JUDGMENT OF THE COURT (Second Chamber)

12 February 2009 *

In Case C-45/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 2 February 2007,

Commission of the European Communities, represented by K. Simonsson, M. Konstantinidis, F. Hoffmeister and I. Zervas, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by A. Samoni-Rantou and S. Chala, acting as Agents,

defendant,

* Language of the case: Greek.

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by I. Rao, acting as Agent, and D. Anderson QC,

intervener,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, J.-C. Bonichot, K. Schiemann, J. Makarczyk and C. Toader, Judges,

Advocate General: Y. Bot,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 20 November 2008,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by submitting to the International Maritime Organisation (IMO) a proposal (MSC 80/5/11, 'the contested proposal') for monitoring the compliance of ships and port facilities with the requirements of Chapter XI-2 of the International Convention for the Safety of Life at Sea, concluded in London on 1 November 1974 ('the SOLAS Convention') and the International Ship and Port Facility Security Code ('the ISPS Code'), the Hellenic Republic has failed to fulfil its obligations under Articles 10 EC, 71 EC and 80(2) EC.

2 By order of the President of the Court of 2 August 2007, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Hellenic Republic.

Legal framework

3 Article 1 of Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security (OJ 2004 L 129, p. 6; 'the Regulation'), entitled 'Objectives', provides as follows:

'1. The main objective of this Regulation is to introduce and implement Community measures aimed at enhancing the security of ships used in international trade and

domestic shipping and associated port facilities in the face of threats of intentional unlawful acts.

2. The Regulation is also intended to provide a basis for the harmonised interpretation and implementation and Community monitoring of the special measures to enhance maritime security adopted by the Diplomatic Conference of the IMO on 12 December 2002, which amended the [SOLAS Convention] and established the [ISPS Code].'

4 Article 3 of the Regulation, entitled 'Joint measures and scope', provides as follows:

'1. In respect of international shipping, Member States shall apply in full, by 1 July 2004, the special measures to enhance maritime security of the SOLAS Convention and Part A of the ISPS Code, in accordance with the conditions and with respect to the ships, companies and port facilities referred to therein.

2. In respect of domestic shipping, Member States shall apply, by 1 July 2005, the special measures to enhance maritime security of the SOLAS Convention and Part A of the ISPS Code to Class A passenger ships within the meaning of Article 4 of Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships [OJ 1998 L 144, p. 1, as last amended by Commission Directive 2003/75/EC of 29 July 2003 (OJ 2003 L 190, p. 6)] operating domestic services and to their companies, as defined in regulation IX-1 of the SOLAS Convention, and to the port facilities serving them.

3. Member States shall, after a mandatory security risk assessment, decide the extent to which they will apply, by 1 July 2007, the provisions of this Regulation to different categories of ships operating domestic services other than those referred to in paragraph 2, their companies and the port facilities serving them. The overall level of security should not be compromised by such a decision.

…

4. When implementing the provisions required pursuant to paragraphs 1, 2 and 3, Member States shall take fully into account the guidelines contained in Part B of the ISPS Code.

5. Member States shall conform to the following paragraphs of Part B of the ISPS Code as if they were mandatory:

…'

5 Article 9 of the Regulation, entitled 'Implementation and conformity checking', provides in paragraph 1:

'Member States shall carry out the administrative and control tasks required pursuant to the provisions of the special measures to enhance maritime security of the SOLAS

Convention and of the ISPS Code. They shall ensure that all necessary means are allocated and effectively provided for the implementation of the provisions of this Regulation.'

6 Article 11 of the Regulation, entitled 'Committee procedure' provides in paragraph 1 that '[t]he Commission shall be assisted by a Committee'.

7 Annex I to the Regulation contains the amendments inserting the new Chapter XI-2 into the Annex to the SOLAS Convention in its amended version. The amended version of the ISPS Code is to be found in Annex II to the regulation.

8 The first subparagraph of Article 7(1) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23) provides as follows:

'Each committee shall adopt its own rules of procedure on the proposal of its chairman, on the basis of standard rules of procedure which shall be published in the *Official Journal of the European Communities*.'

9 Article 2 of the Standard rules of procedure — Council Decision 1999/468 (OJ 2001 C 38, p. 3; 'the Standard rules of procedure'), entitled 'Agenda', provides in paragraph 2:

'The agenda shall make a distinction between:

…

(b) other issues put to the committee for information or a simple exchange of views, either on the Chairman's initiative, or at the written request of a committee member …'

The pre-litigation procedure

10 On 18 March 2005, the Hellenic Republic submitted the contested proposal to the IMO Maritime Safety Committee. By that proposal, that Member State asked the committee to examine the creation of check lists or other appropriate tools for assisting the Contracting States of the SOLAS Convention in monitoring whether ships and port facilities complied with the requirements of Chapter XI-2 of the Annex to that convention and the ISPS Code.

11 Taking the view that the Hellenic Republic had thus submitted a national position within an international organisation in an area falling within the exclusive external competence of the European Community, on 10 May 2005 the Commission sent to that Member State a letter of formal notice, to which the latter responded on 7 July 2005.

12 Since it was unsatisfied with that response, the Commission issued a reasoned opinion on 13 December 2005, to which the Hellenic Republic responded on 21 February 2006.

13 Unconvinced by the Hellenic Republic's response to the reasoned opinion, the Commission decided to bring the present action.

The action

14 The Commission argues that, since the adoption of the Regulation, integrating both Chapter XI-2 of the Annex to the SOLAS Convention and the ISPS Code into Community law, the Community has enjoyed exclusive competence to assume international obligations in the area covered by that regulation. It follows, in its submission, that the Community alone is competent to ensure that the standards on the subject are properly applied at Community level and to discuss with other IMO Contracting States the correct implementation of or subsequent developments in those standards, in accordance with the two measures referred to. The Member States therefore no longer have competence to submit to the IMO national positions on matters falling within the exclusive competence of the Community, unless expressly authorised to do so by the Community.

15 In that connection, it must first be observed that, under Article 3(1)(f) EC, the setting of a common policy in the sphere of transport is specifically mentioned as one of the objectives of the Community (see also Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 20, *'AETR'*).

16 Second, under Article 10 EC, the Member States must both take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty or resulting from action taken by the institutions and also abstain from any measure which might jeopardise the attainment of the objectives of the Treaty (*AETR*, paragraph 21).

17 If those two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope (*AETR*, paragraph 22).

18 It is common ground that the provisions of the Regulation, which has as its legal basis Article 80(2) EC, the second subparagraph of which refers to Article 71 EC, are Community rules promulgated for the attainment of the objectives of the Treaty.

19 It is thus necessary to examine whether, by submitting to the IMO Maritime Safety Committee the contested proposal, which the Hellenic Republic does not dispute is a national proposal, that Member State may be regarded as having assumed obligations which might affect the provisions of the Regulation.

20 The Commission argues that the case-law arising from *AETR* applies to non-binding measures such as the contested proposal, whereas the Hellenic Republic submits that, by making such a proposal in the context of its active participation in an international organisation, it did not assume an obligation within the meaning of that case-law. That Member State adds that, in any event, the fact that it submitted the contested proposal to the IMO did not lead to the adoption of new rules within that international organisation.

21 However, as the Advocate General noted at point 36 of his Opinion, in asking the IMO Maritime Safety Committee to examine the creation of check lists or other appropriate tools for assisting the Contracting States of the SOLAS Convention in monitoring whether ships and port facilities complied with the requirements of Chapter XI-2 of the

Annex to that convention and the ISPS Code, the Hellenic Republic submitted to that committee a proposal which initiates a procedure which could lead to the adoption by the IMO of new rules in respect of Chapter XI-2 and or/the ISPS code.

22 The adoption of such new rules would as a consequence have an effect on the Regulation, the Community legislature having decided, as is apparent from both Article 3 of that regulation and Annexes I and II thereto, to incorporate in substance both of those international instruments into Community law.

23 In those circumstances, since it set in motion such a procedure with the contested proposal, the Hellenic Republic took an initiative likely to affect the provisions of the Regulation, which is an infringement of the obligations under Articles 10 EC, 71 EC and 80(2) EC.

24 That interpretation cannot be undermined by the Hellenic Republic's argument that the Commission infringed Article 10 EC by refusing to include the contested proposal on the agenda for the meeting on 14 March 2005 of the Maritime Safety Committee (Marsec committee), which is provided for in Article 11(1) of the Regulation and chaired by the Commission's representative.

25 It is true that, in order to fulfil its duty of genuine cooperation under Article 10 EC, the Commission could have endeavoured to submit that proposal to the Maritime Safety Committee and allowed a debate on the subject. As is apparent from Article 2(2)(b) of the Standard rules of procedure, such a committee is also a forum enabling exchanges

of views between the Commission and the Member States. The Commission, in chairing that committee, may not prevent such an exchange of views on the sole ground that a proposal is of a national nature.

26 None the less, any breach by the Commission of Article 10 EC cannot entitle a Member State to take initiatives likely to affect Community rules promulgated for the attainment of the objectives of the Treaty, in breach of that State's obligations, which, in a case such as the present, arise under Articles 10 EC, 71 EC and 80(2) EC. Indeed, a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by an institution of rules of Community law (see, by analogy, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 20 and case-law cited).

27 In support of its argument, the Hellenic Republic also invokes a gentleman's agreement allegedly adopted by the Council of the European Union in 1993 under which Member States are permitted to submit proposals to the IMO, not only collectively but also individually, where no common position has been established beforehand.

28 However, the documents comprising that alleged gentleman's agreement do not bear out the Hellenic Republic's argument. As the Advocate General noted in point 46 of his Opinion, it is apparent in essence from those documents that the exclusive competence of the Community does not preclude the Member States from actively participating in the IMO, provided that the positions adopted by those States within that international organisation are coordinated at Community level beforehand. It is common ground, in the present case, that no such coordination occurred.

29 Moreover, a gentleman's agreement, even if it had the scope ascribed to it by the Hellenic Republic, could not, in any event, affect the division of powers between the Member States and the Community, such as it results from the provisions of the Treaty; it cannot permit a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty (see, to that effect, Case 204/86 *Greece* v *Council* [1988] ECR 5323, paragraph 17).

30 Similarly, the Hellenic Republic's argument that an obligation to abstain from active participation in the IMO will not ensure that the Community interest is protected, since the Community is not a member of that international organisation, cannot be accepted. The mere fact that the Community is not a member of an international organisation in no way authorises a Member State, acting individually in the context of its participation in an international organisation, to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty.

31 Moreover, the fact that the Community is not a member of an international organisation does not prevent its external competence from being in fact exercised, in particular through the Member States acting jointly in the Community's interest (see, to that effect, Opinion 2/91 [1993] ECR I-1061, paragraph 5).

32 The Hellenic Republic also relies on Article 9(1) of the Regulation, which in its submission confers exclusive competence on the Member States for implementing the safety requirements laid down by that regulation, which are based on the amendments to the SOLAS Convention and the ISPS Code.

33 In that connection, it is sufficient to note that the competence of the Member States, which stems from that provision, does not imply that they have an external competence to take initiatives likely to affect the provisions of the regulation.

34 At the hearing, the Hellenic Republic also invoked Article 307(1) EC, arguing that, since it became an IMO member before it joined the Community, its obligations towards the IMO and, more specifically, its obligation to participate actively in that international organisation as a member of it are not affected by the provisions of the Treaty.

35 However, it must be borne in mind that Article 307(1) EC is designed to apply only if there is an incompatibility between, on the one hand, an obligation arising under the international convention, concluded by the Hellenic Republic before its accession to the Community and by which that State became an IMO member, and, on the other, an obligation arising under Community law (see, to that effect, Case C-62/98, *Commission* v *Portugal* [2000] ECR I-5171, paragraphs 46 and 47).

36 First, the whole thrust of the Hellenic Republic's argument is that its submission of the contested proposal to the IMO Maritime Safety Committee is not at variance with that Member State's obligations under Community law, which rules out precisely the possibility of relying on Article 307(1) EC.

37 Second, the Hellenic Republic does not establish that it was required to submit the contested proposal to that committee by virtue of the IMO's founding documents and/or legal instruments drawn up by that international organisation.

38 Consequently, it must be declared that, by submitting the contested proposal to the IMO, the Hellenic Republic has failed to fulfil its obligations under Articles 10 EC, 71 EC and 80(2) EC.

Costs

39 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 Hellenic Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Declares that, by submitting to the International Maritime Organisation (IMO) a proposal (MSC 80/5/11) for monitoring the compliance of ships and port facilities with the requirements of Chapter XI-2 of the International Convention for the Safety of Life at Sea, concluded in London on 1 November 1974, and the International Ship and Port Facility Security Code, the Hellenic

Republic has failed to fulfil its obligations under Articles 10 EC, 71 EC and 80(2) EC;

2. Orders the Hellenic Republic to pay the costs.

[Signatures]