JUDGMENT OF THE COURT (Fifth Chamber)

13 July 2000 *

In Case C-160/99,

Commission of the European Communities, represented by F. Benyon, Legal Adviser, and B. Mongin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and D. Colas, Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by maintaining unamended Article 257(1) of the French Customs Code of 11 May 1977 as regards Community shipowners covered by Article 1(1) 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 French Republic has failed to fulfil its obligations under that regulation,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P.J.G. Kapteyn (Rapporteur), P. Jann and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 April 1999, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by maintaining unamended Article 257(1) of the French Customs Code of 11 May 1977 ('the Code') as regards Community shipowners covered by Article 1(1) 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, hereinafter 'the Regulation'), the French Republic has failed to fulfil its obligations under that regulation.

2 Article 1 of the Regulation provides that, as from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) is to apply to Community shipowners who have their ships registered in, and flying the flag of, a Member State, provided that those 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 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. ...'.

4 Under Article 9 of the Regulation, Member States are required, before adopting laws, regulations or administrative provisions in implementation of the Regulation, to consult the Commission and to inform it of any measures thus adopted.

5 The Regulation entered into force on 1 January 1993.

6 Article 257(1) of the Code provides that transport services carried out between the ports of metropolitan France are to be reserved to ships flying the French flag. However, the Minister responsible for the merchant navy may authorise a foreign ship to carry out a particular transport service.

7 A footnote to Article 257 ('the footnote') states the following:

'See also 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)'.

8 Article 258 of the Code provides as follows:

'1. Transport services carried out:

(a) between the ports of the same French overseas department;

(b) between the ports of the departments of Guadeloupe, French Guiana and Martinique

shall also be reserved to ships flying the French flag.

2. The transportation of certain goods may, by order adopted by the Minister responsible for the merchant navy after obtaining an opinion from the Minister responsible for the budget, be reserved to French ships, where that transportation is provided:

(a) between the ports of French overseas departments and the ports of metropolitan France;

(b) between the ports of Réunion and the ports of other French overseas departments.

3. Derogations from the provisions of paragraphs (1) and (2) of this article may be permitted by decisions of the authority responsible for the local register of shipping.'

9 Article 259(1) of the Code provides that, in exceptional circumstances temporarily interrupting shipping services reserved to vessels flying the French flag, the Government may, by decree adopted in cabinet presided over by the President of the Republic, suspend the application of Article 257 for as long as that interruption continues.

10 On 4 August 1994, the Commission reminded the French authorities of the obligation incumbent on them under Article 9 of the Regulation. The Commission also asked to be notified before the end of August 1994 of the legislation in force in France concerning maritime cabotage and of any new legislative or

administrative measures adopted on or after the date of entry into force of the Regulation.

11 By letter of 29 September 1994, the French authorities replied that no new law, regulation or administrative measure had been adopted for the purposes of applying the Regulation.

12 On 14 February 1996, the Commission, taking the view that Article 257(1) of the Code was contrary to Article 1 of the Regulation, gave formal notice to the French Republic requiring it to bring that situation to an end.

13 On 25 April 1997, no reply having been received within the time-limit prescribed in the letter giving formal notice, the Commission sent a reasoned opinion to the French Republic, requesting it to comply therewith within two months from the date of its service.

14 On 25 June 1997, in response to the reasoned opinion, the French authorities communicated to the Commission a preliminary draft of a law amending Articles 257 to 259 of the Code. They requested the Commission to state its views on that draft prior to its adoption, but did not give any indication of the date on which that draft law might enter into force.

15 By letter of 17 October 1997, the Commission asked the French authorities to clarify certain aspects of Articles 258 and 259 of the preliminary draft of the law in question and suggested changes to the wording of Article 258(3). On 6 May 1998, the French authorities informed the Commission that they accepted that suggestion. They refused, however, to provide the clarification concerning Article 259 which the Commission had requested. On 11 August 1998, the Commission repeated its request for clarification. In their reply dated 15 Sep-

tember 1998, the French authorities accepted the proposed amendment and stated that they would endeavour to arrange for the adoption of the legislative amendments with the minimum of delay, but without specifying any timetable in that regard.

16 By letter of 16 February 1999, the French authorities submitted to the Commission a new preliminary draft law amending Articles 257 and 259 of the Code, which took into account the suggestions made with a view to bringing those articles into line with the Regulation. That letter stated that the French authorities intended to propose to the national Parliament that the draft law bringing the Code into line with Community law be adopted together with all the various drafts then under consideration. However, no timetable was provided in that connection.

17 By telefax of 13 April 1999, the French authorities communicated a new version of the draft law; this was identical to the previous one, apart from a reference to ships registered in a State which is a signatory to the Agreement on the European Economic Area. That telefax stated, without giving any further details, that the text of the draft law in question would be submitted to the French Parliament during the month of July 1999.

18 In those circumstances, the Commission decided to bring the present action.

19 The Commission maintains that Article 257(1) of the Code is manifestly contrary to Article 1(1) of the Regulation, in that it reserves the right to provide cabotage services (that is to say, transport services between the ports of metropolitan France) to ships flying the French flag.

20 The French Republic does not deny that that article, as drafted at present, is not in conformity with the Regulation; nor does it dispute that the draft amendment

has not yet been passed. It states, however, that it has taken two measures to ensure the temporary application of the Community rules pending adoption of the legislative amendments which are being prepared. The first of these concerns a circular setting out the contents of the Regulation (Circular No 93-S-030 of 19 March 1993, published in *Bulletin Officiel des Douanes* [Official Customs Notices] No 1139 of 19 March 1993, hereinafter referred to as 'the circular'), and the second is the footnote.

21 It should be noted in that regard that those two measures are not such as to remedy the breach of obligations consisting of the failure to amend the Code in such a way as to bring it into line with the Regulation.

22 According to settled case-law, if a provision of national law that is incompatible with a provision of Community law, even one directly applicable in the legal order of the Member States, is retained unchanged, this creates an ambiguous state of affairs by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law; maintaining such a provision in force therefore amounts to a failure by the State in question to comply with its obligations under the Treaty (see, in particular, Case 74/86 *Commission* v *Germany* [1988] ECR 2139, paragraph 10).

23 In addition, as the Court has held on numerous occasions, the incompatibility of national legislation with Community provisions can be remedied for good only by means of binding national provisions having the same legal force as those which must be amended (see, in particular, Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraph 13). Neither the circular nor the mere reference to the Regulation in the footnote can be regarded as constituting such provisions.

24 It follows from the foregoing that, by maintaining unamended Article 257(1) of the Code as regards Community shipowners covered by Article 1(1) of the Regulation, the French Republic has failed to fulfil its obligations under that regulation.

Costs

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the French Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by maintaining unamended Article 257(1) of the French Customs Code of 11 May 1977 as regards Community shipowners covered**

by Article 1(1) 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), the French Republic has failed to fulfil its obligations under that regulation;

2. Orders the French Republic to pay the costs.

Edward Sevón Kapteyn

Jann Wathelet

Delivered in open court in Luxembourg on 13 July 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber