JUDGMENT OF THE COURT (Second Chamber)

9 March 2006 *

In Case C-323/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 24 July 2003,

Commission of the European Communities, represented by I. Martínez del Peral and K. Simonsson, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by L. Fraguas Gadea and J.M. Rodríguez Cárcamo, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J. Makarczyk, R. Silva de Lapuerta, P. Kūris and J. Klučka, Judges,

Advocate General: A. Tizzano,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by maintaining in force legislation which:

— allows a concession for maritime transport services in the Vigo estuary to be granted to a single operator for a period of 20 years and which includes as a criterion for the award of the concession experience in transport in the Vigo estuary;

— allows the imposition of public service obligations on seasonal transport services with the islands and regular transport services between mainland ports;

— allows the introduction of a more restrictive system than that in effect on the date on which 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) entered into force, that is to say, the arrangements adopted by decision of 11 June 1984;

— was not the subject of any consultation with the Commission prior to being approved,

the Kingdom of Spain has infringed Articles 1, 4, 7 and 9 of Regulation No 3577/92 and has failed to fulfil its obligations under that regulation and the EC Treaty.

Legal background

Community law

2 Article 59 of the EC Treaty (now, after amendment, Article 49 EC) provided in its first paragraph:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

3 Article 62 of the EC Treaty (repealed by the Treaty of Amsterdam) stated:

'Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of the Treaty.'

4 Regulation No 3577/92 provides in Article 1(1):

'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 ...'.

5 Under Article 2 of Regulation No 3577/92:

'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;

...'

6 Article 4(1) of Regulation No 3577/92 provides:

'A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services on shipping companies participating in regular services to, from and between islands.'

7 Article 6 of Regulation No 3577/92 is worded as follows:

'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.'

8 Article 7 of Regulation No 3577/92 provides:

'Article 62 of the Treaty shall apply to the matters covered by this Regulation.'

9 According to Article 9 of Regulation No 3577/92:

'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.'

National law

10 On 9 April 1999, the Autonomous Community of Galicia adopted Law 4/1999 declaring maritime passenger transport in the Vigo estuary to be a public service belonging to the regional government of Galicia (Ley 4/1999 de declaración de servicio público de titularidad de la Junta de Galicia del transporte público marítimo de viajeros en la ría de Vigo, BOE No 118 of 18 May 1999, p. 18552; 'Law 4/1999').

11 Pursuant to Article 2(2) and (3) of Law 4/1999, the regional authorities of Galicia indirectly manage maritime passenger transport services in the Vigo estuary through the grant of an administrative concession for a period of 20 years, renewable for a maximum of 10 years.

12 Article 3 of Law 4/1999 provides that the concession is to be awarded by public tender and that account will be taken, inter alia, of experience in operating transport services in the Vigo estuary, quality of service, prices, an undertaking to employ transport workers in the Vigo estuary on the basis of seniority and competence, together with undertakings to safeguard the natural environment of the Cíes Isles.

13 The arrangements in force before Law 4/1999 had been adopted by decision of 11 June 1984, according to which the provision of regular maritime passenger and freight services between Vigo and Cangas and between Vigo and Moaña was made subject to the grant of authorisation for a renewable period of 10 years.

Pre-litigation procedure

14 After receiving a number of complaints, the Commission formed the view that Law 4/1999 did not comply with Regulation No 3577/92 and sent the Kingdom of Spain a letter of formal notice, on 19 July 2000, to which the latter responded by letter of 5 October 2000.

15 Since the Commission did not consider the explanations provided in that response to be satisfactory, it sent the Kingdom of Spain a reasoned opinion, on 7 May 2001, calling on that Member State to take the measures necessary to comply with the opinion within two months of the date of notification.

16 Taking the view, however, that the measures necessary to comply with the obligations arising from Regulation No 3577/92 had not been adopted by the Spanish authorities, the Commission decided to bring these proceedings.

