OPINION OF ADVOCATE GENERAL GULMANN
delivered on 9 December 1992 *

Mr President,
Members of the Court,

1. The activities of the Community include, *inter alia*, the abolition of obstacles to freedom of movement for services and the adoption of a common policy in the sphere of transport (see Article 3 of the EEC Treaty).

It is therefore reasonable to express some surprise over the facts that prompted the question referred to the Court by the Amtsgericht (Local Court) Emden (Federal Republic of Germany) for a preliminary ruling.

The facts and the legal framework in the two cases pending before the Amtsgericht Emden are simple. A Netherlands national and a Belgian national navigating on German inland waterways in 1990, both of whom held the Netherlands master's certificate for inland navigation, the 'Groot Vaarbewijs II' (Full Navigation Certificate II), were fined by the competent German authority on the ground that that certificate was not valid in the Federal Republic of Germany.

The surprise caused by these cases becomes even greater when it is learned that in fact — as it will become clear in the course of these remarks — it is not altogether easy to determine the scope of the Community rules which are relevant for the purpose of deciding how cases such as these are to be settled.

In its orders for reference, the Amtsgericht Emden expresses the view that there is no objective reason not to recognize the right of holders of the Netherlands master's certificate to navigate on the German inland waterways at issue in these cases and the fact that the German authorities require a German master's certificate implies indirect discrimination against the boatmasters concerned, who hold a Netherlands certificate.

The question referred by that court for a preliminary ruling is as follows:

'Is Article 76 of the EEC Treaty to be interpreted as meaning that a Member State is precluded from making navigation on its national waterways conditional upon the possession of a master's certificate for inland navigation issued in accordance with national law without making any differentiation in principle according to the nature of the inland waterways to be sailed?'

* Original language: Danish.

The interpretation of Article 76 of the EEC Treaty

2. Under Article 76 of the Treaty

'no Member State may ... make the various provisions governing the subject when this Treaty enters into force less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State'. [1]

To answer the question referred to the Court, it is important to note that Article 76 does not prohibit national rules of a particular kind, for example national rules giving rise to indirect discrimination. It merely forbids Member States to *amend* existing rules in a way which will make them 'less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State'. It imposes what is known as a 'standstill' obligation.

Article 76 cannot therefore be held to imply a prohibition of national rules making navigation on inland waterways conditional upon the possession of a boatmaster's certificate issued in accordance with national law if those rules already existed when the Treaty entered into force. On the other hand, it would be contrary to Article 76 if the relevant German rules were to be amended, with the results described in that provision, after the Treaty entered into force. Article 76 creates rights for the individual which citizens of the Member States may invoke before the national courts.

3. It is clear from the documents before the Court that the German legislation on boatmasters' certificates has been amended on a number of occasions since the Treaty entered into force. It is for the national court to decide whether those amendments place foreign boatmasters in a less favourable situation, as compared with German boatmasters, than under the original rules on masters' certificates. The nature of the amendments has been examined in the course of the proceedings before the Court and it appears from the information supplied in this connection that the situation of foreign boatmasters is in any case probably no worse under the German rules, as amended, than it was before.

4. It was pointed out, in the course of the proceedings, that there had been a change in the way the rules were implemented and that

1 — The prohibition contained in Article 76 applies only 'until the provisions referred to in Article 75(1) have been laid down' and only so long as the Council, acting unanimously, has not decided otherwise. Those two conditions are irrelevant for the purpose of these cases. At the material time the Council had not yet legislated to solve the problems arising from the lack of mutual recognition in the matter of boatmasters' certificates; see remarks below on the directive adopted in 1991.

such a change in administrative practice was contrary to Article 76 since it meant that boatmasters holding a Netherlands certificate have been accorded less favourable treatment in recent years than in the past. [2]

At no point in the course of the proceedings did any of the parties — including the German Government — dispute the fact that changes in the way a Law is implemented may, in certain circumstances, give rise to an infringement of Article 76. Nor do I think there can be any doubt that that is so. For foreign carriers, the effects of changes in the practical procedures for implementing the Law may be just as serious as the effects of amending the existing rules and therefore just as likely to represent an obstacle to the objectives Article 76 seeks to achieve. [3]

5. It is for the national court to decide whether the administrative practice has been changed in a manner unfavourable to foreign carriers. The national court must determine whether there was an administrative practice in the past which allowed holders of the 'Groot Vaarbewijs II' to navigate on German inland waterways without a German master's certificate and whether it has been replaced by a new administrative practice which requires them to have a German certificate as well.

It would of course be particularly important for the purposes of the present cases, if it could be established that — as the Netherlands Government in particular maintains — there was an earlier administrative practice which showed a certain degree of consistency and generality, [4] under which holders of the Netherlands master's certificate could navigate on German inland waterways without having to have a German master's certificate as well.

