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Press and Information

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Advocate General's Opinion in Case C-438/05

*The International Transport Workers' Federation & The Finnish Seamen's Union v
Viking Line ABP & Ou Viking Line Eesti*

ADVOCATE GENERAL POIARES MADURO PROPOSES THAT TRADE UNIONS MAY TAKE COLLECTIVE ACTION TO DISSUADE A COMPANY FROM RELOCATING WITHIN THE COMMUNITY

However, collective action that has the effect of partitioning the labour market along national lines or prevents a relocated company from providing services in another Member State is incompatible with Community law.

The International Transport Workers' Federation (ITF) is a federation of 600 transport workers' unions in 140 countries, based in London. One of its principal policies is the "Flag of Convenience" (FOC) policy. According to this policy, so as to eliminate flags of convenience, unions in the country where beneficial ownership of the vessel is to be found, regardless of the flag of the vessel, have the right to conclude agreements covering that vessel.

Viking Line, a Finnish ferry company, owns the *Rosella*, a Finnish-flagged ferry operating between Tallinn and Helsinki. It is crewed by members of the Finnish Seamen's Union (FSU) which is affiliated to the ITF.

In October 2003 Viking Line sought to reflag the loss-making *Rosella*, registering it in Estonia so as to allow Viking Line to employ an Estonian crew on the lower Estonian wages and therefore be able to compete with other ferries on the same route. This proposal was made known to the crew and the FSU, who opposed the reflagging. In November 2003, following a request from the FSU, the ITF sent a circular to all its members stating that the *Rosella* was beneficially owned in Finland and that therefore the FSU retained the negotiating rights. Affiliated unions were called upon not to enter into negotiations with Viking. Non-compliance with this circular could lead to sanctions and, potentially, exclusion from the ITF. This effectively prevented Viking Line from dealing with an Estonian union.

In December 2003, following threats of strike action by the FSU, Viking agreed to increase the crew numbers on the *Rosella* and not to commence reflagging before 28 February 2005. The ITF never withdrew its circular and therefore, as it still planned to reflag the loss-making *Rosella* at a later date, Viking Line brought the matter before the courts in England, where the ITF is based. Viking Line requested that the ITF be ordered to withdraw the circular and FSU be ordered not

to interfere with Viking Line's rights to freedom of movement in relation to the reflagging of the *Rosella*.

The Court of Appeal, before whom the case was brought on appeal by the FSU and ITF, has referred a number of questions to the Court of Justice of the European Communities for a preliminary ruling concerning the application of the Treaty rules on freedom of establishment to the case and whether the actions of the FSU and ITF constitute a restriction on freedom of movement.

First, Advocate General Miguel Poiares Maduro states that, in his view, the Treaty rules on freedom of movement do apply to the situation in question. Public interests relating to social policy and fundamental rights may justify certain restrictions on freedom of movement, as long as they do not go beyond what is necessary. However, the fact that social policy is one of the aims of the EC Treaty does not mean that measures taken in this field are automatically excluded from the scope of the rules on freedom of movement.

Furthermore, Mr Poiares Maduro concludes that the provisions on freedom of movement should apply to situations involving two private parties where the action in question is capable of effectively restricting others from exercising their right to freedom of movement by raising an obstacle that they cannot reasonably circumvent. This is the case here, where the practical effect of the coordinated actions of the FSU and ITF is to render Viking Line's right to freedom of establishment subject to the FSU's consent.

As to whether the actions in question strike a fair balance between the right to take collective action and the freedom of establishment, the Advocate General notes that a coordinated policy of collective action among unions normally constitutes a legitimate means to protect the wages and working conditions of seafarers. However, collective action that has the effect of partitioning the labour market and that impedes the hiring of seafarers from certain Member States in order to protect the jobs of seafarers in other Member States would strike at the heart of the principle of non-discrimination on which the common market is founded.

So far as concerns collective action to alleviate the adverse consequences of reflagging the *Rosella*, Mr Poiares Maduro points out that it is first for the national court to determine whether the action in question goes beyond what domestic law considers lawful, taking into account Community law. In this respect Community law does not preclude trade unions from taking collective action which has the effect of restricting the right of establishment of a company that intends to relocate to another Member State, in order to protect the workers of that company. However, collective action taken to prevent a company established in one Member State from lawfully providing its services in another Member State after relocation would be incompatible with Community law.

Finally, the Advocate General recognises that the FSU, together with the ITF and its affiliated unions may use collective action as a means to improve the working conditions of seafarers throughout the Community. However, in the same way as there are limits to action at national level, there are limits to the right of collective action at European level. An obligation imposed on all national unions to support collective action by any of their fellow unions could easily be abused. Such a policy would be liable to protect the collective bargaining power of some national unions at the expense of the interests of others and to partition the labour market in breach of the rules on freedom of movement. By contrast, if the other unions were free to choose whether or not to participate in a given collective action then this danger would be prevented. It is for the national court to determine whether this is so in the present case.

IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.

Unofficial document for media use, not binding on the Court of Justice.

Languages available: All

The full text of the Opinion may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-438/05>

It can usually be consulted after midday (CET) on the day of delivery.

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*Pictures of the delivery of the Opinion are available on EbS "Europe by Satellite",
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