The action

The application of Regulation No 3577/92 to maritime transport services in the Vigo estuary

17 Before examining the four complaints pleaded by the Commission, alleging infringement of Articles 1, 4, 7 and 9 of Regulation No 3577/92, the Court must address the Spanish Government's argument that, in any event, the action is not well founded on the ground that that regulation does not apply to the maritime transport services in the Vigo estuary governed by Law 4/1999.

18 The Spanish Government argues that 'maritime cabotage' must be understood as the carriage of passengers and goods by sea between ports. Maritime transport in the Vigo estuary is neither carriage by sea nor carriage between ports in the sense given to those terms in the context of Regulation No 3577/92.

19 First, as regards the meaning of carriage by sea, the Spanish Government submits that the Community legislature, when it regulated maritime transport, was referring to external sea and not to internal waters. External sea corresponds to territorial sea, as defined by international treaties and, more specifically, by Article 8 of the United Nations Convention on the Law of the Sea of 10 December 1982 ('the Montego Bay Convention') which distinguishes it from internal waters which are waters on the landward side of the baseline of the territorial sea.

20 Furthermore, the Spanish Government argues, Regulation No 3577/92 is based on the principle that cabotage is both an essential component of the Community transport network and an instrument necessary for establishing the internal market. Unlike external shipping or shipping in territorial sea, shipping entirely within internal waters has a very limited economic and social impact and has little effect on the objective of establishing the internal market in the Community context.

21 Second, the Spanish Government argues that shipping in the Vigo estuary does not constitute shipping between ports since, on the one hand, according to the applicable national rules the whole of that estuary forms part of the Vigo port services zone and, on the other, the Cíes Isles do not have a port, but only a quay for the disembarkation of passengers with limited berthing capacity.

22 Lastly, in the Spanish Government's view, it also follows from the definition of 'sea area' and 'port area' in Article 2 of Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships (OJ 1998 L 144, p. 1) that the 'port area' includes all the waters of the Vigo estuary. Thus, the Community rules themselves do not regard that area as a sea area.

23 In interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (Case C-17/03 *VEMW and Others* [2005] ECR I-4985, paragraph 41, and the case-law cited).

24 It follows that, in order to interpret the term 'carriage ... by sea between ports' which is part of the definitions of mainland and island cabotage in Article 2(1)(a) and (c) of Regulation No 3577/92, account must be taken of the objective of that provision,

which is to implement freedom to provide services for maritime cabotage under the conditions and subject to the exceptions which it lays down (see Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 19).

25 Equating 'sea' within the meaning of Regulation No 3577/92 with 'territorial sea' within the meaning of the Montego Bay Convention is likely to undermine that objective. The application of that regulation solely to territorial sea, within the meaning of that convention, would preclude the liberalisation intended by that regulation of potentially significant maritime transport services where they operate on the landward side of the baseline of the territorial sea that States may draw, in accordance with that convention, across the natural entrance points of a bay.

26 Furthermore, it does not follow from Regulation No 3577/92 that the Community legislature intended to limit its scope to territorial sea within the meaning of the Montego Bay Convention.

27 Therefore, it is not permissible to equate the two terms.

28 The argument that shipping in an estuary such as the Vigo estuary has little effect on the objective of establishing the internal market is also irrelevant. There is nothing in Regulation No 3577/92 to suggest that its scope depends on the impact that shipping in a specific area would have, in economic and social terms, on the establishing of the internal market.

29 It follows that the points raised by the Spanish Government do not show that an estuary, that is to say a river valley inundated by the sea, such as the Vigo estuary, is not part of the sea for the purposes of Regulation No 3577/92.

30 Furthermore, the argument that maritime transport services in the Vigo estuary are not 'between ports' within the meaning of Regulation No 3577/92 cannot be accepted either.

31 Unlike Directive 98/18 which in Article 2(p) defines, 'port area' as 'an area other than a sea area, as defined by the Member States ...', Regulation No 3577/92 does not contain any reference to the law of those States for the purpose of defining the term 'port'.

32 It follows from the need for uniform application of Community law and the principle of equality that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community, having regard to the context of the provision and the objective pursued by the legislation in question (Case C-43/04 *Stadt Sundern* [2005] ECR I-4491, paragraph 24, and the case-law cited).

