OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 8 December 2005 [1]

I — Introduction

1. The question referred by the Tribunale Amministrativo Regionale per la Sicilia [2] concerns the scope of the freedom to provide services in maritime cabotage.

2. The referring court asks the Court for information on whether island cabotage [3] carried out by cargo vessels with a gross tonnage (gt) greater than 650 is governed by the provisions concerning the manning of vessels contained in the legislation of the flag State or of the State in which the island cabotage takes place if the cabotage voyage immediately follows or precedes an international voyage without cargo. This question appears to be technical, but is of considerable importance for the maritime transport sector, [4] which accounted for some 41% of transport operations within the Community in 2002 and so almost equalled the leader, road transport. [5]

3. The referring court considers the answer to the question necessary for a ruling in an action which Agip Petroli SpA (hereinafter 'Agip Petroli') has brought against the Capitaneria di porto di Siracusa (the Port of Syracuse Harbour Office) and others. In the proceedings Agip Petroli objects inter alia to a decision refusing it permission to transport crude oil between two Sicilian ports on the grounds that the vessel concerned was then to proceed to a foreign port and the crew of the vessel did not meet the requirements of Italian law.

1 — Original language: German.

2 — The Regional Administrative Court for Sicily, Italy.

3 — Island cabotage is *inter alia* the carriage of passengers or goods by sea between ports situated on the islands of one and the same Member State; see paragraph 8 of this Opinion.

4 — See the Commission's Third Report on the implementation of Council Regulation No 3577/92 applying the principle of freedom to provide services to maritime cabotage (1997–1998), 24 February 2000, COM(2000) 99 final.

5 — See European Commission, European Union — Energy & Transport in Figures 2004 ('Statistical Pocketbook 2004'), Part3(Transport),Chapter3.1(General),Section3.1.1(Statistical overview EU transport), accessible from http://europa.eu.int/comm/dgs/energy_transport/figures /pocketbook/2004_en.htm

II — Legislative background

4. The relationship between the Treaty rules on the freedom to provide services and those concerning the transport sector is determined by Article 51(1) EC (formerly Article 61 of the EC Treaty):

'Freedom to provide services in the field of transport shall be governed by the provisions of the title relating to transport.'

5. In the title relating to transport Article 80 EC (formerly Article 84 of the EC Treaty) provides:

'1. The provisions of this title shall apply to transport by rail, road and inland waterway.

2. The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport. ...'

6. On the basis of Article 84(2) of the EC Treaty the Council adopted on 7 December 1992 Regulation No 3577/92 applying the principle of freedom to provide services to maritime transport within the Member States (maritime cabotage) [6] (hereinafter 'the Regulation'). The recitals in the preamble to the Regulation provide inter alia:

'[3] ... the abolition of restrictions on the provision of maritime transport services within Member States is necessary for the establishment of the internal market; ... the internal market will comprise an area in which the free movement of goods, persons, services and capital is ensured;

[4] ... therefore freedom to provide services should be applied to maritime transport within Member States;

[5] ... the beneficiaries of this freedom should be Community shipowners operating vessels registered in and flying the flag of a Member State whether or not it has a coastline;

6 — OJ 1992 L 364, p. 7.

[6] ...

[7] ... in order to avoid distortion of competition, Community shipowners exercising the freedom to provide cabotage services should comply with all the conditions for carrying out cabotage in the Member State in which their vessels are registered; ... Community shipowners operating ships registered in a Member State who do not have the right to carry out cabotage in that State should nevertheless be beneficiaries of this Regulation during a transitional period;

[8] ... the implementation of this freedom should be gradual and not necessarily provided for in a uniform way for all services concerned, taking into account the nature of certain specific services and the extent of the effort that certain economies in the Community showing differences in development will have to sustain'.

7. Article 1(1) of the Regulation lays down the following principle:

'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 ...'

8. Article 2 of the Regulation includes the following definitions:

'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: ...

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

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

...'

9. Finally, Article 3 of the Regulation provides:

'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).

3. However, from 1 January 1999, for cargo vessels over 650 gt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State).

4. The Commission shall make an in-depth examination of the economic and social impact of the liberalisation of island cabotage and shall submit a report to the Council before 1 January 1997 at the latest.

...'

