JUDGMENT OF THE COURT (Third Chamber)

9 March 2006 *

In Case C-371/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Köln (Germany), made by decision of 21 August 2003, received at the Court on 1 September 2003, in the proceedings

Siegfried Aulinger

v

Bundesrepublik Deutschland,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, J.-P. Puissochet (Rapporteur), S. von Bahr and U. Lõhmus, Judges,

* Language of the case: German.

Advocate General: F.G. Jacobs,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 October 2005,

after considering the observations submitted on behalf of:

— Mr Aulinger, by R. Karpenstein, Rechtsanwalt,

— the Bundesrepublik Deutschland, the defendant in the main proceedings, by A. Frieser, Rechtsanwalt,

— the German Government, by W.D. Plessing, and subsequently by A. Tiemann and C. Schulze-Bahr, acting as Agents, and by A. Frieser, Rechtsanwalt,

— the Commission of the European Communities, by G. zur Hausen and subsequently by F. Hoffmeister, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro (OJ 1992 L 151, p. 4).

2 This reference has been made in the course of proceedings between Mr Aulinger and the Bundesrepublik Deutschland (Federal Republic of Germany), which obliged him to give up his employment as a bus operator transporting individuals travelling to Serbia and Montenegro on the basis of what he considers to be an incorrect interpretation of Regulation No 1432/92.

Legal context

3 In the context of the conflicts which accompanied the achievement of independence by several republics of the former Federal Republic of Yugoslavia, in particular the conflicts arising in Bosnia-Herzegovina in 1992, the Security Council of the United Nations, acting under Chapter VII of the United Nations Charter, adopted Resolution 757 (1992) establishing an economic embargo on the Federal Republic of Yugoslavia (Serbia and Montenegro) on 30 May 1992. That embargo targeted primarily trade in commodities and products.

4 Paragraphs 5 and 7 of Resolution 757 (1992) provided:

'5. ... all States shall not make available to the authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) or to any commercial, industrial or public utility undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro), any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within the Federal Republic of Yugoslavia (Serbia and Montenegro), except payments exclusively for strictly medical or humanitarian purposes and foodstuffs.

...

7. ... all States shall:

(a) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro), unless the particular flight has been approved, for humanitarian or other purposes

consistent with the relevant resolutions of the Council, by the Committee established by resolution 724 (1991);

...'

5 The European Economic Community and its Member States had recourse to a Community instrument to ensure, inter alia, a uniform implementation within the Community of certain of the measures required under Resolution 757 (1992), namely Regulation No 1432/92, which was adopted by the Council of the European Communities.

6 Article 1 of that regulation provides:

'As from 31 May 1992, the following shall be prohibited:

(a) the introduction into the territory of the Community of all commodities and products originating in or coming from the Republics of Serbia and Montenegro;

(b) the export to the Republics of Serbia and Montenegro of all commodities and products originating in or coming from the Community;

(c) any activity whose object or effect it is to promote, directly or indirectly, the transactions mentioned under (a) and (b);

(d) the provision of non-financial services whose object or effect it is, directly or indirectly, to promote the economy of the Republics of Serbia and Montenegro, in particular those non-financial services provided:

(i) for the purpose of any economic activity carried out in or from the Republics of Serbia and Montenegro; or

(ii) to one of the following persons:

— any natural person in the Republics of Serbia and Montenegro,

— any legal person so constituted or incorporated under the law of the Republics of Serbia and Montenegro,

— any organisation exercising an economic activity (whether or not in the Republics of Serbia and Montenegro) controlled by persons resident in the Republics of Serbia and Montenegro or by organisations constituted or incorporated under the law of these Republics.

The terms of the prohibition on air transport services are defined [in an annex].'

7 Article 5 of Regulation No 1432/92 provides:

'This Regulation shall apply within the territory of the Community, including its air space and in any aircraft or vessel under the jurisdiction of a Member State, and to any person elsewhere who is a national of a Member State and any body elsewhere which is incorporated or constituted under the law of a Member State.'

The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

8 Mr Aulinger is a bus operator established in Germany. Whilst the embargo on the Republics of Serbia and Montenegro was in force, he transported immigrant workers to or from the areas bordering the territory covered by the embargo, in particular Serbian and Montenegrin nationals travelling to or from Serbia or Montenegro. For the most part, he acted as a subcontractor for a travel agency, also established in Germany, which organised the entire journey between departure and arrival points

in Germany and such points in the republics under embargo, and vice versa, relying on bus operators established in those republics to cover the leg of the journey taking place in their own territory. The agency issued passengers with single 'through' tickets for such so-called 'split' transport ('split transport').

9 After criminal proceedings had been brought against him for infringement of Regulation No 1432/92, Mr Aulinger virtually ceased all involvement in that split transport in 1993.

10 The criminal proceedings brought against Mr Aulinger, however, culminated in a judgment of 21 April 1995 of the Bundesgerichtshof (Federal Court of Justice), which ruled that Resolution 757 (1992) did not prohibit the carriage of private individuals to or in the territory covered by the embargo and considered that there was no need to rule on whether Regulation No 1432/92 imposed such a prohibition since no steps had been taken to implement national procedures necessary for imposing criminal sanctions for infringement of that regulation.

11 Mr Aulinger thereupon sought compensation for the damage which he claimed to have suffered. He was awarded damages in respect of the criminal proceedings brought against him. He then brought an action against the defendant in the main proceedings ('the Bundesrepublik Deutschland') claiming DEM 500 000 in damages for loss of his main source of income due to the almost total interruption of his split transport activities to and from the area bordering the territory covered by the embargo. In support of his claim, he argued that Regulation No 1432/92 did not prohibit such activities. It was pointed out in this regard that the Commission of the European Communities itself did not consider such transport to be prohibited and that the German authorities should have consulted the Member States before adopting their position on this point of crucial importance for many bus operators. The other Member States might then have shared the Commission's analysis.

12 The Bundesrepublik Deutschland submitted that the purpose of split transport was to circumvent the prohibition on the direct carriage of persons into the territory covered by the embargo and, as a consequence, such transport was also prohibited by Regulation No 1432/92. As it considered that its interpretation of the regulation was, in any event, justifiable, the Bundesrepublik Deutschland concluded that there was no fault as required under Paragraph 839 of the Bürgerliches Gesetzbuch (Civil Code) to give rise to liability on the part of the State. It added that it had not been required to consult other Member States and/or the Commission since the interpretation and application of Community law are, as a rule, matters for the Member States. Consultation had, none the less, taken place among the Member States at (or on the occasion of) meetings of certain bodies with the Commission.

13 The dispute was brought before the Landgericht Bonn (Regional Court, Bonn), which found in favour of the Bundesrepublik Deutschland. It based its decision principally on the latter's argument that there could not be any fault capable of giving rise to liability on its part under Paragraph 839 of the Civil Code.

14 Mr Aulinger appealed to the Oberlandesgericht Köln (Higher Regional Court, Cologne), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 1(d) of [Regulation No 1432/92] to be interpreted as meaning that the commercial carriage of persons to or from the territory covered by the embargo involving so-called "split" transport was permitted or prohibited?

"Split transport" is to be understood as meaning the carriage of persons to or from the territory covered by the embargo by means of a joint operation between an undertaking established in a Member State of the Community and

an undertaking established in the territory covered by the embargo, the former providing carriage to the vicinity of the border of the territory covered by the embargo and the latter carriage from there into the territory covered by the embargo (the passengers changing vehicles).

(2) If the Court of Justice finds that split transport was permissible, was there an obligation under Article 10 EC or Article 297 EC or other provisions of Community law to consult other Member States and/or the Commission before taking national measures based on the unlawfulness of split transport?'

The questions referred for a preliminary ruling

The first question

Observations submitted to the Court

15 It was submitted on behalf of Mr Aulinger that the question of whether split transport to or from the territory covered by the embargo was prohibited must be distinguished from that of whether the provision of services covering only part of such transport, such as those which he himself provided, was equally prohibited. It was pointed out that he did not organise the split transport but merely provided a travel agency with services in territories that were not subject to the embargo.

16 Examples were provided to illustrate his view that Regulation No 1432/92 could not have prohibited services such as those he provided without leading to the absurd conclusion that any act which made it possible for split transport to take place would have been banned. Thus, the person who sold the single through tickets to passengers, the passengers themselves who contributed by paying the ticket price and the petrol pump attendant who filled the bus petrol tank would have been breaching the embargo. The embargo, he adds, was economic in nature and was not designed to prohibit travel or the carriage of persons.

17 According to Mr Aulinger, the same conclusion must be drawn in relation to split transport taken as a whole. The question of whether that was prohibited by Article 1(d) of Regulation No 1432/92 must be considered in the light of Resolution 757 (1992). Paragraph 5 of that resolution merely prohibits making funds or any other 'economic resources' available to the authorities or any other undertaking established in the Federal Republic of Yugoslavia. Whilst the notion of 'economic resources' would undoubtedly encompass the supply of services to the above-mentioned bodies, the carriage of passengers to a place where responsibility for them was taken over by Serbian or Montenegrin transport undertakings cannot be regarded as a supply of services to those undertakings or, therefore, as making economic resources available to them. Only the passengers were the recipients of the services in question.

18 According to Mr Aulinger, Regulation No 1432/92 was not intended to impose any further sanctions in addition to those laid down by Resolution 757 (1992). Its sole purpose was to ensure uniform implementation throughout the Community of the sanctions decided on by the Security Council of the United Nations. Mr Aulinger bases his argument on the 10th recital in the preamble to that regulation and on the judgment in Case C-124/95 *Centro-Com* [1997] ECR I-81. Accordingly, the regulation could not of itself prohibit the carriage of persons to a place where responsibility for them was taken over by Serbian or Montenegrin bus operators in the course of split transport.

19 The Bundesrepublik Deutschland, the German Government and the Commission refer firstly to the wording of Article 1(d) of Regulation No 1432/92. They argue that the commercial carriage of persons is a 'service' within the meaning of that provision. It is immaterial whether such a service is provided by means of direct transport or split transport. The Bundesrepublik Deutschland submits that the terms used in that provision demonstrate the broad scope of the ban being imposed. More specifically, journeys undertaken by means of split transport would have had the effect of promoting, at least indirectly, the economy of the Republics of Serbia and Montenegro.

20 The Bundesrepublik Deutschland and the Commission base their argument on the premiss that direct transport to and from the territory covered by the embargo constituted a breach of the embargo since the effect of such transport was to make Community vehicles available to the economies of the countries under embargo and to enable hard currency to be imported there by the persons being transported. They consider that the same analysis must apply to split transport. According to the German Government and the Commission, the only exception to this would be in the case of journeys undertaken in private cars on a non-commercial basis, which would be acceptable on humanitarian grounds and also because, in such cases, there would not be a supply of 'services' within the meaning of Article 1(d) of Regulation No 1432/92.

21 The Bundesrepublik Deutschland and the German Government also argue that the literal interpretation summarised above is supported by the spirit and the purpose of Regulation No 1432/92.

22 The German Government also refers to Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (OJ 1993 L 102, p. 14), which replaced Regulation No 1432/92.

23 It notes that Article 1(e) of Regulation No 990/93 prohibits the provision of non-financial services and provides for derogations from this rule, set out in Article 2 of that regulation, concerning, inter alia, transits through the territory of the Federal Republic of Yugoslavia and entry into its territorial sea. According to the German Government, those derogations would have been meaningless if transport to and from the area covered by the embargo had not been prohibited. That regulation thus supports its interpretation of Regulation No 1432/92.

24 The Bundesrepublik Deutschland submits that there is no need to ascertain whether Resolution 757 (1992) itself prohibited split transport since the Community legislature could, if necessary, have decided to impose a more severe embargo, given the geographical proximity of the Community to the territory covered by the embargo. Regulation No 1432/92 must therefore be interpreted autonomously and, in essence, this argument is also advanced on the same grounds by the Commission.

25 The Bundesrepublik Deutschland and the German Government further contend that the obligation to ensure that Regulation No 1432/92 is effective necessarily entails regarding it as prohibiting split transport. Otherwise, the Bundesrepublik Deutschland takes the view that the provisions of that regulation could have been easily circumvented and at the same time cooperation with undertakings (bus operators) established in Serbia and Montenegro promoted. The German Government refers in particular to the judgment in Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraphs 3 and 18.

26 Lastly, in reliance on that judgment, the Bundesrepublik Deutschland states that the prohibition of split transport did not infringe the fundamental rights of the undertakings in question.

27 The Commission, however, takes the view that if carriage had been provided only as far as the border with the territory covered by the embargo, without any provision being made for the further carriage of passengers into that territory, it would have been impossible to prove that the effect of such an operation was to promote the Serbian and Montenegrin economies. In that case, the latter would not have benefited from the provision of a means of Community transport and such an operation would not of itself have led to the persons concerned being transported into Serbia and Montenegro.

28 While the Commission acknowledges that the carriage of such persons as far as the border would have made it possible for them subsequently to enter the territory covered by the embargo by their own means and for the hard currency they were carrying to have bolstered that territory's economy, it considers that that is too broad an interpretation of the embargo: the provision of services by a 'Community' carrier would merely be a preliminary operation and the economies of the republics subject to the embargo would be bolstered as a result of the passengers themselves and not as a result of the carriers transporting them as far as the areas bordering the territory covered by the embargo.

29 The Commission also points out that, in the context of actual split transport, such as that at issue in the main proceedings, it is for the national court to establish who provided the prohibited service. It is for the national court to determine to what extent a subcontractor such as Mr Aulinger, who cooperated in the implementation of split transport without necessarily being directly responsible for the planning and management of it, breached Article 1(d) of Regulation No 1432/92.

The Court's reply

30 The 10th recital in the preamble to Regulation No 1432/92 states that the purpose of the regulation is, inter alia, to ensure a uniform implementation throughout the Community of certain of the measures in Resolution 757 (1992). Consequently,

account must be taken of the wording and the purpose of that resolution (see, to that effect, *Bosphorus*, paragraphs 13 and 14) in order to interpret that regulation. Regulation No 1432/92 cannot therefore be interpreted in a manner that is contrary to Resolution 757 (1992).

31 No provision in Regulation No 1432/92, or indeed in Resolution 757 (1992), prohibits the movement of persons between the Member States of the Community and the Republics of Serbia and Montenegro.

32 However, as the German Government and the Commission rightly submitted, Article 1(d) of Regulation No 1432/92 prohibits direct commercial transport of persons between a location in the territories of the Member States and a location in Serbia or Montenegro by carriers established in one of those Member States. Such a provision of non-financial services falls within that measure in so far as it corresponds partly to an 'economic activity carried out in ... the Republics of Serbia and Montenegro' and partly to a provision of services to 'natural person[s] in the Republics of Serbia and Montenegro', as expressly referred to in Article 1(d) of Regulation No 1432/92 as examples of provisions of non-financial services that are prohibited.

33 The same conclusion must hold in relation to the provision of transport between the same points of arrival and departure, organised by means of a joint operation between an undertaking established in a Member State and an undertaking established in the territory covered by the embargo, the former providing carriage to or from the area bordering the territory covered by the embargo, the latter providing carriage from that point into the territory covered by the embargo or from inside that territory to that point (the passengers changing vehicles). In that regard, it matters little whether the service is provided by, or subcontracted to, a succession of different carriers.

34 In the absence of such an interpretation, the effectiveness of Regulation No 1432/92 could, moreover, easily be undermined by means of cooperation agreements concluded between Community undertakings and Serbian or Montenegrin undertakings.

35 Therefore, if, at the time when Regulation No 1432/92 was in force, a bus operator was involved, even as a subcontractor, in the split transport of passengers between the territory of a Member State of the Community and the territory of the Republics of Serbia and Montenegro, he would have been in breach of the provisions of that regulation. He could, on the other hand, have continued to provide a commercial service carrying persons to the area bordering the territory covered by the embargo, provided that that service did not form part of a split transport operation.

36 The answer to the first question must therefore be that Article 1(d) of Regulation No 1432/92 must be interpreted as meaning that the commercial carriage of persons to or from Serbia and Montenegro in the form of split transport was prohibited. 'Split transport' is to be understood as meaning the carriage of persons to or from the territory covered by the embargo, organised by means of a joint operation between an undertaking established in a Member State of the Community and an undertaking established in the territory covered by the embargo whereby the former provides carriage to or from the area bordering the territory covered by the embargo and the latter provides carriage from that point into the territory covered by the embargo or from inside that territory to that point (with passengers changing vehicles).

The second question

37 In view of the answer to the first question, there is no need to answer the second question.

Costs

38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 1(d) of Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro must be interpreted as meaning that the commercial carriage of persons to or from Serbia and Montenegro in the form of split transport was prohibited.

'Split transport' is to be understood as meaning the carriage of persons to or from the territory covered by the embargo, organised by means of a joint operation between an undertaking established in a Member State of the Community and an undertaking established in the territory covered by the embargo whereby the former provides carriage to or from the area bordering the territory covered by the embargo and the latter providescarriage from that point into the territory covered by the embargo or from inside that territory to that point (with passengers changing vehicles).

[Signatures]