33 In that connection, given the context of Regulation No 3577/92 and the objective it pursues, namely to implement freedom to provide services for maritime cabotage, the term 'port' in that regulation encompasses infrastructure, albeit small-scale, the function of which is to enable goods to be loaded and unloaded or passengers to be embarked and disembarked for conveyance by sea. Therefore, the infrastructures that exist in the Cíes Isles must be regarded as ports within the meaning of Regulation No 3577/92.

34 Furthermore, an autonomous and uniform interpretation of 'port' for the purposes of that regulation leads to the conclusion that the infrastructures that exist in Vigo, Cangas and Moaña are covered by that definition, since those towns each have infrastructures permitting the embarkation and disembarkation of persons and the loading and unloading of goods for conveyance by sea.

35 It is clear from all of the foregoing considerations that the maritime passenger transport services in the Vigo estuary governed by Law 4/1999 constitute transport services by sea between ports for the purposes of Regulation No 3577/92. Consequently, that regulation is applicable to those services.

The first complaint, alleging infringement of Article 1 of Regulation No 3577/92

36 The Commission submits that Law 4/1999 infringes Article 1 of Regulation No 3577/92 in two respects: first, by reserving maritime passenger transport services in the Vigo estuary to a single undertaking by the grant of an administrative concession for a period of 20 years, thereby paralysing access to the market for the duration of that concession; second, by making experience in operating transport services in the Vigo estuary a criterion for the selection of the undertaking to be granted the concession, thus favouring the existing operator and leading to discrimination against operators from other Member States.

37 The Spanish Government contends that the concession arrangements for maritime passenger transport in the Vigo estuary are justified by overriding reasons in the public interest within the meaning of the case-law of the Court.

38 First, the Spanish Government submits that the maritime service to the Cíes Isles, which is the only possible connection with those islands, must be limited for environmental reasons. The number of persons authorised to visit them each day is fixed by a quota and the only reasonable means of complying with that quota is to control the number of passengers who embark for that destination. Added to that is the limited capacity of the quay on those islands which cannot support heavy maritime traffic.

39 Second, as regards sea connections between the towns of Vigo, Cangas and Moaña, the Spanish Government argues that that means of transport is the most direct, the simplest, the quickest and the most economical. Its discontinuation would have serious repercussions on the organisation of traffic in the geographical area of Vigo and the Morrazo Peninsula, and would result in difficulties in terms of excessive use and overloading of land transport infrastructures. The services relating to those connections are unprofitable and, therefore, their financial viability is uncertain or poor. Consequently, the complete liberalisation of those services would probably lead to the disappearance of the Vigo-Cangas-Moaña route, or to its operation under unsatisfactory conditions as regards safety, frequency of services and prices.

40 Third, the Spanish Government claims that maritime traffic in the Vigo estuary must be controlled and its volume limited. It is a finite geographical area in which various activities have to coexist, some of which, such as fishing for shellfish from barges or floating craft, clearly require limits on shipping traffic.

41 Fourth, according to the Spanish Government, the duration of the concession can be justified by the need to amortise the investments involved, which are substantial.

42 Finally, as regards the selection criterion for the successful tenderer relating to experience acquired in maritime transport in the Vigo estuary, the Spanish Government asserts that that criterion was not decisive for the award of the concession, nor did it lead to retaining the undertaking which was already operating in that estuary. Furthermore, the Spanish Government points out in its rejoinder that that criterion was withdrawn by a law of 23 December 2003.

43 It must be noted that Article 1 of Regulation No 3577/92 clearly establishes the principle of freedom to provide maritime cabotage services within the Community (*Analir and Others*, paragraph 20, and Case C-288/02 *Commission* v *Greece* [2004] ECR I-10071, paragraph 29).

44 A national measure which reserves maritime transport services in the Vigo estuary to a single undertaking by means of an administrative concession for a duration of 20 years, renewable for a period of 10 years, is liable to impede or even prohibit the provision of those services by undertakings in other Member States and therefore constitutes a restriction on freedom to provide services. The same is true of the selection criterion relating to experience in maritime transport in the Vigo estuary (see, to that effect, *Analir and Others*, paragraph 22, and *Commission* v *Greece*, paragraph 30).

45 As regards the determination of whether those restrictions may be permitted, it must be pointed out that the freedom to provide services, as a fundamental principle of the Treaty, may be restricted only by rules which are justified by overriding reasons in the public 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 (*Analir and Others*, paragraph 25, and the case-law cited, and *Commission* v *Greece*, paragraph 32). That is not, however, the case in these proceedings.

46 As far as concerns the Cíes Isles, as the Commission rightly observes, measures which are less restrictive than that concession, such as the organisation of a system of advance booking and sale of the available places, could be introduced in order to adapt the traffic to those islands to environmental requirements and the limited capacity of the quay referred to by the Spanish Government.

47 Next, as regards the requirements relating to the organisation of traffic in the geographical area of Vigo and the Morrazo Peninsula, it must be observed, as the Advocate General pointed out in point 49 of his Opinion, that the Spanish Government has failed to show that passenger transport services across the Vigo estuary which, according to the information mentioned in its rejoinder serve 1 300 000 passengers per year, must be subject to a concession granted to a single operator for a duration of 20 years, which may be extended to 30 years, in order to avoid becoming unprofitable and disappearing.

48 Furthermore, the Spanish Government has also failed to show that the intensity of maritime traffic in the Vigo estuary would give rise to difficulties preventable only by the introduction of a measure as restrictive as that concession, or, even assuming that substantial investments are required in order to maintain the maritime connections in question, that such investments could be amortised only over a period of 20 or even 30 years.

49 Finally, as regards the selection criterion relating to experience in the transport sector in the Vigo estuary, it suffices to observe that the Spanish Government does not plead overriding reasons to justify the restriction which results from that criterion.

50 Moreover, the fact that that criterion was said not to be decisive for the award of the concession is irrelevant, since the finding of a Member State's failure to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom (Case C-175/97 *Commission* v *France* [1998] ECR I-963, paragraph 14, and the case-law cited).

51 The withdrawal of that criterion by a law dated 23 December 2003 is also irrelevant. The question whether a Member State has failed to fulfil obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (Case C-209/02 *Commission* v *Austria* [2004] ECR I-1211, paragraph 16, and the case-law cited).

52 It follows from the foregoing that the first complaint is well founded.

The second complaint, alleging infringement of Article 4 of Regulation No 3577/92

53 According to the Commission, it is clear from Article 4 of Regulation No 3577/92 that a Member State may conclude public service contracts with or impose public service obligations on shipping companies only if they participate in regular services to, from and between islands.

54 Transport services in the Vigo estuary are not regular transport services to or between islands. Firstly, regular services such as those of the Vigo-Cangas and Vigo-

Moaña routes are not island services and, secondly, the services to the Cíes Isles are not regular, but seasonal tourist services.

55 The Spanish Government submits that Article 4 of Regulation No 3577/92 may nevertheless apply to this case.

56 The Spanish Government argues that the possibility of concluding public service contracts for maritime transport services to or between islands or of making such services subject to public service obligations has its basis in the fact that in such cases that is the only means of establishing a connection between the islands or between the islands and the mainland in the area concerned. It is therefore appropriate for arrangements to apply that are identical or comparable to those provided for in Article 4 of Regulation No 3577/92 to shipping connections in an estuary, since the existing land connections are much too difficult.

57 The Commission acknowledges that Article 4 may in fact apply in exceptional cases to maritime transport services other than those to or between islands, in particular in the case of an estuary or a fjord where a road link is so long or difficult that it does not constitute a real alternative to the sea connection. It submits, however, that there is no such exceptional situation in this case.

58 In that regard, even assuming that Article 4 of Regulation No 3577/92 may apply in exceptional cases to certain maritime transport services other than those to or between islands, it must be observed, as the Advocate General stated in points 43 and 44 of his Opinion, that the towns of Vigo, Cangas and Moaña have, in addition to the sea connections, a road network linking them directly and affording ready access to them. In those circumstances, the regular maritime transport services between those towns cannot, in any event, be treated as maritime transport services to or between islands.

59 As regards maritime transport services to and from the Cíes Isles, the Spanish Government does not deny that they are not regular services.

60 It follows that the second complaint is well founded.

The third complaint, alleging infringement of Article 7 of Regulation No 3577/92

61 According to the Commission, Article 7 of Regulation No 3577/92 prohibits Member States from introducing more restrictive arrangements than those applicable at the date of the entry into force of the regulation, that is to say 1 January 1993. The arrangements existing before the adoption of Law 4/1999 were less restrictive than those introduced by that law.

62 In that connection, it must be pointed out that Article 7 of Regulation No 3577/92 must be interpreted in the light of the provision which immediately precedes it. Although Article 6 allows Member States to maintain after 1 January 1993 and for a period expiring at the latest on 1 January 2004 existing restrictions in a number of specific cases, Article 7 provides, in substance, that those States may not introduce restrictions that are new in relation to the existing situation. The two provisions therefore complement one another and constitute in fact the two sides to a system of progressive liberalisation.

63 That interpretation of Articles 6 and 7 of Regulation No 3577/92 is supported by the fact that the repeal, by the Treaty of Amsterdam, of Article 62 of the EC Treaty, to which Article 7 refers, which prohibited Member States from introducing any new restrictions on the freedom to provide services, coincided with the disappearance, in the text of Article 49 EC, of the reference to the progressive abolition, during the transitional period, of restrictions on freedom to provide services within the Community.

64 It follows that, as the Advocate General observed in point 75 of his Opinion, Article 7 of Regulation No 3577/92 is only meaningful in a context of progressive liberalisation of the services referred to in the regulation.

65 Therefore, the question whether the Kingdom of Spain has failed to fulfil its obligations under Article 7 of Regulation No 3577/92, on account of the adoption of Law 4/1999 by the Autonomous Community of Galicia, arises only if the maritime transport services in the Vigo estuary were covered by Article 6 of that regulation at the date on which the period laid down in the reasoned opinion expired.

66 Since that was not the case, the third complaint must be dismissed as unfounded.

The fourth complaint, alleging infringement of Article 9 of Regulation No 3577/92

67 The Commission submits that Law 4/1999 was not the subject of any consultation before it was adopted, in breach of the obligation laid down in Article 9 of Regulation No 3577/92.

68 In that connection, it must be recalled that, under Article 9, '[b]efore adopting laws, regulations or administrative provisions in implementation of ... Regulation, Member States shall consult the Commission'.

69 Since Law 4/1999 constitutes such a provision, and the Spanish Government does not deny that the Commission was not consulted with regard to that law, the fourth complaint is well founded.

70 It follows from all of the foregoing considerations that, by maintaining in force legislation which:

— allows a concession for maritime transport services in the Vigo estuary to be granted to a single operator for a period of 20 years and which includes as a criterion for the award of that concession experience in transport acquired in that estuary,

— allows the imposition of public service obligations on seasonal transport services with the islands and regular transport services between mainland ports,

— was not the subject of any consultation with the Commission prior to being approved,

the Kingdom of Spain has infringed Articles 1, 4 and 9 of Regulation No 3577/92 and has failed to fulfil its obligations under that regulation.

Costs

71 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 applied for costs to be awarded against the Kingdom of Spain and the latter has been unsuccessful in its main pleas, the Kingdom of Spain must be ordered to pay the costs.

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

1. Declares that, by maintaining in force legislation which:

— allows a concession for maritime transport services in the Vigo estuary to be granted to a single operator for a period of 20 years and which includes as a criterion for the award of that concession experience in transport acquired in that estuary,

— allows the imposition of public service obligations on seasonal transport services with the islands and regular transport services between mainland ports,

— was not the subject of any consultation with the Commission of the European Communities prior to being approved,

the Kingdom of Spain has infringed Articles 1, 4 and 9 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) has failed to fulfil its obligations under that regulation;

2. Dismisses the remainder of the application;

3. Orders the Kingdom of Spain to pay the costs.

[Signatures]