III — Facts of the case, main action, questions referred and proceedings before the Court

10. On 7 December 2001 Agip Petroli had crude oil to transport from Magnisi (Sicily) to Gela (also in Sicily) and, to this end, chartered the *Theodoros IV*, a tanker of more than 650 gt sailing under the Greek flag. After unloading its cargo of crude oil at Gela, the *Theodoros IV* was to sail on without cargo directly to a foreign port.

11. On 6 December 2001 the Port of Syracuse Harbour Office refused Agip Petroli permission to sail from Magnisi to Gela on the ground that the *Theodoros IV*, did not meet the requirements of Article 318 of the Italian Shipping Code (Codice della navigazione). It maintained that that provision required the crews of vessels engaged in

island cabotage to consist solely of seamen who were nationals of Member States of the European Union. As permitted by Greek law, however, the *Theodoros IV*, had on board a number of seamen who were nationals of the Philippines.

12. The Port of Syracuse Harbour Office did not consider the law of the flag State, Greece, to be applicable, arguing that, although Article 3(3) of the Regulation provided for the flag State to be responsible for matters relating to manning when an island cabotage voyage preceded a voyage to another State, a circular issued by the Italian Ministry of Transport and Shipping held that Article 3(3) of the Regulation was applicable only if the voyage following or preceding a cabotage voyage was 'functionally and commercially autonomous'. This was the case only where the vessel was sailing with cargo on board and the destination of the voyage was a foreign port.

13. Agip Petroli saw the Port of Syracuse Harbour Office's refusal inter alia as an infringement of the Regulation and brought an action before the referring court both against the decision and against the ministerial circular.

14. The referring court points out that the Regulation does not contain a definition of the term 'voyage' and considers both interpretations to be possible. The argument for a restrictive interpretation was that circumvention of Article 3(2) of the Regulation by means of consecutive sham cabotage voyages must be avoided. On the other hand, the wording of the Regulation did not provide any grounds for a restriction to voyages with cargo on board. A restrictive approach would also render Article 3(3) of the Regulation inapplicable to island cabotage involving oil in Italy, since vessels unloading crude oil in the ports of Sicily or Sardinia could not, for technical reasons, take on any refined oil in those ports for transport to other countries.

15. In these circumstances the referring court considered it necessary to request a preliminary ruling. By order of 20 July 2004, received by the Court on 29 October 2004, it therefore stayed the proceedings and requested the Court to give a preliminary ruling on the following question:

Does 'voyage [which] follows or precedes a ... voyage' in Article 3(3) of Regulation (EEC) No 3577/92 mean only a voyage which is 'functionally and commercially autonomous, that is to say, with cargo on board and destined for or coming from a foreign port', as stated in the contested measures in this case, or does it also include a voyage without cargo on board (that is, a 'voyage in ballast')?

16. In the proceedings before the Court Agip Petroli, the Italian Government, the Greek Government, the Norwegian Government and the Commission submitted written and oral observations. The French Government commented only at the hearing before the Court.

IV — Legal analysis

17. The referring court would essentially like to know whether 'voyage to or from another State' (hereinafter 'international voyage') in Article 3(3) of the Regulation means that the vessel must have cargo on board during the voyage or whether it must otherwise be proved that the voyage has an economically autonomous purpose.

18. The wording of the provision, the scheme of the Regulation and its objectives indicate that those questions must be answered in the negative.

19. The Regulation provides *no definition* of the term 'voyage'. Article 2 of the Regulation refers only to 'cabotage', which includes *by definition* 'the carriage of passengers or goods'. Although the term 'cabotage' thus presupposes a voyage, it does not reveal whether the term 'voyage' in itself includes such carriage or whether cabotage is a voyage during which such carriage occurs. Consequently, no inferences can be drawn from the term 'cabotage' for the term 'voyage'.

20. The *wording* of Article 3(3) of the Regulation merely requires that a cabotage voyage be preceded or followed by an international voyage. The provision does not qualify the term 'voyage' further. The wording does not therefore lay down any further requirements, such as the transport of cargo or the existence of 'functional or commercial autonomy', and, on the face of it, refers to any kind of international voyage.

21. To judge from the *scheme* of the Regulation, the applicability of the law of the flag State is the rule, while the applicability of the law of the host State is the exception.

22. The seventh recital in the preamble explains that Community shipowners should have to comply only with the conditions for carrying out cabotage which apply in the flag State. This is intended to avoid distortion of competition. Article 1 of the Regulation takes up that rule, stating that compliance with the requirements of the law of the flag State is to be the general rule.

23. Pursuant to Article 3(2) of the Regulation, island cabotage is an exception to that rule, since that provision declares the law of the host State to be applicable to matters relating to the manning of vessels carrying out island cabotage.

24. In the case of cargo vessels over 650 gt, Article 3(3) of the Regulation restores the principle of the applicability of the law of the flag State if the cabotage voyage follows or precedes an international voyage. Contrary to the Italian Government's assumption, Article 3(2) consequently provides for the exception, Article 3(3) for the rule, since the Regulation does not contain two distinct principles [7] — one for mainland cabotage and the other for island cabotage — as the Italian Government appears to assume in respect of Article 3 of the Regulation. The Regulation has in fact only one principle, which is enshrined in Article 1 of the Regulation. [8]

25. A restrictive interpretation of Article 3(3) of the Regulation through the addition of further requirements to be satisfied by the term 'voyage' would thus result in the exception (the applicability of the law of the host State) being more widely applicable than the principle (the applicability of the law of the flag State). This would run counter to the tenet of interpretation according to which the principles of legislation are to be interpreted broadly and the exceptions to it restrictively. [9]

26. The *scheme* of the Regulation therefore argues for a broad interpretation of Article 3(3) of the Regulation and for no further, qualifying characteristics to be read into the concept of international voyage.

27. The *objectives of the Regulation* similarly require a broad interpretation of Article 3(3) of the Regulation and a restrictive interpretation of the scope of the exception in Article 3(2).

28. The Regulation is designed to complete the opening of the market in the Community's maritime transport sector and, to this end, calls for the gradual application of the principle of the freedom to provide services to maritime transport. The third and fourth recitals in the preamble explain that, in order to establish the internal market, the principle of the freedom to provide services should be applied to maritime transport within the Member States and existing restrictions should be abolished.

7 — See the eighth recital in the preamble to and Article 3(4) of the Regulation and point 40 et seq. of this Opinion.

8 — See also point 27 et seq. of this Opinion.

9 — As shown fully in Case C-476/01 *Kapper* [2004] ECR I-5205, paragraphs 71 and 72.

29. The provisions of the Regulation must therefore be interpreted in the light of Articles 49 and 50 EC. This is not precluded by Article 51(1) EC. It is true that cabotage voyages constitute transport services which, pursuant to Article 51(1) EC, are governed not by the provisions on the freedom to provide services but by the special provisions of Article 70 et seq. EC.

30. The exception required by Article 51(1) EC does not, however, entail a departure from the objectives of the freedom to provide services in the internal market. These objectives must rather be achieved within the framework of the common policy laid down in Article 70 et seq. EC. Secondary law in the context of the special rules for transport must therefore be interpreted in the light of the principles laid down in Articles 49 and 50 EC, particularly when it seeks — as does the present Regulation — to establish the freedom to provide services. [10]

31. The freedom to provide services requires the broadest possible application of the principle that the law of the flag State governs maritime cabotage, as Article 3(3) of the Regulation has provided since 1999 for island cabotage carried out by large cargo vessels on international voyages.

32. As the Greek Government rightly argues, many cabotage voyages form no more than part of international voyages. Where the provisions of national legal systems contradict each other, however, many cabotage voyages are unlikely to be technically possible. An example serves to illustrate this:

33. Article 3(3) of the Regulation is intended to enable, say, a Dutch vessel to undertake without difficulty during a voyage from Portugal to Cyprus cabotage voyages from Mallorca to Menorca (Spain), from Sardinia to Sicily (Italy) and from Crete to Rhodes (Greece) in order to make appropriate use of available transport capacities. If the law of the host State in each case (Spain, Italy or Greece) were applicable to the cabotage sections and if the applicable provisions were inconsistent with one another and/or with the Dutch provisions, at least some of the cabotage voyages would be impossible in practice. [11]

10 — See Case 13/83 *Parliament* v *Council* [1985] ECR 1513, paragraph 62, Case 49/89 *Corsica Ferries France* [1989] ECR 4441, paragraphs 10 to 12, Case C-361/98 *Italy* v *Commission* [2001] ECR I-385, paragraphs 31 to 33, and Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 55 et seq.

11 — While, theoretically, the composition of the crew could be adjusted on each occasion, this would not, as a rule, be economically viable.

34. This would not only prevent appropriate use of available transport capacities, but also adversely affect the freedom to provide services. If, on the other hand, the law of the flag State applies everywhere, the freedom to provide services is ensured.

35. The same may also be true of situations in which cabotage voyages are preceded and followed by voyages without cargo. This too can be illustrated by an example:

36. A French vessel has cargo to transport from Marseilles to Corsica (both in France). The shipowner also has the opportunity to transport cargo from Malta to Cyprus, but there is no suitable cargo for the voyage from Corsica to Malta. There is, however, a chance of a cabotage voyage from Sardinia to Sicily (both in Italy). The short international passages between Corsica and Sardinia and between Sicily and Malta are completed without cargo.

37. Such utilisation of transport capacities would be consistent with the aims of the freedom to provide services within the meaning of the Regulation. If, however, it was required that international voyages always be undertaken with cargo, cabotage voyages would not be possible if the French rules on manning were inconsistent with those of Italian law. The freedom to provide services would consequently be adversely affected.

38. If, alternatively, evidence of 'functional and commercial autonomy' of international voyages was required, it might be produced, in the above example, through presentation of the contract on transport from Malta to Cyprus. If the shipowner had not yet concluded the subsequent contract, however, but was merely speculating on its conclusion, the evidence would be unlikely to be forthcoming. The freedom to provide services would again be adversely affected in this case.

39. It must therefore be concluded that only an interpretation of the concept of international voyage in Article 3(3) of the Regulation which is true to the wording of that provision and covers any type of voyage will comply with the liberalisation objectives of the Regulation.

40. The *objectives of the exception* for which Article 3(2) of the Regulation provides similarly lead to no other conclusion.

41. As regards the economic and social impact of the liberalisation of island cabotage,[12] Article 3(2) of the Regulation was intended to provide the shipowners of the host States with a comprehensive guarantee of a preferential position until 1999 by making the law of the host State applicable.

12 — See Article 3(4) of the Regulation.

42. For the period since 1999, however, Article 3(3) of the Regulation provides for the principle of the application of the law of the flag State to apply to matters relating to the manning of cargo vessels over 650 gt carrying out island cabotage during an international voyage.

43. This is part of the gradual liberalisation of the cabotage market with a view to the achievement of the internal market objectives of the Regulation. With this in mind, the Commission commented as early as 1997 that it could see no convincing reasons for retaining the exception to the principle of the application of the law of the flag State; in fact, the requirements of international trade demanded the widest possible application of the basic principle. [13]

44. For this reason, too, the purposes of the exception should not be given precedence over the main objective of the Regulation, to establish the freedom to provide services in maritime transport within the Member States.

45. This cannot, of course, result, as Agip Petroli suggests, in the Regulation being ignored in favour of the immediate establishment of the freedom to provide services. This is already precluded by the exclusion of the transport sector in Article 51(1) EC. [14]

46. However, in line with the main objectives of the Regulation, the exception must not be interpreted extensively. The interplay of Article 3(2) and Article 3(3) of the Regulation should therefore be taken to mean that the exception provided for in Article 3(2) must be so applied that the main objectives of the Regulation are adversely affected as little as possible.

47. This means that Article 3(2) continues to apply to internal circumstances, but that, whenever an international voyage precedes or follows a cabotage voyage, the latter comes within the scope of Article 3(3) where the other conditions laid down therein apply.

48. The remaining scope of Article 3(2) must, of course, be borne in mind.

13 — See the report from the Commission to the Council on the implementation of Council Regulation (EEC) No 3577/92 applying the principle of the freedom to provide services to maritime cabotage (1995–1996) and on the economic and social impact of the liberalisation of island cabotage, COM(97) 296 final.

14 — See paragraphs 29 and 30 of this Opinion.

49. In particular, the Member States may take measures to prevent *improper reliance on Article 3(3) to circumvent* the scope of Article 3(2).

50. Thus it is in principle unacceptable, for example, for a vessel sailing under the Greek flag continuously to undertake voyages between Malta, Magnisi and Gela and to carry cargo only between Magnisi and Gela. The economic activity would then in fact be confined to Italian territory and circumvent Italian law.

