JUDGMENT OF THE COURT (Sixth Chamber)

13 June 2002 *

In Joined Cases C-430/99 and C-431/99,

REFERENCE to the Court under Article 234 EC by the Raad van State, Netherlands, for a preliminary ruling in the proceedings pending before that court between

Inspecteur van de Belastingdienst Douane, Rotterdam district

and

Sea-Land Service Inc. (C-430/99),

Nedlloyd Lijnen BV (C-431/99),

on the interpretation of Articles 92, 59 and 56 of the EC Treaty (now, after amendment, Articles 87 EC, 49 EC and 46 EC) and Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide

* Language of the case: Dutch.

services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, R. Schintgen and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Sea-Land Service Inc., by G.J.W. Smallegange, Advocaat,

— Nedlloyd Lijnen BV, by A.J. Braakman, Advocaat,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Commission of the European Communities, by D. Triantafyllou, B. Mongin and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Sea-Land Service Inc., represented by G.J.W. Smallegange; Nedlloyd Lijnen BV, represented by A.J. Braakman; the Netherlands Government, represented by H.G. Sevenster, acting as Agent; and the Commission, represented by H.M.H. Speyart, at the hearing on 4 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By judgments of 4 November 1999, received at the Court on 8 November 1999, the Netherlands Raad van State (Council of State) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 92, 59 and 56 of the EC Treaty (now, after amendment, Articles 87 EC, 49 EC and 46 EC) and Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

2 Those question were raised in two proceedings between the Inspecteur van de Belastingdienst Douane, Rotterdam district ('the Inspector') and Sea-Land Service Inc. ('Sea-Land'), on the one hand, and Nedlloyd Lijnen BV ('Nedlloyd'), on the other, with respect to payment of a charge for vessel traffic services.

Legal framework

Community law

3 Under Article 61(1) of the EC Treaty (now, after amendment, Article 51(1) EC), freedom to provide services in the field of transport is governed by the provisions of the Title relating to transport.

4 Article 84(1) of the EC Treaty (now, after amendment, Article 80(1) EC) states that those provisions apply to transport by rail, road and inland waterway. Article 80(2) provides that the Council 'may ... decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.' On that basis, the Council adopted Regulation No 4055/86 of 22 December 1986.

5 Article 1 of that regulation states that:

'1. Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

2. The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established

outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

3. The provisions of Articles 55 to 58 and 62 of the Treaty shall apply to the matters covered by this Regulation.

4. For the purpose of this Regulation, the following shall be considered "maritime transport services between Member States and between Member States and third countries" where they are normally provided for remuneration:

(a) *intra-Community shipping services:*

the carriage of passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State;

(b) *third-country traffic:*

the carriage of passengers or goods by sea between the ports of a Member State and ports or off-shore installations of a third country.'

6 Article 8 of Regulation No 4055/86 reads as follows:

'Without prejudice to the provisions of the Treaty relating to right of establishment, a person providing a maritime transport service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.'

7 According to Article 9 of that regulation, '[a]s long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services within the meaning of Article 1(1) and (2).'

The national legislation

8 The Scheepvaartverkeerswet (Shipping Act), as amended by the law of 7 July 1994 (*Staatsblad* 1994, No 585, hereinafter the 'SVW'), which entered into force on 1 October 1995, provides, in the framework of the vessel traffic services system ('verkeersbegeleidingssysteem', hereinafter the 'VTS system'), for the introduction of a tariff for those services (hereinafter the 'VTS tariff'). Previously, the costs of those services were covered by dues for pilotage, a service which was privatised in the Netherlands in 1995. At the relevant time, the VTS tariff was paid only by seagoing vessels.

9 Article 1(1)(i) of the SVW defines vessel traffic services as 'the bringing about and maintenance of safe and smooth shipping traffic by means of a system of personnel and infrastructural facilities on a systematic and interactive basis.'

10 Pursuant to the first paragraph of Article 15c of the SVW, the master, owner or bareboat charterer of a ship coming under the VTS system is required to pay the VTS tariff and to provide the information necessary to determine its amount.

11 Article 15d of the SVW states:

'1. The VTS tariff serves as payment for vessel traffic services rendered by the State, in so far as those services constitute an individual provision of services.

2. The tariff referred to in paragraph 1 shall be paid to the State. An administrative decree shall determine the shipping lanes to which the tariff applies, the criteria for applying that tariff and derogations.

3. The tariff referred to in paragraph 1 shall be set by ministerial decree. This shall also define the rules relating to collection and methods of payment.'

12 The provisions of Article 15d of the SVW were implemented by the Besluit verkeersbegeleidingstarieven scheepvaartverkeer (Decree on vessel traffic services tariffs for shipping traffic) of 4 November 1994 (*Staatsblad* 1994, No 807, hereinafter 'the BVS'). Pursuant to Article 2(1) of the BVS, the VTS tariff, set by ministerial decree, is payable for navigation of a seagoing vessel in the following areas:

(a) Eems;

(b) Den Helder;

(c) Noordzeekanaal;

(d) Nieuwe Waterweg; and

(e) Westerschelde.

13 Under Article 4(1) of the BVS, the basis for and amount of the VTS tariff are determined according to the length of the ship, rounded up to the whole metre, with only whole metres being taken into consideration.

14 Under Article 5(1) of the BVS, the VTS tariff is not payable for ships belonging to the following categories:

(a) ships whose length does not exceed 41 metres;

(b) Netherlands warships;

(c) other ships owned or used by the State;

(d) warships of countries other than the Netherlands, where that has been agreed with the flag State of the ships concerned;

(e) ships coming from a port, an anchorage or a mooring in an area subject to the tariff which leave the channel in order to navigate at sea and then return to the point of departure by the same channel;

(f) ships which come into a port, an anchorage or a mooring in the Netherlands without carrying out an economic activity in that connection.

15 The third paragraph of Article 15d of the SVW was implemented by the Regeling verkeersbegeleidingstarieven scheepvaartverkeer (Regulation on vessel traffic services tariffs for shipping traffic) of 14 September 1995 (*Nederlandse Staatscourant* 1995, No 8). It provides that a tariff of NLG 250 is payable for ships of between 41 and 100 metres in length, while each additional metre entails a supplementary tariff of NLG 17, with a maximum of NLG 2 800 for ships whose length is equal to or greater than 250 metres.

Main proceedings and questions referred for a preliminary ruling

16 The Inspector issued invoices to Sea-Land, a United States company with its headquarters in Wilmington (United States), and to Nedlloyd, a company governed by Netherlands law with its headquarters in Rotterdam (Netherlands), for collection of the VTS tariff. The two shipping companies lodged an objection to those invoices. The Inspector rejected those objections by decisions of 5 February and of 15 and 19 May 1996. By judgments of 19 January 1998, the Arrondissementsrechtbank (District Court) of Rotterdam (Netherlands) ruled that the actions brought against those decisions were well founded and,

accordingly, annulled them. The Inspector appealed against those judgments to the Raad van State.

17 Sea-Land and Nedlloyd claimed in the national court that the VTS tariff is contrary to the freedom to provide services. The different treatment of inland waterway vessels and seagoing vessels with respect to the VTS tariff gives rise to discrimination prohibited under the Treaty. Those companies also claimed that exemption from the VTS tariff, particularly for inland waterway vessels, must be deemed to constitute aid within the meaning of Article 92(1) of the EC Treaty. Since that aid has not been notified to the Commission, it is unlawful.