6. In any event, there is in my view no doubt that Article 76 must be interpreted as

2 — It was pointed out that the German authorities had previously turned a blind eye to the fact that holders of the 'Groot Vaarbewijs II' were navigating on German inland waterways without a German master's certificate. For example, according to the order for reference in Case C-221/91, the plaintiff in the main proceedings said that, although he had been subjected to checks on several occasions, he had never encountered any problem as a result of navigating on the strength of his Netherlands certificate. In the course of the oral procedure in the two cases, the Netherlands Government explained that the problems encountered in practice by boatmasters holding the 'Groot Vaarbewijs II' had arisen in 1981, when the German legislation first made provision for recognition of foreign boatmasters' certificates. There had, it said, been 30 to 40 cases in the course of the last three years or so in which Netherlands barges had been inspected and allowed to continue their journey only if they took on board a pilot who held a German master's certificate.

3 — In paragraphs 20 and 21 of its judgment in Case C-195/90 Commission v Germany [1992] ECR I-3141, the Court stated that Article 76 '... is intended to prevent the introduction by the Council of a common transport policy from being rendered more difficult, or from being obstructed, by the adoption, without the Council's agreement, of national measures the direct or indirect effect of which is to alter unfavourably the situation in a Member State of carriers from other Member States in relation to national carriers'.

4 — On the requirements of consistency and generality in administrative practices, reference may be made to the following statement by the Court in its judgment in Case 21/84 *Commission* v *France* [1985] ECR 1355, paragraph 13: 'It must however be noted that for an administrative practice to constitute a measure prohibited under Article 30 that practice must show a certain degree of consistency and generality. That generality must be assessed differently according to whether the market concerned is one on which there are numerous traders or whether it is a market, such as that in postal franking machines, on which only a few undertakings are active. In the latter case, a national administration's treatment of a single undertaking may constitute a measure incompatible with Article 30' (paragraph 13).

meaning that a change in an administrative practice such as that just described constitutes an infringement of Article 76. [5]

Can the rules of the Treaty be held to entail an obligation for Member States to recognize masters' certificates for inland navigation issued in other countries?

7. As I have said, the court of reference considers that the non-recognition of the Netherlands master's certificate constitutes indirect discrimination against boatmasters who are nationals of other Member States. It therefore also needs to be considered whether other provisions of the Treaty may have some bearing on the question whether Netherlands boatmasters' certificates ought to be recognized by the German authorities. That question has been addressed in the observations submitted to the Court.

8. The plaintiffs in the main proceedings were providing transport services in the Federal Republic of Germany and it is therefore appropriate to consider, in particular, whether the Treaty rules on freedom to provide services — Articles 59 and 60 — may apply. The first question to be settled in this connection is how much importance is to be attached to the provision contained in Article 61(1) of the Treaty, which states that 'freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport'.

9. It is tempting, at first sight, to assume that the requirements in respect of boatmasters' qualifications are governed by the special rules applicable to transport contained in Title IV of Part Two of the Treaty. Article 74 provides that, in matters of transport, Member States are to pursue the objectives of the Treaty within the framework of a common transport policy and Article 75 gives the Council extensive powers to lay down 'appropriate provisions' for that purpose. Accordingly, the Council directives on the mutual recognition of national certificates for the conduct of means of transport [6]

5 — I think that in practice the requirement for foreign boatmasters to have a German master's certificate places them in a less favourable situation than their German counterparts and does not simply constitute equal treatment as between foreign boatmasters and German boatmasters. In my view, these cases are therefore not an occasion for deciding whether Article 76 merely prohibits any Member State from placing foreign carriers in a less favourable situation than its own carriers or whether it also prohibits any Member State from depriving carriers of other Member States of a relative advantage they previously enjoyed over its own carriers. On this problem, see paragraphs 14 to 17 of Advocate General Jacobs's Opinion in Case C-195/90 *Commission* v *Germany* [1992] ECR I-3141, at p. 3158, referred to in note 3 above.

6 — See the First Council Directive of 4 December 1980 on the introduction of a Community driving licence (80/1263/EEC) (OJ 1980 L 375, p.1) and Council Directive 91/672/EEC on the reciprocal recognition of national boatmasters' certificates for the carriage of goods and passengers by inland waterway (OJ 1991 L 373, p. 29).

were adopted on the basis of Article 75. [7]

10. The German Government contends that Article 61 of the Treaty must be interpreted as meaning that any obstacles to freedom to provide services arising from national requirements in respect of boatmasters' certificates should be removed by means of rules established on the basis of Article 75 of the Treaty and points out that when the events which gave rise to the two cases occurred there were no Community rules on the recognition of boatmasters' certificates issued in other Member States. Directive 91/672, previously cited, was adopted on 16 December 1991 and Member States were not required to implement it until 1 January 1993; the German Government therefore contends that under Community law the Federal Republic of Germany was not obliged to recognize the Netherlands 'Groot Vaarbewijs II' until that date. [8]

11. That argument appears, at first sight, to be sound.

However, the Netherlands Government and the Commission have argued that Article 61 does not necessarily have the effect claimed by the German Government and that Directive 91/672 may, at least to some extent, be merely confirming what already follows from the provisions of the Treaty.

Can a general principle of mutual recognition of occupational qualifications be held to arise from the provisions of the Treaty on freedom of movement, from Article 5 of the Treaty, and from the general objectives of the Treaty?

12. The Commission essentially takes the view that there is an obligation to recognize boatmasters' certificates issued by other Member States even in cases involving the

7 — The Court's judgment in Case 16/78 *Choquet* [1978] ECR 2293 is not inconsistent with that line of thinking. That case concerned the compatibility with Community law of German rules under which holders of foreign driving licences who had been established for more than one year in the Federal Republic of Germany were obliged to obtain a German driving licence. The Court acknowledged that legislative provisions of that kind could indirectly affect not only the rights guaranteed by Articles 48 and 52 of the Treaty but also those guaranteed by Article 59 in connection with the freedom to provide services. Its judgment in that case could therefore ostensibly be invoked to support the idea that, despite the rule contained in Article 61, Article 59 is generally applicable to the national rules on driving licences and similar certificates. But that would be a misinterpretation. The judgment in that case is not concerned with those who provide services in the field of transport but with all those who use motor vehicles when exercising their principal activity as employed or self-employed persons — whether, in the case of self-employed persons, they wish to become established or to provide services — and for whom a driving licence is consequently of some importance in their work. In paragraph 4 of the judgment, the Court stated that '... national rules relating to the issue and mutual recognition of driving licences by the Member States exert an influence, both direct and indirect, on the exercise of the rights guaranteed by the provisions of the Treaty relating to freedom of movement for workers, to establishment and, *subject to the reference contained in Article 61(1) of the Treaty*, to the provision of services in general' (my emphasis).

8 — The directive lists the boatmasters' certificates, including the 'Groot Vaarbewijs II', which must be recognized as valid for the purposes of navigation on certain waterways including some German waterways. The decision on reciprocal recognition of boatmasters' certificates was taken without any need for Member States' provisions on the issuing of boatmasters' certificates to be harmonized first. Thus Article 5 of the Directive provides for harmonization in this connection to be effected by 31 December 1994 at the latest. The Directive thus reflects the Member States' view that the issuing of such certificates is subject to requirements in respect of qualifications which make it reasonable to authorize navigation on the waterways concerned.

provision of services, despite the fact that, according to Article 61, the Treaty rules on the provision of services do not apply in the field of transport.

The Commission points out, first, that the Court has confirmed that the basic rules on the free movement of goods, persons, services and capital are applicable in the field of transport in the absence of express provisions to the contrary. In its judgment of 4 April 1974 in *Commission* v *France*, the Court held that, 'conceived as being applicable to the whole complex of economic activities, these basic rules can be rendered inapplicable only as a result of express provision in the Treaty'. [9] At the same time, the Court emphasized that Article 61 is an express provision of that kind, allowing an exception to the rule in the case of transport, regard being had to the special aspects of this branch of activity.

The Commission also refers to the Court's decisions on the free movement of workers and the right of establishment, according to which Member States are under an obligation to take account of occupational qualifications obtained in other Member States and, in the light of the judgment quoted above, that obligation extends to the field of transport as well.

The Commission maintains that, according to the case-law of the Court, the obligation to take account of occupational qualifications awarded in other Member States arises primarily from Article 5, in conjunction with the tasks and the general objectives set out in the Treaty. Consequently, according to the Commission, it is a general principle which must therefore apply to the provision of services in the field of transport as well.

In support of its view, the Commission points out that it would be unreasonable for providers of services exercising their occupational activities in a Member State on a purely temporary basis to be subjected to treatment different from, and more restrictive than, that accorded to traders seeking permanent integration into the economic life of a Member State by means of establishment.

13. In my opinion, the Commission's argument does not stand up to closer scrutiny.

It is true that, in cases concerning the Treaty provisions on workers and establishment, the Court has cited Article 5 to justify its ruling that Member States are required to take account of occupational qualifications awarded in other Member States and compare them with a view to assessing their equivalence. [10]

But the Court emphasizes that the obligations imposed on Member States under Article 5 are obligations to achieve the objectives

9 — Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 21.

10 — See Case 71/76 *Thieffry* [1977] ECR 765, paragraphs 15 to 19, Case 222/86 *Heylens* [1987] ECR 4097, paragraph 12, Case C-340/89 *Vlassopoulou* [1990] ECR I-2357, paragraph 14, and Case C-104/91 *Borrell* [1992] ECR I-3003, paragraph 9.

of the Treaty. It has stated most recently, in its judgment in *Borrell*, previously cited, that

'... in so far as Community law makes no special provision, the objectives of the Treaty, and in particular freedom of establishment, may be achieved by measures enacted by the Member States, which, under Article 5 of the Treaty, must take "all appropriate measures ... to ensure fulfilment of the obligations arising out of this Treaty ..." and abstain from "any measure which could jeopardize the attainment of the objectives of this Treaty" ...' (paragraph 9).

In other words, an obligation to accept occupational qualifications awarded in other Member States cannot be deduced from Article 5 alone. The obligations imposed on Member States under Article 5 in this connection are a logical consequence of the fundamental obligations contained in the Treaty provisions on freedom of movement. The obligations of Member States to recognize occupational qualifications awarded in other Member States are therefore based ultimately on the Treaty provisions relating specifically to the free movement of persons and services. That is an important conclusion inasmuch as it follows from the case-law of the Court that the Treaty provisions on freedom of movement may in certain circumstances give rise to different obligations for the Member States, depending on differences in the nature of the various activities. [11]

That being so, it seems to me that the judgment to be given in the present cases will have to take account of the fact that the question of the Netherlands boatmasters' certificates arose in cases in which the persons claiming recognition of the certificates provided services in the field of transport.

14. The decisive question, therefore, for the purpose of the conclusions to be drawn in these cases, is whether the Treaty rules on the provision of services are directly or indirectly applicable in this field.

Can Article 61 of the Treaty be interpreted restrictively as meaning that it does not preclude the application of Articles 59 and 60 in the particular field at issue in these cases?

15. As already mentioned, it is initially tempting to take the line that Article 61 covers recognition of occupational qualifications in the field of transport too and there appears to be some support for that view in the case-law of the Court.

Thus, in its judgment in *Parliament* v *Council*, [12] on the subject of the Council's alleged failure to act in the field of transport, the Court stated that:

'It should first be borne in mind that Article 61(1) provides that freedom to provide

11 — It will become clear from the considerations set out below that I do not think Article 5 of the Treaty constitutes an essential legal basis for establishing an obligation to recognize occupational qualifications in connection with the provision of services.

12 — Case 13/83 *Parliament* v *Council* [1985] ECR 1513.

services in the field of transport is to be governed by the provisions of the Title relating to transport. Application of the principles governing freedom to provide services, as established in particular by Articles 59 and 60 of the Treaty, must therefore be achieved, according to the Treaty, by introducing a common transport policy ...' (paragraph 62). [13]

16. However, it seems to me that there is a good case for considering whether Article 61 could perhaps be interpreted restrictively as meaning that it does not preclude the application of Articles 59 and 60 of the Treaty to matters relating to the recognition of occupational qualifications in connection with the provision of services in the field of transport. [14]

17. It is clear that the Treaty aims to introduce freedom to provide services in the field of transport too. [15] It must also be assumed that the decision that that objective was to be achieved by introducing a common transport policy was determined by the special conditions prevailing in the field of transport [16] — the 'features which are special to transport'. The special conditions in the field of transport were a prime consideration in the Court's decision in the case of *Pinaud Wieger*, which concerned cabotage. The Court justified its conclusion on the ground of the 'complexity of the cabotage sector' and emphasized that freedom to provide services could be achieved 'in an orderly fashion only in the context of a common transport policy which takes into consideration the economic, social and ecological problems and ensures equality in the conditions of competition'. [17] In these circumstances, it may be argued that the sole purpose of Article 61 is to exclude the application of Articles 59 and 60 in the field of transport, when the problems just mentioned mean that Member States might encounter particular difficulties if they authorize providers of services to provide transport services in their territory.

18. I am convinced that the special conditions in the field of transport which justified the adoption of the provision contained in Article 61 of the Treaty do not prevail in the sector at issue. In my view, the main consideration is that national provisions on the subject should not be intended to limit the extent to which foreign boatmasters may provide services in the territory of a Member State on economic, social or ecological grounds or for reasons connected with competition, but merely to ensure that safety is maintained in inland waterway navigation. The German rules empower the authorities specifically to approve foreign boatmasters' certificates and it must be assumed that safety in navigation is the sole consideration governing their decision.

13 — See also paragraph 7 of the judgment in Case C-17/90 *Pinaud Wieger* [1991] ECR I-5253, where the reasoning is similar.

14 — As already mentioned, it follows from the judgment in *Commission* v *France* cited in note 9 that the general rules of the Treaty are directly applicable to the field of transport unless the Treaty expressly excludes their application.

15 — See paragraphs 62 and 64 of the judgment in *Parliament* v *Council* cited in note 12 above.

16 — See paragraph 65 of the judgment in *Parliament* v *Council*. See also the judgment in *Commission* v *France* cited in note 9, where the Court held that 'since transport is basically a service, it has been found necessary to provide a special system for it, taking into account the special aspects of this branch of activity. With this object, a special exemption has been provided by Article 61(1) ...' (paragraphs 27 and 28).