51. Taking improper advantage of provisions of Community law is not permitted, and a Member State is entitled to take measures to prevent attempts, under cover of the rights created by the EC Treaty, to circumvent its legislation. In individual cases the national courts may therefore take account — on the basis of objective evidence — of abuse in order to deny the persons concerned the benefit of the provisions of Community law on which they seek to rely. [15]

52. They must, however, assess such conduct in the light of the objectives pursued by those provisions. [16] Moreover, measures which are not specifically designed to prevent the circumvention of national legislation, but which are based on a general assumption of improper conduct, normally exceed what is necessary and permitted by Community law to prevent improper conduct. [17]

53. Accordingly, for the purposes of preventing circumvention of Article 3(2) of the Regulation, neither the transport of cargo on an international voyage nor, generally, evidence of the 'functional and commercial autonomy' of the international voyage may be required.

54. As already explained, [18] requiring cargo to be transported on international voyages would greatly restrict opportunities for cabotage. The referring court demonstrates that much of the cabotage involving the transport of oil to Italian islands, for example, would become impossible. Similarly, the Norwegian Government has rightly drawn attention to the fact that special vessels, such as oil tankers, which are able to take on only one type of cargo, often fail to find in the port where their cargo is discharged any suitable cargo for the continuation of their voyage and would therefore be excluded, as a general rule, from cabotage.

15 — As demonstrated by the judgment in Case C-212/97 *Centros* [1999] ECR I-1459, paragraphs 24 and 25.

16 — See the judgment in *Centros* (cited in footnote 15, paragraph 25).

17 — See the judgments in Case C-9/02 *de Lasteyrie du Saillant* [2004] ECR I-2049, paragraphs 50 to 52, and Case C-464/02 *Commission* v *Denmark* [2005] ECR I-7929, paragraphs 67 and 68.

18 — See paragraphs 31 to 37 of this Opinion.

55. Requiring the transport of cargo on international voyages goes beyond what is both necessary to prevent improper conduct and permitted by Community law. The need to prevent circumvention cannot justify so broad a restriction of the freedom to carry out cabotage.

56. In the view of the Greek Government and of the Commission, Community shipowners must in any case produce evidence of a functional and commercial element by other means to protect themselves against circumvention if they wish to undertake an international voyage without cargo before or after an island cabotage voyage. That means that it must be shown that the international voyage without cargo is insignificant, incidental and economically justified. As a rule, such a statement presupposes that all the scheduling is known in advance.

57. Such requirements may restrict the economic freedom of movement of Community shipowners and the freedom to provide services. [19] Moreover, details of other planned voyages and contracts constitute trade information in whose confidentiality there is, as a rule, considerable interest, as the Norwegian Government rightly points out. In principle, they must not be disclosed.

19 — See paragraph 38 of this Opinion.

58. As the Norwegian Government again rightly comments, there would also be the attendant problem of assessing the economic value of the subsequent contracts referred to. Differences of assessment and the question of the correct standards may lead to considerable uncertainty in this context, which may also have a highly adverse effect on the freedom to provide services.

59. Requiring general evidence of the 'functional and commercial autonomy' of an international voyage therefore also goes beyond what is permitted by Community law to prevent improper conduct.

60. Only in exceptional circumstances can the need to prevent circumvention justify the requirement of evidence on commercial transactions preceding or following island cabotage. For this the Member States must have at least some reason to suspect an attempt to circumvent Article 3(2) of the Regulation in specific cases.

61. Nor may the requirements relating to such evidence be such as to restrict the freedom to provide services more than is necessary to prevent abuse. In this respect information giving a plausible indication of a cabotage voyage within the meaning of Article 3(3) of the Regulation must suffice as evidence.

V — Conclusion

62. In view of the foregoing I propose that the Court answer the question referred by the Tribunale Amministrativo Regionale per la Sicilia as follows:

A 'voyage [which] follows or precedes a voyage to or from another State' in Article 3(3) of Regulation No 3577/92 includes in principle any voyage to or from another State, whether or not the vessel has cargo on board and/or regardless of the 'functional and commercial autonomy' of the voyage. The protection against circumvention for which Article 3(2) of Regulation No 3577/92 provides must rather be so ensured that the principle of the freedom to provide services in maritime transport within the Member States under the provisions of Article 3(3) of Regulation No 3577/92 is restricted no more than necessary.