

VIKING C 438/05
SUMMARY OF ADVOCATE GENERAL POIARES MADURO

In short, AG Maduro suggests the following answers:

1. Article 43 EC and Regulation 4055/86, applying the freedom to provide services to maritime transport, have vocation to apply to collective action taken by a trade union or association of trade unions
2. Private undertakings may invoke article 43EC and Regulation 4055/86 against trade unions in circumstances such as those under consideration
3. Article 43 does not preclude trade unions from taking collective action with a view to prevent the relocation of an undertaking to another Member State, provided that cases of intra Community relocation are not treated less favourably than cases of relocation within the national borders
4. Article 43 precludes a coordinated policy of collective action where this has the effect of partitioning the labour market and impeding the hiring of workers from certain Member States in order to protect the jobs of workers in other Member States

On the applicability of the provisions on freedom of movement to industrial actions (question 1)

AG Maduro takes the view that neither the rules on freedom of movement nor the right to associate and the right to strike are absolute. On the contrary, both policy objectives must be brought together. For that reason, Maduro that collective action taken by a trade union or association of trade unions which seeks to promote the objectives of the Community's social policy, is not, for that reason alone, exempted from the application of Article 43 EC and Regulation 4055/86.

On the horizontal application of the provisions on freedom of movement (question 2)

First, AG Maduro notes that the rules on freedom of movement and the rules on competition grant rights to market participants. Without them, it would be impossible to achieve the Community's fundamental aim of having a functioning common market. Relying on previous ECJ case law, AG Maduro argues that private action can jeopardise the objectives of the provisions of free movement. As a consequence, private individuals must not be allowed to act without appropriate concern for the rights that other private individuals draw from the rules on freedom of movement.

Secondly, the Advocate General considers the rules on freedom of movement apply are to those private actions which are capable of restricting rights to freedom of movement by raising an obstacle that cannot be reasonably circumvented by the holders of the rights.

Thirdly, however, AG Maduro acknowledges that domestic law should prevail in such cases. Treaty rules would only apply where domestic law conflicts with the rules on freedom of movement or where no remedy is available allowing the right holder to challenge a breach of the right to freedom of movement.

AG Maduro concludes that the coordinated actions of the FSU and ITF are capable of effectively restricting the exercise of the right to freedom of establishment of Viking and are therefore subject to Article 43 EC and Regulation 4055/86.

On the balance between the right to freedom of establishment and the right to collective action (questions 3 to 10)

AG Maduro starts by replacing the interests at stake in a broad perspective. He considers that the exercise of the right to freedom of establishment is instrumental to increasing the economic welfare of all the Member States. At the same time, freedom of establishment has painful consequences for the workers of companies that have decided to relocate.

The Advocate General considers that the European economic order is based on a social contract whereby workers must accept recurring negative consequences inherent to the common market in exchange for the general improvement of society's living and working conditions. AG Maduro further argues that the right to associate and the right to collective action are fundamental rights.

It follows that the key question is to what ends collective action may be used and how far it may go. In particular, AG Maduro states that collective action should not have for effect the partitioning of the labour market that impedes the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States.

The Advocate General validates collective action aiming at maintaining the jobs and working conditions of the current crew, provided that cases of intra Community relocation are not treated less favourably than relocation within the national borders. Maduro therefore establishes a distinction between preventive actions and a posteriori actions. The latter should not be accepted under Community law since they would prevent an undertaking that has moved elsewhere from providing services in the Member State in which it was previously established.

With regard to the ITF flag of convenience policy, Maduro acknowledges that a policy aimed at coordinating the national unions so as to promote a certain level of rights for seafarers is consistent with their right to collective action. However, such policy should not be operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions. The referring court must therefore decide whether in the circumstances of the case other unions were in effect free to choose whether or not to participate in collective action, thereby preventing the danger of discriminatory abuse of a coordinated policy.