17 — See paragraph 11 of the judgment in *Pinaud Wieger* cited in note 13 above.

In short, a restrictive interpretation of Article 61 has the advantage of ensuring that freedom to provide services in the field of transport is not obstructed, as a result of that provision, by national rules which may be manifestly contrary to the Treaty provisions on freedom to provide services and are not justified by special conditions in the field of transport.

19. A further point in favour of a restrictive interpretation is that, as already mentioned, the Court has stated that the Treaty provisions on free movement of workers and the right of establishment apply in the field of transport and those provisions may be held to entail an obligation for Member States, in certain circumstances, to recognize occupational qualifications awarded in other Member States. I think it would be difficult to explain why the rules applicable to providers of services exercising their professional activities in a Member State on a purely temporary basis should be more restrictive than the rules on free movement of workers and the right of establishment, which are designed to allow permanent integration into the economic life of a Member State. [18]

20. For the foregoing reasons, a restrictive interpretation of Article 61 appears, in principle, to be justified. I have reservations about proposing that the Court should adopt such an interpretation, however, arising from two considerations. First, it may be argued that a restrictive interpretation is not entirely consistent with the wording of Article 61, which states in very general terms that 'freedom to provide services in the field of transport' is to be governed by the special provisions relating to transport, or with the case-law of the Court which, taken in its most natural sense, must be understood to mean that the introduction of freedom to provide services in relation to transport must take place, in all respects, within the framework of the Treaty provisions on transport. [19]

The second consideration is that, in my opinion, it is possible, on the basis of the Treaty provisions relating specifically to transport, to reach a conclusion which will ensure that the fundamental objective of the Treaty concerning freedom to provide services may also be achieved in the field at issue in these cases.

Do the Treaty provisions relating specifically to transport entail a directly applicable obligation to ensure freedom to provide services?

21. The answer to this question is to be found in the judgment in *Parliament* v *Council*. [20]

18 — A similar example is to be found, in the field of services, in the problems associated with the recognition of licences to drive motor vehicles, where there is also a difference in treatment which it is hard to justify and which arises from the fact that Articles 59 and 60 do not apply to transport. As mentioned in footnote 7, the Court held in its judgment in *Choquet* that persons such as tradesmen or businessmen who provide services in fields other than transport and who use a means of transport to do so may rely on Articles 59 and 60 if, in the State where the service is provided, their provision of the service is indirectly affected by obstacles arising from requirements which are not objectively justified with respect to proof of their ability to drive the means of transport they are using. It is difficult to see why such persons should be deemed to be protected by Articles 59 and 60 while those for whom the certificates at issue are a direct condition for the pursuit of their occupation are not.

19 — It should also be noted that the Court, in *Choquet*, expressly made a reservation with regard to Article 61 which is almost certainly to be understood as meaning that Article 61 also applies to the field at issue in these cases.

20 — See note 12. I refer in this connection to the Opinion of Advocate General Darmon in *Pinaud Wieger*, cited in note 13 above, at p. 5262.

In that judgment, the Court held that

'... the obligations imposed on the Council by Article 75(1)(a) and (b) include the introduction of freedom to provide services in relation to transport, and that the scope of that obligation is clearly defined by the Treaty. Pursuant to Articles 59 and 60 the requirements of freedom to provide services include, as the Court held in its judgment of 17 December 1981 (Case 279/80 *Webb* [1981] ECR 3305), the removal of any discrimination against the person providing services based on his nationality or the fact that he is established in a Member State other than that where the services are to be provided' (paragraph 64).

The Court went on to state that

— 'The Council was required to extend freedom to provide services to the transport sector before the expiry of the transitional period, pursuant to Article 75(1)(a) and (2), in so far as the extension related to international transport to or from the territory of a Member State or across the territory of one or more Member States';

— 'It is common ground that the necessary measures for that purpose have not yet been adopted';

— On that point it must therefore be held that 'the Council has failed to act since it has failed to adopt measures which ought to have been adopted before the expiry of the transitional period and whose subject-matter and nature may be determined with a sufficient degree of precision'.

Lastly, the Court stated in paragraph 69 that Article 176 required the Council to take the measures necessary to comply with the judgment and that the Council had 'a reasonable period for that purpose'.

22. My views on the importance of that judgment for the purpose of these cases may be expressed in their simplest form as follows.

