ECLI:EU:C:2021:550

JUDGMENT OF THE COURT (Fourth Chamber)

8 July 2021 (*)

(Reference for a preliminary ruling – Articles 49 and 54 TFEU – Freedom of establishment – National legislation requiring third-country nationals employed on a vessel flying the flag of a Member State to hold a work permit in that Member State – Exemption covering vessels that call at the Member State's port no more than 25 times in a one-year period – Restriction – Article 79(5) TFEU – National legislation aimed at fixing the volumes of admission of third-country nationals coming from third countries to the territory of the Member State concerned in order to seek work, whether employed or self-employed)

In Case C-71/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Østre Landsret (High Court of Eastern Denmark, Denmark), made by decision of 10 February 2020, received at the Court on 12 February 2020, in the criminal proceedings against

VAS Shipping ApS,

THE COURT (Fourth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, N. Piçarra, D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: G. Hogan,

Registrar: C. Strömholm,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– VAS Shipping ApS, by M. Clemmensen, advokat,

– the Danish Government, by J. Nymann-Lindegren and M. Jespersen and by S. Wolff, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and M. Noort, acting as Agents,

– the European Commission, by L. Armati and by S.L. Kalėda and H. Støvlbæk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 June 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in criminal proceedings brought against VAS Shipping ApS for having employed on board vessels flying the Danish flag third-country national seafarers who do not hold a Danish work permit and are not exempt from the requirement to hold that permit.

Legal context

3 Paragraph 13(1) of the Udlændingeloven (Law on foreign nationals), in the version resulting from the lovbekendtgørelse nr. 1061 (Codifying Decree No 1061), of 18 August 2010 ('the Law on foreign nationals'), was worded as follows:

'A foreign national shall have a work permit to take paid or unpaid employment, to be a self-employed person or in order to provide services for consideration or otherwise in Denmark. A work permit shall also be required for employment on a Danish vessel or aircraft which, as part of regular services or otherwise, calls regularly at Danish ports or airports. Exemptions are, however, provided for in Article 14.

…'

4 Under Paragraph 59(4) and (5) of the Law on foreign nationals:

'4. Any person who employs a foreign national without the required work permit or in breach of the conditions laid down for a work permit shall be liable to a fine or a term of imprisonment of up to two years.

5. The fact that the infringement was committed deliberately or as a result of gross negligence, that a financial gain was obtained or sought by the infringement for the person concerned himself or for others, or that the foreign national does not have the right to reside in Denmark shall be regarded as an aggravating circumstance in determining the penalty under subparagraph 4.'

5 It follows from Paragraph 61 of that law that a legal person, in particular a company, may incur criminal liability.

6 Paragraph 33(4) of bekendtgørelse nr. 270 om udlændinges adgang her til landet (Regulation No 270 on foreign nationals' access to Denmark) of 22 March 2010, in the version applicable to the facts in the main proceedings ('the Regulation on foreign nationals'), provided:

‘The following foreign nationals shall be exempted from the work permit requirement:

…

4. personnel on Danish cargo vessels in international traffic which enter Danish ports on no more than 25 occasions, calculated continuously over the previous year, irrespective of the calendar year, where a work permit is required for that purpose, under the second sentence of Paragraph 13(1) of the Law on foreign nationals.

…’

7 Paragraph 103 of the Søloven (Law on shipping), in the version applicable to the dispute in the main proceedings (‘the Law on shipping’), provides:

‘1. A managing owner shall be selected for a vessel owned by part owners.

2. A natural person, a limited liability company or a partnership which satisfies the conditions laid down in Paragraph 1(2)(1) and (3) respectively may be selected as managing owner.’

8 Under Paragraph 104 of the Law on shipping:

‘In relation to third parties, the managing owner shall, by virtue of his or its capacity, be entitled to conclude any legal transactions normally concluded by a shipping company. The managing owner may therefore engage, dismiss and instruct the master, take out ordinary insurance, and receive monies paid to the shipping company. The managing owner shall not, without special authorisation, sell or mortgage the vessel or charter out the vessel for more than one year.’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Four part-owned companies established in Sweden, comprising various public limited companies incorporated under Swedish law, registered four vessels in the *Dansk Internationalt Skibsregister* (Danish International Register of Shipping) in order to pursue their maritime transport activities in Denmark. As required by Paragraph 103 of the Law on shipping, they designated VAS Shipping, a limited liability company governed by Danish law, as the managing owner with authority to conclude, pursuant to Paragraph 104 of that law, all the legal transactions normally involved in shipping. VAS Shipping is 100% owned by Sirius Rederi AB, a company incorporated under Swedish law.

10 VAS Shipping is being prosecuted before the Danish courts for infringement of Paragraph 59(4) of the Law on foreign nationals, read in conjunction with subparagraph 5 of that paragraph, Paragraph 61 of that law and Paragraph 33(4) of the Regulation on foreign nationals. According to the Public Prosecutor’s Office, as managing owner, VAS Shipping allowed, in the period from 22 August 2010 to 22 August 2011, the four vessels at issue in the main proceedings to call at Danish ports more than 25 times, although third-country workers who did not hold a work permit in Denmark were on board and were not exempt from the requirement to hold such a permit under the Law on foreign nationals.

11 By judgment of 4 May 2018, the Retten i Odense (Odense District Court, Denmark) ordered VAS Shipping to pay a fine of 1 500 000 Danish Kroner (DKK) (approximately EUR 201 407) in respect of that infringement. In support of its decision, that court held that the Danish legislation, in so far as it lays down an obligation to hold a work permit, applicable without discrimination on

grounds of nationality, constitutes a restriction on the freedom of establishment enshrined in Article 49 TFEU, read in conjunction with Article 54 TFEU. However, the Retten i Odense (Odense District Court) found that that restriction was justified by overriding reasons in the public interest, linked to the stability of the Danish labour market and that it did not go beyond what was necessary in order to attain the objective pursued. According to that court, in view of the difference in salary levels between third-country nationals who are crew members of a vessel and Danish workers, the requirement of a work permit is an effective and appropriate means of avoiding disturbances on the national labour market.

12 VAS Shipping appealed against the judgment of the Retten i Odense (Odense District Court) to the referring court, the Østre Landsret (High Court of Eastern Denmark, Denmark).

13 It is common ground between the parties to the main proceedings that the work permit requirement, laid down in Paragraph 13(1) of the Law on foreign nationals, in conjunction with Paragraph 33(4) of the Regulation on foreign nationals, amounts to a restriction on the freedom of establishment enshrined in Article 49 TFEU. However, while the Public Prosecutor's Office takes the view that that restriction is compatible with EU law, VAS Shipping submits that that national legislation requires shipowners from other countries of the European Union to change their recruitment policy, without it being necessary to safeguard the public interest objective pursued.

14 The referring court notes that the Court has already ruled on the criteria to take into account in assessing the proportionality of the restrictions imposed on an employer as regards his or her choice of workers. That case-law concerns the rules on the freedom to provide services. It is therefore not clear whether it can be applied to the assessment of whether Danish legislation which, in certain circumstances, requires employers from other Member States to employ workers who have a Danish work permit complies with EU law, and more particularly with the freedom of establishment enshrined in Article 49 TFEU.

15 In those circumstances, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 49 TFEU preclude legislation of a Member State which requires third-country crew members on a vessel flagged in a Member State and owned by a shipowner who is a national of another EU Member State to have a work permit, unless the vessel enters ports of the Member State on at most 25 occasions calculated continuously over the previous year?'

Consideration of the question referred

16 By its question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding legislation of a first Member State which provides that third-country national crew members of a vessel flying the flag of that Member State and owned, directly or indirectly, by a company whose registered office is in a second Member State, must hold a work permit in that first Member State, unless the vessel concerned has called at ports in the first Member State no more than 25 times in one year.

17 In that regard, it must be noted, first, that freedom of establishment, which Article 49 TFEU grants to nationals of the Member States and which includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central

administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 45 and the case-law cited).

18 Freedom of establishment thus covers, in particular, the situation where a company established in a Member State creates a subsidiary in another Member State. The same is true, in accordance with settled case-law, where such a company or a national of a Member State acquires a holding in the capital of a company established in another Member State allowing it or him to exert a definite influence on the company's decisions and to determine its activities (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 46 and the case-law cited).

19 Second, according to the settled case-law of the Court, the definition of 'establishment' within the meaning of Articles 49 and 54 TFEU involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period and registration of a vessel cannot be separated from the exercise of the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes fixed establishment in the State of registration (see, to that effect, judgments of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraphs 20 to 22, and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraph 70).

20 It follows, as the Advocate General observed in point 38 of his Opinion, that Articles 49 and 54 TFEU are applicable in a situation such as that in the main proceedings, in so far as four part-owned Swedish companies have registered four vessels in the Danish International Register of Shipping, have designated a company established in Denmark and wholly owned by a Swedish company as the managing owner of the vessels, and use the vessels in question to pursue an economic activity.

21 It is in the light of those clarifications that it must be determined whether the legislation of a Member State, such as that at issue in the main proceedings, constitutes a 'restriction' within the meaning of the first paragraph of Article 49 TFEU.

22 It must be borne in mind that, according to the settled case-law of the Court, the concept of 'restriction' within the meaning of the first paragraph of Article 49 TFEU covers, in particular, measures which, even though they are applicable without discrimination on grounds of nationality, are liable to impede the exercise of freedom of establishment or render it less attractive (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 48 and the case-law cited).

23 Actual exercise of freedom of establishment entails, in particular, as a necessary adjunct to that freedom, that the subsidiary, agency or branch set up by a legal person established in another Member State must be able, where relevant, and if the activity which it proposes to carry out in the host Member State so requires, to take on workers in that Member State (judgment of 21 December 2016, *AGET Iraklis*, C-201/15, EU:C:2016:972, paragraph 52 and the case-law cited).

24 However, it must be borne in mind that the question referred concerns the legislation of a Member State which relates to the conditions of employment, on board vessels flying the flag of that Member State, of third-country nationals and, more specifically, their obligation to hold a work permit.

25 It is apparent from Article 79(5) TFEU that Member States retain the right to determine volumes of admission of third-country nationals coming from third countries to their territory in

order to seek work, whether employed or self-employed. For the purposes of applying that provision, the flag State of a vessel must be considered to be the State in which a third-country national working on board that vessel is employed (see, by analogy, judgment of 5 February 2004, *DFDS Torline*, C-18/02, EU:C:2004:74, paragraph 44).

26 In that regard, the requirement that third-country nationals hold a work permit for the purpose of employment in a Member State is, as the Danish Government submitted in its written observations, a measure intended to regulate the conditions of access to work and to residence of third-country nationals on the national territory. Such an obligation enables, in that respect, the Member States to monitor the volumes of third-country nationals entering their territory with a view to seeking employment.

27 Therefore, a Member State is entitled to provide that third-country nationals employed on its territory, including on a vessel registered in that Member State, must obtain a work permit, providing also, where appropriate, for exemptions from that requirement.

28 It is true that, according to settled case-law of the Court, the powers retained by the Member States must be exercised consistently with EU law (judgments of 25 July 1991, *Factortame and Others*, C-221/89, EU:C:1991:320, paragraph 14, and of 19 June 2014, *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 23), in particular the fundamental freedoms guaranteed by the FEU Treaty, including freedom of establishment (judgment of 15 October 2015, *Grupo Itevelesa and Others*, C-168/14, EU:C:2015:685, paragraph 64 and the case-law cited).

29 The fact remains that legislation of a Member State, applicable without distinction to all vessels flying the flag of that State, which, in accordance with Article 79(5) TFEU, lays down an obligation, for all third-country nationals employed as crew members of such vessels, to have a work permit, while exempting from that requirement crew members of such vessels who, in the course of a year, call at the ports of that Member State no more than 25 times, cannot be classified as a '[restriction] on the freedom of establishment', within the meaning of the first paragraph of Article 49 TFEU and, accordingly, as being incompatible with that provision.

30 It is true that such a provision may place a company established in a first Member State which then establishes itself in a second Member State in order to operate a vessel flying the flag of that second Member State in a less favourable position than that of companies operating, in the second Member State, vessels flying the flag of another Member State and whose legislation does not impose a similar obligation.

31 However such adverse consequences stem from possible differences in the application, by each Member State, of the right, which the Member States are expressly granted in Article 79(5) TFEU, to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work (see, by analogy, judgment of 14 April 2016, *Sparkasse Allgäu*, C-522/14, EU:C:2016:253, paragraph 25 and the case-law cited).

32 In view of all the foregoing considerations, the answer to the question referred is that Article 49 TFEU, read in the light of Article 79(5) TFEU, must be interpreted as not precluding legislation of a first Member State which provides that crew members, who are third-country nationals, of a vessel flying the flag of that Member State and owned, directly or indirectly, by a company with its head office in a second Member State must hold a work permit in that first Member State, unless the vessel concerned has made no more than 25 calls to ports in the first Member State in one year.

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 49 TFEU, read in the light of Article 79(5) TFEU, must be interpreted as not precluding legislation of a first Member State which provides that crew members, who are third-country nationals, of a vessel flying the flag of that Member State and owned, directly or indirectly, by a company with its head office in a second Member State must hold a work permit in that first Member State, unless the vessel concerned has made no more than 25 calls to ports in the first Member State in one year.

[Signatures]

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* Language of the case: Danish.