18 According to the Inspector, the obligation to participate in the VTS system and to pay the VTS tariff is a legitimate measure, applying without distinction to all vessels with a length equal to or greater than 41 metres, irrespective of nationality. To the extent that that tariff nevertheless constitutes an obstacle to freedom to provide services, it would come under the exception at issue in Case C-55/94 *Gebhard* [1995] ECR I-4165, or, at the very least, that relating to public security, as referred to in Article 56 of the Treaty, in conjunction with Article 66 of that Treaty (now Article 55 EC). Furthermore, the Inspector contended that exemption from the VTS tariff applies without distinction as to the nationality of inland waterway vessels. There is thus no distortion of competition in the relevant market, that is, inland navigation, nor is intra-Community trade appreciably affected. The Inspector maintained that, to the extent that the exception must none the less be regarded as aid, the financial advantage therefrom is so minor that it should be deemed to constitute *de minimis* aid and, as such, permissible. Moreover, the public financing of infrastructure, such as the VTS tariff scheme, can be regarded as a general measure of economic policy.

19 The Raad van State points out that, thanks to vessel traffic services, up-to-date information can be provided to vessels circulating in areas of dense traffic or

frequent movements of dangerous consignments which make navigation difficult — information primarily intended to promote the safety of shipping.

20 According to that court, the VTS tariff constitutes neither direct discrimination nor indirect discrimination on the grounds of nationality. First, that tariff is not linked to the flag State of the ship. Second, exemption from the VTS tariff enjoyed by inland waterway vessels is based on objective reasons. Nevertheless, it cannot be ruled out that the obligation to take part in the VTS system and the associated requirement to pay the VTS tariff constitute a non-discriminatory restriction on freedom to provide services. In that case, it is necessary to consider whether that restriction is among the exceptions laid down by the Treaty, *inter alia* that referred to in Article 56.

21 The national court also questions whether the exemption of inland waterway vessels constitutes an aid prohibited by Article 92 of the Treaty. It considers that the exemption from the VTS tariff is justified by the nature and internal structure of the system. In any event, it is doubtful that that measure distorts competition or affects trade between Member States. In that respect, the national court finds that maritime navigation and inland navigation cannot be considered to constitute one and the same market, particularly as regards the Rotterdam-Antwerp axis. Even supposing that it does constitute an aid, it cannot be ruled out that it should be considered a *de minimis* aid.

22 In those circumstances, the Raad van State decided to stay proceedings and to submit to the Court for a preliminary ruling the following questions, set out in identical terms in the two main proceedings:

1) (a) Does a system such as VTS, in so far as it provides for mandatory participation in vessel traffic services, constitute an obstacle to freedom

to provide services for the purposes of Regulation (EEC) No 4055/86 in conjunction with Article 59 ... of the EC Treaty?

(b) If not, is the position otherwise if participants in the system are charged for services provided?

(c) Must Question 1(b) be answered differently if that charge is levied on shipping whose participation in the system is mandatory, but not on other users, such as inland waterway or seagoing vessels the length of which does not exceed 41 metres?

2) (a) If a system such as VTS and its associated tariff constitute an obstacle to freedom to provide services, does that obstacle come under the exceptions in Article 56 ... of the EC Treaty for provisions justified on grounds of public security?

(b) Is it material to the reply to Question 2(a) whether the tariff is greater than the actual cost of the service provided to a given ship?

3) If a system such as VTS and its associated tariff constitute an obstacle to freedom to provide services, and if that obstacle is not justified under Article 56 ... of the EC Treaty, can it be justified either because it is merely a non-discriminatory 'selling arrangement', as referred to in *Keck and Mithouard*, or because it fulfils the conditions which the Court has laid down in other judgments, in particular in *Gebhard*?

4) (a) Must a system of a Member State such as VTS be deemed to constitute aid within the meaning of Article 92(1) of the EC Treaty ... inasmuch as it exempts certain categories of participants in that system, in particular inland waterway vessels, from the requirement to pay the tariff?

(b) If so, does that aid come within the prohibition laid down in that provision?

(c) If Question 4(b) must also be answered affirmatively, does the classification as aid prohibited under Community law also have consequences under Community law for the tariff which participants, apart from those exempted, are required to pay?

23 By order of the President of the Court of 17 December 1999, Cases C-430/99 and C-431/99 were joined for the purposes of the written procedure and judgment.

The first three questions

24 By its first three questions, the national court is essentially asking whether Regulation No 4055/86, in conjunction with Articles 56 and 59 of the Treaty, precludes a vessel traffic services system such as the VTS system at issue, which requires payment of a tariff by seagoing vessels longer than 41 metres which participate in that system on a mandatory basis, while other vessels, such as inland waterway vessels, are exempt from that tariff.

25 First of all, as regards the matters covered by Regulation No 4055/86, the wording of Article 1(1) makes it clear that it applies to maritime transport services between the Member States and between the latter and third countries.

26 As regards the persons covered by Regulation No 4055/86, under Articles 1(1) and (2), freedom to provide maritime transport services applies to nationals of Member States who are established in a Member State other than that of the person for whom the services are intended, to nationals of Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

27 Article 58 of the EC Treaty (now Article 48 EC) which, in accordance with Article 1(3) of Regulation No 4055/86, applies to the matters covered by that regulation, provides, in its first paragraph, that companies or firms formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.

28 It is for the national court to determine whether the situations at issue in the main proceedings do in fact fall within the scope of Regulation No 4055/86 as set out in paragraphs 25 and 26 of the present judgment.

29 The arguments which follow are based on the premiss that such is in fact the case, if only for one of the abovementioned situations.

30 Regulation No 4055/86, adopted on the basis of Article 84(2) of the Treaty, lays down measures for the application in the maritime transport sector of the principle of freedom to provide services laid down in Article 59 of that Treaty. Moreover, the Court held to that effect by ruling that Article 1(1) of that regulation defines the beneficiaries of freedom to provide maritime transport services between Member States and between Member States and third countries in terms which are substantially the same as those in Article 59 of the Treaty (Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 10).

31 Moreover, it follows from Articles 1(3) and 8 of Regulation No 4055/86 that the regulation makes applicable to the matters covered by the regulation the whole of the Treaty rules relating to freedom to provide services (see, to that effect, *Commission* v *France*, paragraphs 11 to 13).

32 It is settled case-law that freedom to provide services, as referred to in Article 59 of the EC Treaty, requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services (see, *inter alia*, Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 56; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33; and Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21). Pursuant to that rule, freedom to provide services may also be relied on by an undertaking as against the State in which it is established, if the services are provided for persons established in another Member State (see, *inter alia*, *Commission* v *France*, cited above, paragraph 14, and Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 11).

33 It must be held that the VTS system, in requiring payment of a tariff by seagoing vessels longer than 41 metres and exempting inland waterway vessels, whatever

their national flag and the nationality of the companies which operate them, does not constitute discrimination based directly on nationality.

34 Sea-Land and Nedlloyd, supported by the Commission, claim that the VTS system indirectly discriminates against them on the grounds of nationality, since the overwhelming majority of inland waterway traffic, which is exempt from the VTS tariff, takes place under the Netherlands flag. Ships flying the flag of a Member State are generally operated by national economic operators, whereas shipping companies from other Member States as a rule do not operate vessels registered in the former State.

35 Those arguments cannot be upheld.

36 While it is true that Article 59 and the third paragraph of Article 60 of the EC Treaty (now the third paragraph of Article 50 EC) prohibit all forms of disguised discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result (see, *inter alia*, Joined Cases 62/81 and 63/81 *Seco* v *EVI* [1982] ECR 223, paragraph 8), it is also true that a difference of treatment cannot constitute discrimination unless the circumstances in question are comparable (see, *inter alia*, Case C-479/93 *Francovich* [1995] ECR I-3843, paragraph 23, and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 84).

37 As is apparent from the orders for reference, there are in this case objective differences between seagoing vessels longer than 41 metres and inland waterway vessels, in particular as concerns their respective markets — differences which reveal, moreover, that those two categories of means of transport are not comparable.

