards the proportions of contributions payable by the employer — from which the ISR Law exempts shipowners. The legal consequences of the ISR Law are therefore an inherent feature of the system and the Law does not contain a specific rule regarding the aid scheme. This case therefore differs from Case 173/73 *Italy* v *Commission* where the Court treated the reduction in the rate of contribution pertaining to family allowances payable by the local textile industry in respect of its employees as an unlawful aid expressly on the ground that the reduction was not justified by the nature or the scheme of the social security arrangements in question.

Furthermore, the German Government states that the fact that indent 1 of Paragraph

872(1) of the Reichsversicherungsordnung (German National Insurance Code), as amended by Article 1(3) of the Law of 10 July 1989 (amending the rules on insurance against accidents at sea in the National Insurance Code), permits in the case of crew members of vessels registered in the ISR the payment of contributions which are lower than those provided for seafarers does not constitute aid within the meaning of Article 92 of the EEC Treaty. The calculation of contributions for crew members of vessels registered in the ISR could not be carried out on the basis of average annual pay. In the first place, in the case of seafarers from a non-member country, such a calculation would take into account an excessive rate of pay, and secondly, in the case of seafarers who are nationals of Member States, that calculation would involve a reduction in contributions in relation to their rates of pay. The German Government contends that even if those relatively low rates of pay were included in the calculation of average annual pay, the result would be a reduction in the costs borne by employers.

The German Government also emphasizes that it is not the ISR Law in itself which makes it possible to disapply German labour law in connection with the employment of foreign seafarers, and thus to reduce social contributions accordingly. The parties were already authorized to agree that a foreign law would apply, pursuant to Article 30(1) of the Introductory Law to the Civil Code. Furthermore, as a result of the alternative reference criteria provided for in Article 30(2) of that Law, or in Article 6(2) of the Convention of 19 June 1980, account may be taken of the legal systems of a number of Member States for the purpose of determining the status of workers. In a judgment given on 24 August 1989 (Der Betrieb 1990, p. 1666 et seq.) in a case where the ISR Law was clearly inapplicable, the Bundesarbeitsgericht (Federal Labour Court) concluded, moreover, that even without that Law, German social legislation was not necessarily applicable to German vessels, thereby confirming that the ISR Law has declaratory effect. Similarly, Article 5(1) of the Convention of 29 April 1958 on the high seas (BGBl 1972, II, p. 1089, in particular at p. 1092) provides that vessels are to have the nationality of the State whose flag they are authorized to fly, which, however, in no way affects the question of which law is applicable to the employment contracts of crew members, the only consequence of that classification being, according to that provision, that 'the State must in fact exercise its jurisdiction and its control in technical, administrative and social matters over vessels flying its flag'.

Finally, the argument that employment contracts for seafarers who are not nationals of a Member State may be subject to the law of a State other than that whose flag is flown by the vessel on which they are employed has also been supported by the Commission, as is clear from the Convention of 19 June 1980 and the Proposal for a Council Regulation of 2 August 1989 establishing a Community ship register and providing for the flying of the Community flag by sea-going vessels (OJ 1989 C 263, p. 11). Thus the former does not exclude contracts of employment for seafarers, whilst the latter provides in Article 8 for wages, working hours and further labour conditions to be in conformity with Recommendation No 109 of 1958 issued by the International

Labour Organization (ILO), without prejudice to the collective agreements concluded with the organizations referred to in Article 9, and confirms in Article 15(3) of its amended version of 19 March 1991 amending Article 9 the possibility of choosing the applicable law, which already exists with regard to collective agreements.

As regards the application of Article 117 of the EEC Treaty, the German Government contends that this provision is only in the nature of a programme and is not therefore sufficient to impose specific obligations on the Member States (see the Court's judgment in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365, paragraphs 19 to 23 and 30 to 32). In the event of such obligations being recognized, the German Government points out that Article 117 of the EEC Treaty applies only to workers who are nationals of the Member States and that the ISR Law, in referring to the primacy of Community law, clearly demonstrates that the application of Article 117 of the EEC Treaty is not restricted by that Law.

The German Government adds that the ISR Law has arrested the decline in the employment of workers from Germany and the other Member States. Since its entry into force, the number of seafarers from all the Member States who are employed on board vessels flying the German flag has remained virtually unchanged, which reflects a social situation that is in conformity with the social policy objectives of Article 117 et seq. of the EEC Treaty and with the efforts made by the Commission (see Document COM(89) 266 final: 'A future for the Community shipping industry: measures to improve the operating conditions of Community shipping').

Finally, the German Government rules out the application in this case of Articles 48(2), 118 and 5 of the EEC Treaty, mentioned by the Arbeitsgericht in its orders for reference.

It considers that Article 48(2) of the EEC Treaty applies only to nationals of the Member States, while nationals of non-member countries can rely on the provisions of the Treaty only in their capacity as members of the families of workers who are nationals of a Member State, in accordance with Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), or under bilateral agreements concerning establishment. Since the ISR Law applies only subject to Community law, seafarers originating in other Member States are not discriminated against by comparison with Germans so far as conditions of employment are concerned.

According to the German Government, the ISR Law is also compatible with the social policy objective pursued by Article 118 of the EEC Treaty since, according to the case-law of the Court, the Commission is responsible for promoting close cooperation between the Member States in this area and has, in order to carry out that task, only a

procedural power to establish a consultation procedure (judgment in Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany and Others* v *Commission*, cited above). If the Court's case-law does not preclude Member States from concluding agreements in the field of migration policy, the Federal Republic of Germany cannot be deemed, by adopting the ISR Law, to have failed to fulfil its obligation under Article 5 of the EEC Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.

3. The *Danish Government* points out in the first place that the objectives of the common shipping policy, namely ensuring the maintenance of the Community fleet and employing the largest possible number of Community seafarers on board the vessels which make up that fleet, can be explained by the fact that the Community must not be too dependent on the fleets of non-member countries for the transportation of Community imports and exports, by the need to ensure employment and the maintenance of a qualified and experienced labour force and, finally, by the fact that national fleets contribute towards the Member States' balance of payments.

The state of the Community fleet since 1980 has been characterized by a sharp decline (tonnage fell by one-half between 1980 and 1988 and the share of world tonnage which, after declining by 3% in the 1970-1980 decade was no more than approximately 30%, dropped to 15% in 1988) primarily as a result of the protracted slump in world trade with a resultant over-capacity in the shipping sector, the erosion of the relative advantages enjoyed by the shipping industry in the Community and the protectionist policy and measures adopted by certain non-member countries.

Over the same period, the merchant fleets of non-member countries have grown, particularly in view of the advantages arising from specific tax provisions, less stringent shipping terms, lower rates of pay and lower social charges.

In order to deal with the reduction in the Community share of the world fleet owing to negative cost factors connected with the fact of flying the flag of a Community country, certain Member States of the Community have established international shipping registers which are designed to enable shipowners to change the flag and to restore their international competitiveness in relation to non-member countries.

In Denmark the collective agreements concluded by Danish professional and trade organizations apply only to persons employed on vessels registered in the Dansk Internationalt Skibsregister (Danish International Shipping Register — 'DIS') who are resident in Denmark or who must be treated as Danish nationals by virtue of international undertakings (Articles 10(2) and (3) of the DIS Law). The collective agreements concluded by foreign professional and trade organizations apply only to members of the organization in question and to nationals of the country in question, provided they are not members of another organization with which an agreement has been concluded.

The establishment of the DIS has made it possible for the objectives of the common shipping policy to be achieved. As a result, a large number of vessels are again flying the Danish flag and new vessels are registered under the Danish flag rather than under the flag of a non-member country. The DIS has also contributed towards maintaining employment amongst Danish nationals (6 071 Danes in August 1988 and 6 228 in August 1990; 768 foreigners in 1988 and 1 469 in 1990; amongst the foreigners, 381 were nationals of the Community or of the Nordic countries in 1988 and 308 in 1990). The alternative solution to registration under the DIS — a change of flag — would have involved engaging a smaller number of Community nationals on the same vessels. In the light of that solution, rules which, like the relevant German provisions, authorize in particular differential remuneration do not mean that Community workers are placed at a disadvantage.

In the Danish Government's view, Community law does not preclude the adoption of rules such as those forming the subject-matter of the orders for reference.

With regard to the application of Article 92 of the EEC Treaty, a law which authorizes the conclusion of different agreements cannot be regarded as State aid because it does not amount to aid granted through State resources.

Article 117 of the EEC Treaty is merely a provision in the nature of a programme (see the judgment of 15 June 1978 in Case 149/77 *Defrenne* v *Sabena*, cited above, paragraph 19) which does not have direct effect. As for Article 48 of the EEC Treaty, it cannot be relied upon on its own by nationals of non-member countries, particularly since they are not resident in a Member State of the Community. A seafarer's abode must be regarded as being situated in the country with which his personal and family links are closest, and not in the State in which the vessel is registered. That conception of a seafarer's abode corresponds, moreover, to that embodied in Article 16 of the Commission's proposal for a Council regulation, cited above.

4. According to the *Belgian Government*, the creation by practically all the coastal Member States of the Community of Second International Registers enabling foreign workers to be employed on the conditions in force abroad constitutes a measure which exerts a positive influence on the competitive position of shipping companies in the Community in a global context. The ISR Law must be interpreted as aid designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy, in accordance with Article 92(3)(b) of the EEC Treaty.

The effects of setting up the ISR cannot be assessed independently of the international shipping context as a whole. According to the Belgian Government, an international register based on competition at international level promotes competition. In addition, the employment of seafarers originating

in non-member countries helps to reduce structural unemployment in those countries and offers the possibility of training seafarers, which is necessary for the development of their own fleet. Some of those countries (for instance, India) are categorical, moreover, in their demands that rates of pay should be adapted to their own economic and social conditions in order to maintain the existing social order. The Belgian Government adds that the ISR complies with the ILO's rules on minimum rates in the sector (USD 286 per month).

With regard to Articles 117 and 48 of the EEC Treaty, the Belgian Government points out that those provisions do not apply to workers from non-member countries, such as those involved in this case, since their contract of employment is governed by the law of a non-member country and they are not resident in the Community.

The Belgian Government therefore proposes that the question submitted by the Arbeitsgericht Bremen should be answered as follows:

'The fact that the International Shipping Register (ISR) enables foreign seafarers with no permanent abode or residence in the Federal Republic of Germany not to be covered by German collective labour agreements and thus to be employed at lower home country rates is compatible with Article 92 of the EEC Treaty.

The International Shipping Register (ISR) constitutes aid compatible with the EEC Treaty. Article 117 of the EEC Treaty has not been infringed either'.

5. The *Commission* considers that the problems which have beset the European shipping policy for a number of years are the result of the weak competitiveness of the Community fleet on international markets, essentially because of the costs involved. The halving of the Community fleet between 1980 and 1988 was caused in part by the transfer of the flag used by shipowners in order to reduce appreciably expenses connected with crews (in 1986 the cost of remuneration and social charges for crews varied, in the case of a container ship of 1 500 TEU, from 32% (in Greece) to 57% (in Italy) of running costs).

In order to deal with that situation, a number of Member States allowed recourse to be had to offshore registers which make it possible to engage, in place of Community nationals, seafarers from non-member countries on the conditions in force in their country of origin.

In its communication to the Council entitled 'A future for the Community shipping industry' of 3 August 1989 (cited above), the Commission made a number of proposals designed, in particular, to establish an additional European register (EUROS) and published at the same time its guidelines for the assessment of State aid for shipping (SEC(89) 921 final of 3 August 1989). The amended proposal for a Council regulation of 27 February 1991 contains in Articles 11 to 16 provisions concerning the crews of vessels registered in EUROS, in particular as regards

manning (Article 11), nationality (Article 12), wages, working hours and further labour conditions (Articles 14 and 15) and social security (Article 16). The Council has not yet acted on that proposal.

With regard to the question submitted by the Arbeitsgericht Bremen, the Commission considers first of all the provisions on aid in the EEC Treaty. In its view, it is necessary to consider the three constituent elements of the concept of aid within the meaning of Article 92(1), namely aid 'in any form whatsoever' which is granted 'by a Member State' or 'through State resources' and which favours certain undertakings or the production of certain goods.

It is immediately apparent from the phrase 'in any form whatsoever' that in Article 92(1) of the EEC Treaty the concept of aid is couched in broad terms. In its judgment of 23 February 1961 concerning the concept of aid within the meaning of the ECSC Treaty (Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1), the Court emphasized that 'the concept of aid is ... wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect'.

Such an interpretation also seems necessary in view of the spirit and purpose, that is to say the effectiveness, of Article 92 et seq. of the EEC Treaty, which represents one of the foundations of the Community's activity whose aim is to ensure, in connection with the establishment of the Common Market under Article 2 of the EEC Treaty, that competition is not distorted (Article 3(f) of the EEC Treaty).

According to the Commission, therefore, all kinds of advantages, including reductions in costs which, on account of their nature, may influence the position of the undertakings concerned with regard to competition, constitute aid. It is not the objectives of the measures adopted which must be taken into consideration but their effects. Whether or not a measure is in the nature of aid does not depend on whether it withdraws or offsets certain specific burdens which national law imposes on the undertakings concerned by comparison with those of other Member States, since the Court has emphasized in its judgment in Case 173/73 (*Italy* v *Commission*, cited above, paragraph 17) that, in the application of Article 92, 'the point of departure must necessarily be the competitive position existing within the Common Market before the adoption of the measure in issue'.

The Commission considers that this concept of aid should in principle encompass a rule which, by derogation from the legislation generally in force, enables certain undertakings to engage staff at rates of pay far below the usual level.

The second constituent element — the fact that aid is granted by the State — must also be given a broad interpretation. According to the case-law of the Court, aid need not necessarily be financed through State resources to be described as State aid (see the judgment in Case 290/83 *Commission* v *France* [1985] ECR 439, paragraph 14) and may be the result of conduct attributable to the State (see the judgment in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 263, paragraph 35 et seq.). The Court has also pointed out, in its judgment in Case 78/86 (*Steinike und Weinlig*, cited above, paragraph 21 et seq.), that a measure adopted by the public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage by the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned. The Commission considers that this should be the case *a fortiori* where financing is not provided by the undertakings concerned but is granted to the detriment of others, for instance the workers. In such cases, for aid to be regarded as State aid, it is sufficient if the measure in question is based on a law providing that certain undertakings are to qualify for special relief in respect of certain specific cost factors.

The Commission emphasizes, however, that in so far as the rates of pay for seafarers employed on board the vessels concerned are subject to income tax and payment of the corresponding social security contributions, a rule such as that laid down by the ISR Law entails a loss of revenue and contributions for the social security institutions. If that is the case (as it certainly is with regard to taxes), the reduction in shipowners' costs is borne directly by the public authorities and, to that extent, the aid is 'granted through State resources'.

With regard to the third constituent element, the Commission states that only measures favouring certain undertakings or certain products fall within the concept of aid, which thus excludes any new general rules that are in the nature of economic, social or financial policy. A legislative measure which simply lays down a generally applicable rule cannot therefore be regarded as aid unless it is associated with rules which clearly define the beneficiaries of the advantages in question. According to the Commission, the beneficiaries of certain advantages are actually identified in the case of certain products (see the judgment in Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, paragraph 20). The same holds true where it is necessary to restrict the advantage granted to vessels entered in a given register which is not open to all vessels, particularly those belonging to foreign owners (Article 1(1) of the ISR Law provides that the ISR register is open to merchant vessels authorized to fly the Federal flag and operated in the course of international trade; according to Articles 1 and 2 of the Law relating to the right to fly the flag — without prejudice to Articles 10 and 11 — only vessels whose owners are Germans or companies controlled by Germans are authorized to fly the Federal flag).

Next, the Commission turns to Articles 117 and 48 of the EEC Treaty. With regard to the former, it points out that it contains a statement of the social policy objectives of the Community without imposing specific obligations on the Member States. That provision does not lay down any legal rules and cannot therefore be relied upon as a criterion for assessing the compatibility of a national measure with Community law. Nor can it serve as an interpretative criterion with a view to widening the scope of other Treaty provisions. It is not Article 117 which is designed to prevent 'social dumping' but Article 119 in the matter of equal treatment for men and women.

With regard to Article 48 of the EEC Treaty, the Commission points out that its scope is limited to freedom of movement for workers within the Community. That provision prohibits only rules which discriminate against workers from other Member States on grounds of nationality, whereas the ISR Law affects, in legal terms and in terms of its actual effects, all Community seafarers.

Finally, the ISR Law is not incompatible with Article 16 of Regulation No 1612/68 of 15 October 1968 which introduces a degree of 'preferential Community treatment' with regard to the filling of vacancies by the employment services of the Member States.

The Commission therefore suggests that the question submitted by the Arbeitsgericht Bremen should be answered as follows:

'National legislation which enables seafarers who work on board vessels registered in a special register and who have no permanent abode or residence in the Member State concerned not to be covered by the collective agreements applied there and thus to be employed at lower "home country" rates and on less favourable conditions of employment than those enjoyed by seafarers who are in a comparable situation and whose permanent abode or residence is in that Member State falls within the concept of State aid referred to in Article 92 of the EEC Treaty and cannot be applied in accordance with Article 93(3) of the Treaty before being notified to the Commission or, in the event of the initiation of a formal procedure, before a final decision has declared it to be compatible with the Common Market.

Articles 117 and 48 of the Treaty do not contain any factor of such a kind as to preclude the adoption of such legislation.'

J. C. Moitinho de Almeida
Judge-Rapporteur