The 'reasonable period' which the Council had to introduce freedom to provide services in the field of transport had in any case expired, as far as the obligation imposed on the Member States to recognize occupational qualifications awarded in other Member States was concerned, when the relevant events in these cases occurred, that is, in 1990. The length of the period must be assessed specifically in relation to the measures concerned. The judgment in *Pinaud Wieger* shows, to my mind, that the Court is making just such a specific assessment in that connection. The Court wished to give the Council a reasonable period to introduce freedom to provide services, bearing in mind the 'features which are special to transport'. [21] As I have already said, I do not think that in the field at issue in these cases

21 — See paragraph 65 of the judgment in *Parliament* v *Council*, cited in note 12 above.

there are any special difficulties — of any kind — which could justify the failure to introduce freedom to provide services.

23. After the expiry of the period, the obligation to achieve freedom to provide services in the field thus defined arises directly from the Treaty provisions relating to transport.

The scope of the obligation is defined in Articles 59 and 60, as interpreted by the Court — see in this connection the reference to the judgment in *Webb* contained in paragraph 64 of the judgment in *Parliament* v *Council*.

24. The obligation, like Articles 59 and 60, is directly applicable.

25. This interpretation is, in my view, correct and indeed unavoidable, since any other conclusion, as Advocate General Darmon said, [22] would cause 'undercurrents inimical to the authority of the judgments of the Court, the rigour with which they must be implemented and, finally, the compliance by the institutions with their obligations'.

The arguments in favour of a restrictive interpretation of Article 61 set out in the preceding section strongly support this conclusion.

26. The fact that the Court stated in paragraph 65 of its judgment in *Parliament* v *Council* that the Council might exercise a 'certain measure of discretion' as regards the means to be employed to introduce freedom to provide services in the field of transport, has no bearing on the field at issue here.

It may be that in other fields there are still valid grounds for allowing the Council a measure of discretion and considering that the reasonable period has not yet expired. That, as I have said, was the view taken in *Pinaud Wieger*, where the Court held that the interests involved in the cabotage sector were so specific that considerable difficulties still stood in the way of the achievement of freedom to provide services in that sphere.

There are no such difficulties over the recognition by Member States of occupational qualifications awarded in other Member States. In that field, there is no doubt about the obligations arising from the Treaty with respect to the achievement of freedom to provide services and there is no conceivable reason why the general provisions of the Treaty in that connection should not apply in relation to transport.

27. The obligation imposed by the Treaty provisions on transport, to ensure freedom to provide services (see Articles 59 and 60) with respect to the recognition of occupational qualifications awarded in other Member States was therefore directly applicable in any case by the time the relevant events in the present cases occurred.

22 — See point 48 of his Opinion in *Pinaud Wieger*, cited in note 20 above.

The consequences of the obligation to ensure freedom to provide services in the field at issue in these cases

28. It follows from the foregoing considerations that national requirements in respect of boatmasters' certificates must be assessed on the basis of the case-law developed by the Court through its interpretation of Articles 59 and 60 of the Treaty.

It follows from that case-law that Articles 59 and 60 of the Treaty require not only the abolition of any discrimination against a provider of services on account of his nationality, but also the abolition of any restriction on the freedom to provide services. [23] The Court has held that the third paragraph of Article 60 of the Treaty, under which the person providing a service may pursue his occupation in the State where the service is provided under the same conditions as are imposed by that State on its own nationals, does not mean

'... that all national legislation applicable to nationals of that State and usually applied to the permanent activities of undertakings established therein may be similarly applied in its entirety to the temporary activities of undertakings which are established in other Member States'. [24]

Of course, some obstacles to the freedom to provide services are not incompatible with Articles 59 and 60. In a series of judgments, the Court has declared as follows:

'However, in view of the specific requirements in relation to certain services, the fact that a Member State makes the provision thereof subject to conditions as to the qualifications of the person providing them, pursuant to rules governing such activities within its jurisdiction, cannot be considered incompatible with Articles 59 and 60 of the Treaty. Nevertheless, as one of the fundamental principles of the Treaty the freedom to provide services may be restricted only by rules which are justified in the general interest and are applied to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established. In addition, such requirements must be objectively justified by the need to ensure that professional rules of conduct are complied with and that the interests which such rules are designed to safeguard are protected'. [25]

29. The requirement to hold a national boatmaster's certificate undoubtedly represents an obstacle to the freedom to provide services. However the interest of safety in inland waterway navigation is incontestably a consideration of general interest which may justify requiring the provider of the service to fulfil certain conditions in respect of qualifications. Whether or not the requirement at issue is compatible with Community law will therefore depend on whether the interest of safety is already protected by the rules to which the provider of the service is subject in the State where he is established

23 — See Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 10, and Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 12.

24 — See *Webb*, cited under point 21 above, paragraph 16, and similar judgments in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 26, and *Commission* v *France*, cited in note 23 above, paragraph 12.

25 — See, *inter alia*, the judgment in *Commission* v *France* ('Tourist guides'), cited above, paragraph 14.

and whether the requirement is objectively necessary to protect that interest.

It is established, according to the case-law of the Court, that the authorities are required to take into account occupational and other qualifications obtained in other Member States for the purpose of determining whether the person concerned may lawfully provide services in the territory of the Member State.

It is also established, according to the case-law of the Court, that a Member State may require a foreign boatmaster to fulfil conditions in respect of qualifications equivalent to the conditions which must be fulfilled for a national boatmaster's certificate to be issued. On the one hand, a Member State's inland waterways may have different characteristics and navigation on those waterways may therefore call for different qualifications. On the other hand, in the absence of harmonization of the conditions for issuing boatmasters' certificates, Member States must in principle have the right to decide for themselves the level of safety they wish to maintain.

30. It appears that under the German rules on the subject, the German authorities require boatmasters to have a German certificate only if the foreign certificate in question is not recognized as equivalent.

In these circumstances, it must be considered whether the German authorities may require the provider of the service to *apply for* recognition that his foreign boatmaster's certificate is equivalent *before* he starts to provide services in the Federal Republic of Germany.

31. If so, then failure to apply for recognition of the foreign certificate means that it is illegal for the provider of the service to navigate on German inland waterways, even if he holds a foreign boatmaster's certificate which might in fact be of equal value to the German certificate. In that case, the German courts may exercise their power to verify whether the authorities have correctly assessed the equivalence of the certificates only if an application for recognition is rejected and the person concerned refers the matter to the courts.

If, on the other hand, it is not possible to require the provider of the service to have previously applied for recognition of his certificate, then the German court hearing criminal proceedings brought against a provider of services holding only a foreign boatmaster's certificate would be called upon to give a specific ruling as to whether the foreign certificate is in fact equivalent to the German one. If it is, the person providing the service would have to be discharged. In these cases, that means that the German court must weigh the arguments advanced by the German authorities to justify their refusal to recognize the equivalence of the Netherlands certificate.

32. The first situation is akin to the current state of the law governing the right of establishment, under which a Member State may require a person who is established to obtain the national certificate of that State or recognition of equivalence for his foreign certificate. [26]

33. The Court's case-law on freedom to provide services, on the other hand, must in my view be interpreted as meaning that the decision as to whether a person providing a service should be required to obtain recognition from the authorities that his occupational qualification is in fact equivalent before exercising his activity in the territory of the Member State concerned will depend on a specific assessment of the nature of the occupation, including the public interest which the conditions governing the qualification are designed to protect.

34. The Court has had occasion to consider situations in which a Member State makes the provision of certain services conditional upon the person concerned holding certain qualifications and does not allow him to pursue the occupation in question until he has obtained permission to do so in the form of a licence or some similar kind of authorization, in the course of which the authorities decide whether the conditions in respect of qualifications are fulfilled.

The case-law of the Court suggests that even to require a provider of services to comply with the conditions in respect of qualifications in force in the Member State concerned may itself be contrary to Community law. [27]

However it is also clear from the case-law of the Court that the considerations of public interest underlying the conditions in respect of qualifications are normally sufficiently powerful to justify the requirement that persons providing services who are subject to the rules of the Treaty should likewise comply with the conditions. Member States are under an obligation, in such cases, to take into account any qualifications the person concerned has already obtained in his country of origin.

35. The question, in such cases, is whether the provider of the service may also be required to apply in advance for authorization in the country in which the service is to be provided, so as to give the authorities of that country an opportunity to decide beforehand whether the person concerned satisfies the conditions in respect of qualifications as a result of having acquired equivalent qualifications in the State in which he is established.

Clearly to require a prior application for recognition that qualifications obtained in the State of establishment are equivalent is in itself an obstacle to the freedom to provide services.

26 — See, for example, the judgment in *Borrell and Others*, cited above in note 10, in which the Court declared, in paragraph 19, that '... the rules of the Treaty on freedom of establishment do not affect the Member States' power to impose criminal penalties in respect of the illegal pursuit by a national of another Member State of a regulated profession, in particular in cases where the Community national has failed to seek verification as to whether the diploma or professional qualification awarded to him in his State of origin is equivalent to that required in the host State, or in cases where such equivalence has not been recognized'.

27 — See judgment in *Commission* v *France* ('Tourist guides'), cited in note 23 above.

It is therefore equally clear that a prior application for recognition may be required only if it fulfils the conditions on which obstacles to the freedom to provide services may be lawful according to the case-law of the Court. [28]

36. It must be emphasized in this connection that the requirement of prior recognition substantially restricts the right of freedom to provide services guaranteed by the Treaty. Since their activities in the host State are by definition temporary, those providing services would regard it as a considerable restriction and one that would be likely, it seems, to hinder the effective exercise of the occupation in question, if they were obliged to seek recognition of their qualifications, with all the delays and expense that would entail, before exercising their occupation.

37. I therefore take the view that persons providing services under the rules of the Treaty may properly be required to seek and obtain recognition of their qualifications before they provide services in the territory of a Member State, only if there is a public interest specifically justifying such a requirement. [29] The considerations of public interest justifying the conditions in respect of qualifications will normally be adequately protected if Member States have the power to impose penalties on providers of services who do not fulfil the required conditions in respect of qualifications.

I consider that in the present case, there is no specific public interest to justify requiring Netherlands boatmasters to apply for recognition for their 'Groot Vaarbewijs II' before providing services in the Federal Republic of Germany.

38. It is therefore for the national court to determine whether holders of the 'Groot Vaarbewijs II' have qualifications which must be regarded as equivalent to those

28 — This view is confirmed by the judgment in Joined Cases 110/78 and 111/78 *Van Wesemael* [1979] ECR 35. In that judgment, the Court interpreted Articles 59 and 60 in order to assess the legality of the Kingdom of Belgium's requirement that a licence be held for the operation of employment agencies for entertainers. The question referred to the Court arose in the context of criminal proceedings against persons charged with infringing Belgian law. The Court held that the requirement to hold a licence is not objectively justified when the person providing the service is established in another Member State and in that State holds a licence issued under conditions comparable to those required by the State in which the service is provided ... (paragraph 30). It was therefore for the national court before which the case was brought to consider whether the licences were in fact equivalent and, where appropriate, to release the providers of services concerned.

29 — I consider this view to be confirmed by the judgment in *Webb*, cited under point 21 above. That case concerned Netherlands legislation governing the provision of manpower. The Court emphasized that that was a 'particularly sensitive matter' and referred to 'differences there may be in conditions on the labour market between one Member State and another ... and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature'. On those grounds, the Court declared in paragraph 21 that 'Article 59 does not preclude a Member State which requires agencies for the provision of manpower to hold a licence from requiring a provider of services established in another Member State and pursuing such activities on the territory of the first Member State to comply with that condition even if he holds a licence issued by the State in which he is established, provided however that in the first place ... the Member State ... and in the second place that it takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established'.

which applicants need to qualify for a German boatmaster's certificate. [30]

39. In the light of the foregoing considerations, I propose that the Court should rule that the obligation to ensure freedom to provide services as it applies in the field of transport means that a Member State may not require a provider of services to obtain a boatmaster's certificate in that State if he holds a boatmaster's certificate issued by another Member State on conditions similar to those imposed in the Member State in whose territory the service is provided and if his qualifications must consequently be regarded as equivalent to those needed to qualify for boatmasters' certificates in that State. The provider of services may not be required in this connection to obtain from the Member State in advance recognition that his boatmaster's certificate is equivalent.

Conclusion

40. I therefore propose that the Court give the following answer to the questions submitted by the national court:

30 — Attention should be drawn in this connection to the Netherlands Government's statement that the highest qualifications are required to obtain the Netherlands certificate, the 'Groot Vaarbewijs II', since it entitles holders to sail all types of vessel. Also, as already mentioned, the Netherlands Government argues that there is no objective reason for not authorizing navigation on the German canals at issue in the present case, since they are broadly comparable to Netherlands inland waterways.
The German Government, on the other hand, contends that the German legislation makes provision for the recognition of foreign certificates and that there had in fact been negotiations with the Netherlands Government on the subject of recognition for Netherlands boatmasters' certificates. The German Government had not felt able to grant such recognition at the time, since it considered that the Netherlands rules governing the issue of boatmasters' certificates did not offer sufficient guarantees, if only because the requirement to hold a valid certificate had been in existence only since 1 April 1991 and certain transitional arrangements applicable up to 1984 had enabled boatmen to obtain a master's certificate simply by declaring that they fulfilled the required conditions in respect of aptitude and experience.
I consider it to be of decisive importance in this case that Directive 91/672 recognizes the Netherlands 'Groot Vaarbewijs II' as valid for a number of German waterways. In the light of that fact, the German Government's arguments appear somewhat unconvincing.

Article 76 of the Treaty precludes a Member State from amending its legislation in such a way as to place boatmasters of other Member States in a less favourable situation, as compared with its own boatmasters, than was the case under the rules applicable when the Treaty came into force.

Article 76 of the Treaty also precludes a Member State from changing the way in which it implements the rules in question in such a way as to prevent boatmasters holding navigation certificates issued in other Member States from navigating on the inland waterways of the Member State in question, as they did previously, unless they also hold a master's certificate issued by that Member State.

The obligation to ensure freedom to provide services as it applies in the field of transport means that a Member State may not require a provider of services to obtain a boatmaster's certificate in that State if he holds a boatmaster's certificate issued by another Member State on conditions similar to those imposed in the Member State in whose territory the service is provided and his qualifications must consequently be regarded as equivalent to those needed to qualify for boatmasters' certificates in that State. The provider of services may not be required in this connection to obtain from the Member State in advance recognition that his boatmaster's certificate is equivalent.