38 None the less, the VTS system at issue in the main proceedings, in that it requires the payment of a tariff by seagoing vessels longer than 41 metres, is liable to impede or render less attractive the provision of those services and therefore constitutes a restriction on their free circulation (see, to that effect, *Analir*, cited above, paragraph 22).

39 It is important to note that 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 general interest and are applicable to all persons or 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, to that effect, *Analir*, paragraph 25).

40 First, as noted above, the VTS system is not applied in a discriminatory manner.

41 Next, with regard to the question whether there are overriding reasons based on the general interest which may justify the restriction on freedom to provide services resulting from that system, it must be remembered that the protection of public security is one of the reasons which may, under Article 56(1) of the Treaty, justify restrictions resulting from special treatment for foreign nationals. Protection of public security is therefore, in principle, also capable of justifying a national measure which applies indiscriminately, as in the cases in the main proceedings (see, to that effect, Case C-108/96 *Mac Quen and Others* [2001] ECR I-837, paragraph 28).

42 Vessel traffic services supplied within the framework of the VTS system constitute a nautical service essential to the maintainence of public security in coastal waters as well as in ports, and the VTS tariff to which seagoing vessels longer than 41

metres are subject, as users of that service, contributes to the general interest in public security in those waters.

43 Lastly, as regards proportionality, the VTS system, in that it requires the payment of a VTS tariff by seagoing vessels longer than 41 metres, fulfils that criterion in so far as there is in fact a correlation between the cost of the service from which those vessels benefit and the amount of that tariff. This would not be the case where that amount included cost factors chargeable to categories of ships other than seagoing vessels longer than 41 metres, such as, in particular, inland waterway vessels.

44 The answer to the three first questions must therefore be that, as regards situations falling within the scope of Regulation No 4055/86, that regulation, in conjunction with Articles 56 and 59 of the Treaty, does not preclude a vessel traffic services system, such as the VTS system at issue in the main proceedings, which requires the payment of a tariff by seagoing vessels longer than 41 metres which participate in that system on a mandatory basis, while other vessels, such as inland waterway vessels, are exempt from that tariff, in so far as there is in fact a correlation between the amount of that tariff and the cost of the service from which those seagoing vessels benefit.

The fourth question

45 By its fourth question, the national court in essence asks whether a vessel traffic services system such as the VTS system at issue in the main proceedings constitutes a State aid within the meaning of Article 92(1) of the Treaty,

inasmuch as, while it requires payment of a tariff by seagoing vessels longer than 41 metres which participate in that system on a mandatory basis, it exempts other vessels from that tariff, in particular inland waterway vessels.

46 In that respect, it must be recalled that, according to settled case-law, it is solely for the national court before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, *inter alia*, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59). Nevertheless, the Court has held that it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, *inter alia*, Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20).

47 It must be held that the fourth question is of no relevance to the outcome of the main proceedings, which concern the requirement for Sea-Land and Nedlloyd to pay the VTS tariff. In this case, the persons liable to pay an obligatory contribution cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that contribution (see Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 80).

48 There is therefore no need to answer the fourth question.

Costs

49 The costs incurred by the Netherlands Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Raad van State by judgments of 4 November 1999, hereby rules:

As regards situations falling within the scope of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, that regulation, in conjunction with Articles 56 and 59 of the EC Treaty (now, after amendment, Articles 46 EC and 49 EC), does not

preclude a vessel traffic services system, such as the 'verkeersbegeleidingssysteem' system at issue in the main proceedings, which requires the payment of a tariff by seagoing vessels longer than 41 metres which participate in that system on a mandatory basis, while other vessels, such as inland waterway vessels, are exempt from that tariff, in so far as there is in fact a correlation between the amount of that tariff and the cost of the service from which those sea-going vessels benefit.

Macken Gulmann Puissochet

Schintgen Cunha Rodrigues

Delivered in open court in Luxembourg on 13 June 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber