JUDGMENT OF THE COURT (Second Chamber)

11 January 2007 *

In Case C-251/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 June 2004,

Commission of the European Communities, represented by G. Zavvos and K. Simonsson, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by A. Samoni and S. Chala, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris, J. Klučka (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 May 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by allowing only vessels flying the Greek flag to provide towage services on the open sea, the Hellenic Republic has failed to fulfil its obligations under Article 1 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7).

Legal context

Community legislation

Regulation No 3577/92

2 The third and the fourth recitals of Regulation No 3577/92 are formulated as follows:

'... the abolition of restrictions on the provision of maritime transport services within Member States is necessary for the establishment of the internal market; ... the internal market will comprise an area in which the free movement of goods, persons, services and capital is ensured;

... therefore freedom to provide services should be applied to maritime transport within Member States'.

3 In accordance with Article 1 of Regulation No 3577/92, freedom to provide maritime transport services within a Member State is to apply, as from 1 January 1993, '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'.

4 Article 2(1) of that regulation defines 'maritime transport services within a Member State (maritime cabotage)' as 'services normally provided for remuneration [which] 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;

(b) "off-shore supply services": the carriage of passengers or goods by sea between any port in a Member State and installations or structures situated on the continental shelf of that Member State;

(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'.

Regulation No 4055/86

5 Under Article 1(4) 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 (OJ 1986 L 378, p. 1):

'... 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'.

National legislation

6 Article 11(1)(b), (aa) and (bb) of Decree Law No 187/73, which constitutes the Greek Code of public maritime law, reserves towage operations of any kind, specified in Article 188 of the Code, as well as assistance at sea and maritime rescue operations, defined in Article 189 of that code, in national waters to vessels flying the flag of Greece, when they are effected in and between the territorial waters of that Member State.

7 In accordance with Article 188(2) of the Code, the port authority is to adopt port regulations setting out the conditions for granting a port towage licence, the regulation of towage, circumstances in which towage services must be provided, towage rights in port and mooring waters and all other necessary details. According to Article 188(3), the extent of the right to tow, occasional or emergency towage by other vessels, related rights of tugs or other vessels flying the flag of a State other than Greece, as well as all other related details, are to be laid down by presidential decree.

8 The granting of such licences is governed in particular by Article 1(1) of Presidential Decree No 45/83 on the towage of vessels which specifies that 'the carrying out of professional towage between two points within Greek waters as well as the provision of all services directly relating to such an operation are reserved to Greek vessels

classed as tugs under the legislation in force, licensed by the competent port authority ...', as well as by Article 4(2)(b) of General Ports Regulations, issued by the Chief of Greek Port Police, which requires the vessel owner applying for such a licence to produce to the port authority a certificate of nationality.

9 Under Article 3 of Presidential Decree No 45/83, tugs or other vessels flying the flag of a State other than Greece are authorised:

'(a) to moor at any Greek port or at any point on the Greek coast when they are towing a vessel, an auxiliary boat or other floating object the towage of which commenced in a foreign port or at any other point on the coast of a foreign State or on open sea;

(b) to take over the towage, from any Greek port or any place on the Greek coast, of a vessel or any other floating object bound for a foreign port or any place on the coast of a foreign State or the open sea;

(c) to cross Greek territorial waters when, coming from a foreign port or any point on the coast of a foreign State or from the open sea, they are towing a vessel, an auxiliary boat or any other floating object and are bound for a foreign port or for any place on the coast of a foreign State or the open sea ...' .

Pre-litigation procedure

10 Considering that the Hellenic Republic had failed to fulfil its obligations under Article 1 of Regulation No 3577/92, the Commission initiated the infringement procedure laid down by Article 226 EC.

11 After giving the Hellenic Republic the opportunity to submit its observations, on 27 July 2002 the Commission issued a reasoned opinion requesting that Member State to take the measures necessary to comply with the opinion within two months of its notification.

12 The Greek Government replied to that opinion by letter of 13 November 2002. The Commission took the view that that reply was not satisfactory and decided to bring the present proceedings.

The action

Arguments of the parties

13 In their observations submitted to the Court, the parties focus principally on three points, namely whether or not the list in Article 2(1) of Regulation No 3577/92 is exhaustive, the legal nature of towage in Greek law and the usefulness of

distinguishing between towage in the port area and towage outside that area for the purposes of determining the scope of that regulation.

14 Firstly, although the Commission accepts that the service of towage is not expressly mentioned in Article 2(1) of Regulation No 3577/92 as a 'maritime transport service', it considers that the list contained in that disposition is only indicative, since it is introduced by the term 'in particular'. Consequently, all maritime transport services normally provided for remuneration ought to be described as 'maritime cabotage'. Towage satisfies all the elements of that definition.

15 The Greek Government argues, conversely, that the term 'in particular' ('ειδικότερα' in the Greek version), used in Article 2(1) of Regulation No 3577/92, must be understood as 'more particularly', with the effect of introducing an exhaustive list.

16 Furthermore, the term 'maritime transport service' is expressly defined in Article 1(4) of Regulation No 4055/86.

17 According to the Greek Government, the definition of that term is identical in the Regulations in question, Nos 3577/92 and 4055/86. It includes, apart from the elements already mentioned by the Commission, the purpose of the transport, namely the carriage of passengers or goods, and is, in both cases, exhaustive. The Greek Government adds that maritime assistance services do not constitute a form of transport in the usual sense and that vessels which have suffered damage cannot be regarded as goods which must be transported.

18 The Commission replies that, although the definition of 'maritime transport services' in Article 1(4) of Regulation No 4055/86 also includes, in its view, towage, that definition should not, in any event, apply in this case because that regulation governs only international maritime transport services.

19 Secondly, the Commission submits that it follows from Article 3 of Presidential Decree No 45/83 that towage is not always regarded in Greek law as a service auxiliary to maritime cabotage, since the similarity between maritime transport services and the cases of towage for which it provides led the Greek authorities to authorise, in derogation from Article 1 of that decree, albeit under strict conditions, the carrying out of towage operations by tugs flying the flag of a State other than Greece.

20 In response, the Greek Government submits that towage and maritime assistance constitute, in Greek law, auxiliary services which contribute solely to the proper functioning of maritime transport services. The mere fact of moving a vessel under tow or a floating construction without means of propulsion does not suffice to deprive that service of its auxiliary character or to confer on it the status of maritime

transport. Towage thus falls outside the scope of Regulation No 3577/92 in the absence of a direct link between what is being transported and the tug. Moreover, in considering that Article 3 of Presidential Decree No 45/83 constitutes an exception to Article 1 of that decree, the Greek Government considers that the Commission wrongly interpreted the respective scopes of those two articles. The Greek Government specifies in that respect that Article 1 of that decree governs professional towage between two points situated in Greek territorial waters, whereas the scope of Article 3 of the decree is limited to situations with a foreign element.

21 Thirdly, it is the view of the Commission that the Greek authorities do not distinguish between towage services provided within the port area and those provided outside the port, contrary to what appeared in the recent Commission proposals for a directive on market access to port services. As those proposals do not relate to cabotage outside the port area, it is thus Regulation No 3577/92 which applies in the present case.

22 The Greek Government considers that there is no reason to subject towage services to different legal rules, depending on whether they are carried out within or outside the port area. The distinction made on the basis of the place of provision of that service is arbitrary, without any legal basis and likely to create legal uncertainty in the application of Regulation No 3577/92.

Findings of the Court

23 As a preliminary point, it should be noted that, under Article 51(1) EC, freedom to provide services in the field of transport is governed by the provisions of the title of the EC Treaty relating to transport, which include Article 80(2) EC, permitting the Council of the European Union to lay down appropriate provisions for sea transport.

24 On the basis of Article 80(2) EC, the Council adopted Regulation No 3577/92, the aim of which is to implement freedom to provide services in respect of maritime cabotage under the conditions and subject to the exceptions which it lays down.

25 To that end, Article 1 of that regulation establishes the principle of freedom to provide maritime cabotage services within the European Community. The conditions governing the application of the principle of freedom to provide services, which are laid down in particular in Article 49 EC, have thus been extended to include maritime cabotage (see Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 20).

26 On the other hand, it follows from Article 51(1) EC, read in conjunction with Article 80(2) EC, that services falling within the sea transport sector, but not within the scope of Regulation No 3577/92 or other rules adopted on the basis of Article 80(2) EC, remain governed by the legislation of Member States, in compliance with Article 54 EC and other general provisions of the Treaty (see, to that effect Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 32).

27 In the present case, since the Commission based its application only on the complaint of infringement of Article 1 of Regulation No 3577/92, it is appropriate solely to examine whether towage services in open sea, which fall under sea transport for the purposes of Article 80(2) EC, are covered by that regulation and constitute 'maritime transport services within a Member State (maritime cabotage)'

as defined in Article 2(1) thereof. It is not for the Court to give a ruling that goes beyond the grounds for complaint and form of order sought in the Commission's application under Article 226 EC (see, to that effect, Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 24, and case-law cited).

28 In that regard, it is clear that Article 2(1) of Regulation No 3577/92 does not expressly mention towage. However, since the list of 'maritime cabotage services' for the purposes of that article is introduced by the term 'in particular', it cannot in principle be regarded as exhaustive.

29 Despite the non-exhaustive nature of the list given in Article 2(1) of Regulation No 3577/92, it follows from that provision, construed as a whole, that the services falling within its scope are, firstly, normally provided for remuneration and, secondly, as the essential characteristics of the examples of maritime cabotage in that article illustrate, serve the purpose of transporting passengers or goods by sea between two places in the territory of a single Member State.

30 That interpretation is confirmed, as the Greek Government rightly argues, by the wording of Article 1(4) of Regulation No 4055/86, according to which services are to be considered maritime transport services where they are provided for consideration for the purpose of transporting passengers or goods by sea between any port of a Member State and any ports or off-shore installation of another Member State or a third country.

31 As the Advocate General pointed out in points 45 to 47 of her Opinion, the nature and characteristics of towage are different from those of cabotage, as defined in Article 2(1) of Regulation No 3577/92. Although towage is a service normally

provided for remuneration, it does not in principle entail a straightforward carriage of goods or passengers by sea. Rather, it involves assisting the movement of a vessel, rig, platform or buoy. A towing vessel that is assisting another vessel to manoeuvre, or supplementing that vessel's own propulsive machinery, or substituting for it in cases of failure or breakdown, is assisting the vessel by which the passengers or goods are transported but is not itself the transporting vessel.

32 In those conditions, to infer from the term 'in particular' in Article 2(1) of Regulation No 3577/92 that it can extend the scope of that provision to any service related, incidental or ancillary to the provision of maritime transport services within the Member States, whether or not that service has the essential characteristics of maritime cabotage as expressly defined therein, would be contrary not only to the purpose of that regulation, but also to legal certainty as to the scope of that regulation.

33 It follows that towage cannot be regarded as falling within the scope of Article 2(1) of Regulation No 3577/92.

34 In the light of all the foregoing considerations, the application must be dismissed.

Costs

35 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 Hellenic Republic has applied for costs and the Commission has been unsuccessful in all its pleas, the latter must be ordered to pay the costs.

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

1. Dismisses the application;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]