JUDGMENT OF THE COURT (Second Chamber)

21 October 2004 *

In Case C-288/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 August 2002,

Commission of the European Communities, represented by K. Simonsson and M. Patakia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by E.-M. Mamouna, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans (Rapporteur), President of the Chamber, C. Gulmann and R. Schintgen, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 March 2004,

after considering the observations submitted by the parties,

after hearing the Opinion of the Advocate General at the sitting on 19 May 2004.

gives the following

Judgment

1 By its application, the Commission of the European Communities has brought an action for a declaration that:

— by expressly conferring the right to carry passengers between Greek mainland ports solely upon Greek passenger ships and the right to carry out tours with passenger ships exceeding 650 gt between Greek islands solely upon Greek passenger ships;

— by requiring from Community ships entered in a second or international register a certificate issued by the competent authority of the flag State declaring that that ship is authorised to provide cabotage services;

— by considering that the Peloponnese constitutes an island;

— by applying to Community tankers, freighters, passenger ships and tourist ships, and to Community cruise liners which carry out maritime transport by way of cabotage its national rules as host State relating to manning conditions, and requiring the shipowners to submit an application to the Department for the Supervision of Merchant Ships (DEEP) for measurement of the gross tonnage of the ship, in order for the Greek authorities to calculate the composition of the crew,

the Hellenic Republic has failed to fulfil its obligations under Articles 1, 3 and 6 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7) ('the Regulation').

Relevant provisions

Community legislation

2 Article 1(1) of the Regulation states:

'As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have

their ships registered in, and flying the flag of, a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State, including ships registered in euros, once that Register is approved by the Council.'

3 Article 2 of the Regulation provides:

'For the purposes of this Regulation:

1. "maritime transport services within a Member State (maritime cabotage)" shall mean services normally provided for remuneration and shall in particular include:

(a) "mainland cabotage": the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands;

...

(c) "island cabotage": the carriage of passengers or goods by sea between:

— ports situated on the mainland and on one or more of the islands of one and the same Member State,

— ports situated on the islands of one and the same Member State;

Ceuta and Melilla shall be treated in the same way as island ports;

... '

4 Under Article 3 of the Regulation:

'1. For vessels carrying out mainland cabotage and for cruise liners, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State), except for ships smaller than 650 gt, where host State conditions may be applied.

2. For vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State).

...'

5 Article 6 of the Regulation provides:

'1. By way of derogation, the following maritime transport services carried out in the Mediterranean and along the coast of Spain, Portugal and France shall be temporarily exempted from the implementation of this Regulation:

— cruise services, until 1 January 1995,

— transport of strategic goods (oil, oil products and drinking water), until 1 January 1997,

— services by ships smaller than 650 gt, until 1 January 1998,

— regular passenger and ferry services, until 1 January 1999.

2. By way of derogation, island cabotage in the Mediterranean and cabotage with regard to the Canary, Azores and Madeira archipelagoes, Ceuta and Melilla, the French islands along the Atlantic coast and the French overseas departments shall be temporarily exempted from the implementation of this Regulation until 1 January 1999.

3. For reasons of socioeconomic cohesion, the derogation provided for in paragraph 2 shall be extended for Greece until 1 January 2004 for regular passenger and ferry services and services provided by vessels less than 650 gt.'

6 Under Article 9 of the Regulation:

'Before adopting laws, regulations or administrative provisions in implementation of this Regulation, Member States shall consult the Commission. They shall inform the latter of any measures thus adopted.'

7 Article 10 of the Regulation provides:

'The Commission shall submit to the Council, before 1 January 1995, and thereafter every two years, a report on the implementation of this Regulation and, if appropriate, shall also put forward any necessary proposals.'

National legislation

8 The Ipourgio Emborikis Naftilias (Ministry of the Merchant Navy) published three circulars addressed to the inland port authorities in August and December 1998.

9 Circular No 1151.65/1/98 of 4 August 1998 entitled 'Activities of cargo vessels and tankers flying Community flags which carry out maritime cabotage' states that the Regulation forms an integral part of Greek legislation and prevails over any conflicting provision. Furthermore, point 2.1.1 of that circular lists the ports of the Peloponnese as island ports.

10 Point 2.1.2 provides that, in order to be able to carry out cabotage in Greek waters, an operator using vessels entered in a second register or international register is required to furnish proof that the vessel in question is able to carry out transport activities in the flag country of origin.

11 Circular No 1151.65/2/98 of 18 December 1998 entitled 'Activities of passenger and tourist vessels and cruise liners flying Community flags which operate tours (cruises) in Greek waters' repeats the provisions of the previous circular so far as concerns the Peloponnese. Point 2.4.1 states:

'In general, Greek legislation (as the legislation of the host State) is to apply to the composition of the crews of Community passenger and tourist vessels and cruise liners which are authorised to carry out cruises between mainland ports and the islands or between island ports of our country, whilst the legislation of the flag State is to apply to cruises between ports situated on the mainland.'

12 Circular No 2311.10/10/98 of 21 December 1998 entitled 'Manning of cargo vessels, tankers and cruise liners flying Community flags which carry out maritime cabotage' provides for the application of the provisions of the Greek navy as far as concerns manning conditions.

Pre-litigation procedure

13 After a first exchange of correspondence concerning the implementation of the Regulation by the Hellenic Republic after 1 January 1999 and taking the view that the latter had not fulfilled all the obligations flowing from that regulation, the Commission sent the Hellenic Republic a letter of formal notice on 3 May 2000, to which the Hellenic Republic replied by letter of 28 July 2000.

14 Believing the reply given and the information received at a work session organised on 16 February 2001 to be unsatisfactory, on 18 July 2001 the Commission sent the Hellenic Republic a reasoned opinion, to which the latter replied by letter of 12 October 2001.

15 Taking the view that the measures necessary to comply with the obligations arising from the Regulation had not been taken by the Greek authorities, the Commission decided to bring the present action.

Substance

16 In the light of certain clarifications provided by the Greek Government, the Commission withdrew the second part of the fourth complaint in the reply and the first complaint at the hearing.

17 In the light of that withdrawal, only the Commission's second and third complaints and the first part of the fourth complaint will be examined.

The second complaint

Arguments of the parties

18 The Commission is of the opinion that, by requiring from Community ships entered in a second or international register a certificate issued by an authority of the flag State declaring that that ship is authorised to provide cabotage services, the Greek authorities are creating an obstacle to freedom to provide services.

19 Even if it is accepted that that restriction is justified by an overriding reason in the general interest, according to the Commission it constitutes a disproportionate measure going beyond what is strictly necessary to attain the objective sought.

20 The same result could be achieved by less restrictive means, such as an obligation to submit a copy of the legislation of the Member State authorising ships entered in an international register to provide inland services, or an annual communication of information to national authorities by their counterparts in the other Member States on the development of legislation in the maritime sector. Where there is uncertainty, the Greek authorities could also question the Commission in that regard.

21 In addition, the reports published every two years by the Commission for the attention of the Member States in accordance with Article 10 of the Regulation are a useful tool for checking whether the legal requirements for carrying out cabotage services in the flag State are fulfilled.

22 Moreover, their effectiveness is increased by the Commission's undertaking to regularly inform the Member States of national legislative amendments relating to second registers, including those occurring between two reports, in so far as those amendments have been notified to the Commission pursuant to Article 9 of the Regulation.

23 The Greek Government states that in some Member States there are registers called, inter alia, second registers or international registers, in which ships are registered which cannot necessarily provide cabotage services within those Member States. Therefore, for the purposes of applying Article 1 of the Regulation correctly, the host State must satisfy itself that the ship wishing to carry out cabotage fulfils the conditions required to carry out cabotage in the flag State.

24 As regards ships, it disputes that there are measures which are less restrictive of freedom to provide services than the obligation to provide a certificate issued by the flag State declaring that the conditions required to carry out cabotage in that State are fulfilled.

25 Regarding Article 9 of the Regulation, the Greek Government observes that that provision refers to the Member States informing the Commission and not the other way around. That provision does not therefore really provide for continuous information by the Commission to the Member States.

26 As regards the report which must be drawn up under Article 10 of the Regulation, the Greek Government maintains that it is published over a year after expiry of the two-year period it covers. It follows that legislative amendments introduced at a certain time in a Member State making cabotage within that State possible are communicated to the other Member States by means of such a report only after a considerable delay.

27 Therefore, its certificate system is more consistent with freedom to provide services as it makes possible immediate notification of a legislative amendment made in another Member State.

28 Furthermore, the solution proposed by the Commission involving the submission of a copy of the legislation of the Member State authorising ships entered in international registers to carry out cabotage in that Member State is not proportionate to the objective sought. On the contrary, that solution is more complex, since the legislation must be translated in its entirety by an official authority and submitted to the port authorities of the host State.

Findings of the Court

29 It should be noted that Article 1 of the Regulation clearly establishes the principle of freedom to provide maritime cabotage services within the Community (Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 20).

30 A national measure which requires from Community ships entered in a second or international register a certificate issued by the competent authority of the flag State declaring that that ship is authorised to provide cabotage services is liable to impede or render less attractive the provision of those services and therefore constitutes a restriction on the freedom to provide them (see, to that effect, *Analir*, cited above, paragraph 22).

31 As regards the admissibility of that restriction, it should be noted, first, that the wording of Article 1(1) of the Regulation does not itself provide any indication as to whether a certificate may be demanded in order to determine whether, as that

provision requires, a ship complies with all conditions for carrying out cabotage in the flag State (see, to that effect, *Analir*, cited above, paragraph 24).

32 Secondly, it is important to note that freedom to provide services, as a fundamental principle of the EC Treaty, may be restricted only by rules which are justified by overriding reasons in the general interest and are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, the national legislation in question must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it (see *Analir*, cited above, paragraph 25, and case-law cited).

33 The Commission's second complaint falls within that context of the proportionality of the national legislation in question. The Commission complains that the Hellenic Republic requires from Community ships a certificate issued by the flag State while there are measures less restrictive of freedom to provide services in order to attain the objective, which is to determine whether that ship complies with all conditions for carrying out cabotage in that State.

34 However, as the Advocate General explains in paragraphs 27 to 37 of his Opinion, the alternative solutions proposed by the Commission either do not serve to fully attain the objective sought or in practice turn out to be more complex or more restrictive of freedom to provide services than the certificate system currently in existence.

35 In those circumstances, the Commission, which has the burden of proof in proceedings for failure to fulfil obligations (see, inter alia, Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 102, and case-law cited), has not been able to show that the Hellenic Republic, by requiring that certificate, has failed to fulfil its obligations under the Regulation.

36 It follows that the second complaint should be dismissed.

The third complaint

Arguments of the parties

37 The Commission submits that the Greek authorities wrongly contend, relying only on the etymology of the name, that the Peloponnese constitutes an island, thereby artificially extending the derogation in Article 6(3) of the Regulation to maritime cabotage services between the ports of the Peloponnese and between the ports situated on the mainland and the ports of the Peloponnese.

38 It notes that the Peloponnese was formerly linked to the Greek mainland, from which it was separated by a man-made canal. In addition, communication between the Peloponnese and Greece is by means of a railway line and a national road above the Corinth Canal.

39 The Greek Government submits that the Regulation applies criteria other than the fact of actually being surrounded by water for ports to be regarded as island ports. It refers in that connection to Ceuta and Melilla which are regarded as island ports by Article 2(1)(c) of the Regulation, although they are clearly mainland ports in so far as they are situated on the coast of mainland Africa.

40 Moreover, citing Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, the Greek Government contends that the decisive criterion for determining whether or not a geographic area constitutes an island lies in a statistical analysis of trade carried out by sea.

41 Finally, in the light of the spirit of tolerance and understanding towards certain economies in the Community having particular characteristics, shown by both the preamble to the Regulation and Article 6(3) of the Regulation which provides for a derogation for Greece for reasons of socioeconomic cohesion, that derogation should also be applied to the Peloponnese.

Findings of the Court

42 Since the Regulation does not contain a definition of the term 'island', resort must be had to the common meaning of that term under which an island is defined, in a maritime context, as an area of dry land elevated permanently from the sea.

43 As the Advocate General observes in paragraph 44 of his Opinion, there is no doubt that the Peloponnese is, from a geographical point of view, a peninsula. It was separated from the rest of Greece only by a man-made canal a few tens of metres wide. In those circumstances, it cannot be classified as an island for the purpose of the Regulation.

44 Nor does the fact that Article 2 of the Regulation puts the ports of Ceuta and Melilla in the category of island ports run counter to such an interpretation.

45 Those two ports constitute island ports solely because they have been categorised as island ports by Article 2 of the Regulation. They are not island ports by nature. Therefore, a comparison between Ceuta and Melilla, on the one hand, and the ports of the Peloponnese, which have not been categorised as island ports by Article 2 of the Regulation, on the other, invalidates rather than bears out the argument of the Greek Government that the Peloponnese constitutes an island.

46 Moreover, as the Advocate General maintains in paragraph 45 of his Opinion, although in relation to mainland Africa the ports of those towns are mainland ports, the fact remains that in relation to mainland Europe and in particular to the Iberian peninsular, those ports are comparable to island ports because they have no land links with Spain.

47 As far as concerns the judgment referred to by the Greek Government in *Italy and Sardegna Lines* v *Commission*, cited above, it suffices to state that in that case the Court did not express a view on the term 'island'.

48 Finally, the broad interpretation of Article 6(3) of the Regulation which the Greek Government suggests is at odds with the fact that that provision, as a derogation from the general rules provided for by the Regulation on freedom to provide maritime transport services within a Member State, must be interpreted strictly.

49 It follows from the foregoing that the Commission's third complaint is well founded.

The first part of the fourth complaint

Arguments of the parties

50 At the hearing, the Commission made it clear that the first part of the fourth complaint relates solely to the fact that, under point 2.4.1 of Circular No 1151.65/2/98, the Greek legislation on the manning of ships applies to Community cruise liners exceeding 650 gt which carry out island cabotage.

51 It contends that the provision cited above infringes Article 3(1) of the Regulation, which provides that all matters relating to manning are to be the responsibility of the flag State, except for ships smaller than 650 gt, where host State conditions may be applied. According to the Commission, it is apparent from the wording of that provision that it applies to all cruise liners whether they carry out mainland cabotage or island cabotage.

52 The Greek Government takes the view that, under Article 3(2) of the Regulation, all matters relating to manning, for all categories of ships carrying out cabotage between island ports, including cruise liners, are the responsibility of the host State.

Findings of the Court

53 As follows from the wording of Article 3(1) of the Regulation, that provision applies to vessels carrying out mainland cabotage and to cruise liners. Article 3(2) applies to vessels carrying out island cabotage.

54 It follows that the absence of any classification of 'cruise liners' in Article 3(1) of the Regulation means that that provision applies to all cruise liners, irrespective of the nature of the cabotage they carry out.

55 That interpretation is borne out by the fact that, as the Advocate General notes in paragraph 54 of his Opinion, if cruise liners carrying out island cabotage were to be regarded as being covered by Article 3(2) of the Regulation, the reference to cruise liners in Article 3(1) would no longer have any meaning since the words 'vessels carrying out mainland cabotage' already cover cruise liners carrying out that type of cabotage.

56 Therefore, as regards cruise liners exceeding 650 gt which carry out island cabotage, all matters relating to manning are the responsibility of the flag State. Since point 2.4.1 of Circular No 1151.65/2/98 provides the contrary, the Hellenic Republic has failed to fulfil its obligations under the Regulation.

57 It follows that the first part of the fourth complaint is well founded.

Costs

58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. However, under the first paragraph of Article 69(3), the Court may order that the parties bear their own costs where each party succeeds on some and fails on other heads. Since the Commission and the Hellenic Republic have been partially unsuccessful, the parties must be ordered to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by regarding the Peloponnese as an island and applying to Community cruise liners exceeding 650 gt which carry out island cabotage its national rules as host State on manning conditions, the Hellenic Republic has failed to fulfil its obligations under Articles 1, 3 and 6 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage);**

2. **Dismisses the remainder of the action;**

3. **Orders each party to bear its own costs.**

Signatures.