JUDGMENT OF THE COURT

20 February 2001 *

In Case C-205/99,

REFERENCE to the Court under Article 234 EC by the Tribunal Supremo, Spain, for a preliminary ruling in the proceedings pending before that court between

Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others

and

Administración General del Estado,

on the interpretation of Articles 1, 2 and 4 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),

* Language of the case: Spanish.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann and M. Wathelet (Presidents of Chambers), D.A.O. Edward, P. Jann, L. Sevón, R. Schintgen, F. Macken, N. Colneric, S. von Bahr and C.W.A. Timmermans (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman-Hubeau, Head of Division,

after considering the written observations submitted on behalf of:

— Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir), by T. García Peña, abogada,

— Fletamientos de Baleares SA, by J.L. Goñi Etchevers, abogada,

— Unión Sindical Obrera (USO), by B. Hernández Bataller, abogada,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Greek Government, by K. Paraskevopoulou-Grigoriou and S. Vodina, acting as Agents,

— the French Government, by K. Rispal-Bellanger and D. Colas, acting as Agents,

— the Norwegian Government, by H. Seland, acting as Agent,

— the Commission of the European Communities, by B. Mongin and M. Desantes, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir), represented by B. Hernández Bataller; of the Spanish Government, represented by N. Díaz Abad; of the Greek Government, represented by K. Paraskevopoulou-Grigoriou and S. Vodina; of the French Government, represented by M. Seam, acting as Agent; of the Norwegian Government, represented by H. Seland; and of the Commission, represented by M. Desantes, at the hearing on 24 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2000,

gives the following

Judgment

1 By order of 12 May 1999, received at the Court on 31 May 1999, the Tribunal Supremo (Supreme Court), Spain referred for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 1, 2 and 4 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).

2 Those questions have been raised in four sets of proceedings between Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir), Isleña de Navegación SA (Isnasa), Fletamientos de Baleares SA and Unión Sindical Obrera (USO) ('Analir and Others'), respectively, on the one hand, and Administración General del Estado, on the other, concerning applications by the applicants for annulment of Royal Decree No 1466/1997 of 19 September 1997 on the legal rules governing regular maritime cabotage lines and public-interest shipping (BOE No 226 of 20 September 1997, p. 27712; 'Royal Decree No 1466') on the ground that it is contrary to Community legislation.

Relevant provisions

Community legislation

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

'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, including ships registered in Euros, once that register is approved by the Council.'

4 Article 2 of Regulation No 3577/92 provides:

'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;

(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;

Ceuta and Melilla shall be treated in the same way as island ports.

...

3. "a public service contract" shall mean a contract concluded between the competent authorities of a Member State and a Community shipowner in order to provide the public with adequate transport services.

A public service contract may cover notably:

— transport services satisfying fixed standards of continuity, regularity, capacity and quality,

— additional transport services,

— transport services at specified rates and subject to specified conditions, in particular for certain categories of passengers or on certain routes,

— adjustments of services to actual requirements;

4. "public service obligations" shall mean obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions;

...'.

5 Article 4 of Regulation No 3577/92 states:

'1. 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.

Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.

2. In imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel.

Where applicable, any compensation for public service obligations must be available to all Community shipowners.

3. Existing public service contracts may remain in force up to the expiry date of the relevant contract.'

6 Under Article 7 of Regulation No 3577/92:

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

National legislation

7 Article 7(4) of Spanish Law No 27/1992 of 24 November 1992 concerning State and Merchant Navy Ports (BOE No 283 of 25 November 1992, p. 39953) defines 'public-interest shipping' as that which is regarded as necessary in order to provide essential maritime connections for the peninsula, between the peninsula and the non-peninsular Spanish territories, and between the latter territories. Furthermore, under that provision, it is for the Government to determine which shipping is of public interest and to specify the means of ensuring that that interest is protected.

8 Article 4 of Royal Decree No 1466 states:

'Pursuant to Article 7(4) in conjunction with Article 6(1)(h) of the Law concerning State and Merchant Navy Ports services on regular island cabotage lines, meaning services for the carriage of passengers or goods by sea between ports situated on the peninsula and the non-peninsular territories and between ports of those territories, in accordance with Article 2(1)(c) of Regulation (EEC) No 3577/92, are declared to be public-interest shipping.

The provision of regular shipping services of public interest shall be subject to prior administrative authorisation, the validity of which is conditional on the fulfilment of public service obligations imposed by the Directorate General of the Merchant Navy. Exceptionally, the competent administrative authorities may enter into public-interest contracts in order to ensure the existence of adequate services for the maintenance of maritime connections.'

9 The administrative authorisation provided for in Royal Decree No 1466 is subject to two types of conditions. First, Article 6 of that decree, entitled 'Conditions for authorisation', provides:

'Authorisation to operate a regular island cabotage line shall be issued subject to the following conditions:

(a) the applicant must be a shipowner or shipping company having no outstanding tax or social security debts;

(b) in the case of hiring or chartering, it must be shown that the owner or the charterer has no outstanding tax or social security debts;

...

(e) the undertaking which owns the ships assigned to the line must have no outstanding tax or social security debts;

(f) the applicant must, within the first 15 days of June and December of each year, renew the documents provided for under (a), (b) and (e) above, proving that there are no outstanding tax or social security debts;

...'.

10 Second, Article 8 of Royal Decree No 1466, entitled 'Public service obligations', states:

'1. Only the following may be regarded as public service obligations: conditions for authorisation to operate a regular line concerning the regularity and continuity of the service, the capacity to provide it, the manning of the vessel or vessels and, where appropriate, the ports to be served, the frequency of the service and where relevant the rates.

The imposition of public service obligations must in any event be based on objective public-interest reasons which are duly justified by the need to ensure an adequate regular maritime transport service.

In order to prevent distortion of competition the obligations must be imposed in such a way as not to discriminate between undertakings providing the same or similar services on lines which cover the same or similar routes.

2. Exceptionally, economic compensation may be granted for the public service obligations. The compensation may not discriminate in any way between similar services on lines which cover the same routes.

The right to economic compensation in respect of the fulfilment of public service obligations may be afforded at the request of the party concerned, or by the Ministry of Public Works after a general call for tenders has been issued for the purpose of establishing services on a regular line with public service obligations.

Where the person concerned requests that that right be afforded, the undertaking which seeks authorisation to operate a regular line must first demonstrate to the Directorate General of the Merchant Navy that that line would be profitable in itself if it were not subject to public service obligations.

The undertaking making the request must automatically submit the relevant documentary proof at the same time as those which it must submit in order to obtain the authorisation.

The Directorate General of the Merchant Navy shall base its assessment on, in particular, the level of competition which the requested line will provide for other existing lines and it shall also take account of the rates to be charged.

3. In addition to the public service obligations which are set out in Regulation (EEC) No 3577/92 and referred to in the authorisation, the Directorate General of the Merchant Navy may, in accordance with Article 83(2) of the Law concerning State and Merchant Navy Ports, impose on shipping undertakings providing cabotage services specific public service obligations concerning rescue, maritime safety, pollution control, health standards and other essential matters of public or social interest. This shall, where appropriate, entitle the undertakings concerned to receive appropriate economic compensation for the supplementary costs they have incurred.'

The main proceedings and the questions referred for a preliminary ruling

11 Analir and Others brought separate actions, which were subsequently joined, before the Tribunal Supremo, which in this case is the court with jurisdiction at first and last instance, for annulment of Royal Decree No 1466. They submitted, in support of their claims, that Royal Decree No 1466 was inconsistent with Community law, in particular Regulation No 3577/92.

12 Since it considered that the outcome of the proceedings before it depended on the interpretation of that regulation, the Tribunal Supremo decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. May Article 4, in conjunction with 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) be interpreted as permitting the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation?

2. If so, may the grant and continuation of such administrative authorisation be made subject to conditions, such as having no outstanding tax or social security debts, other than those set out in Article 4(2) of the regulation?

3. May Article 4(1) of Regulation No 3577/92 be interpreted as permitting public service obligations to be imposed on some shipping companies and public service contracts within the meaning of Article 1(3) of the regulation to be concluded with others at the same time for the same line or route, in order to ensure the same regular traffic to, from or between islands?'

The first question

13 Analir and Others claim that the combined provisions of Articles 1 and 4 of Regulation No 3577/92 do not permit the provision of island cabotage services to be made subject to prior administrative authorisation, as required by Royal Decree No 1466. In their submission, it is sufficient to indicate when the activity is first undertaken on the basis of a system of licences by category and of declaration procedures, without prejudice to the option for the administrative authorities to impose public service obligations.

14 They are supported by the Norwegian Government and the Commission, which consider that a system of prior administrative authorisation which, without any real connection with the public-service need, is generally applicable to any carriage between the peninsula and the Spanish islands and between those islands, does not meet the requirements of Articles 2 and 4 of Regulation No 3577/92. The implementation of Article 4 requires, in the Commission's submission, that the existence of such a need be determined separately in each case and for each line.

15 On the other hand, the Spanish Government submits that the requirement of prior administrative authorisation does not constitute an obstacle to the liberalisation of maritime island cabotage. It has proved impossible in practice to provide detailed justification for each line, and on other economic markets which are also liberalised, such as telecommunications, the provision of services is still subject to an authorisation scheme. Extending by analogy the justifications which may be relied upon in connection with telecommunications to the field of maritime cabotage services, the fact that islands are involved should enable the Member States to impose universal service obligations by means of prior administrative authorisation.

16 The Spanish Government is supported by the Greek Government, which submits that it is precisely with the aim of protecting the public interest that Article 4 of Regulation No 3577/92, which must be construed in the light of the generally

liberal spirit of that regulation, provides for the possibility of imposing public service obligations by means of prior administrative authorisation.

17 The first point to be noted here is that, under Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC), the activities of the Community are to include an internal market characterised, in particular, by the abolition, as between Member States, of obstacles to the free movement of services.

18 Under Article 61 of the EC Treaty (now, after amendment, Article 51 EC), freedom to provide services in the field of transport is to be governed by the provisions of the title of that treaty relating to transport, which include Article 84(2) of the EC Treaty (now, after amendment, Article 80(2) EC), which permits the Council of the European Union to lay down appropriate provisions for sea transport.

19 On the basis of Article 84(2) of the Treaty, the Council adopted Regulation No 3577/92, the aim of which is to implement freedom to provide services for maritime cabotage under the conditions and subject to the exceptions which it lays down.

20 To that end, Article 1 of that regulation clearly establishes the principle of freedom to provide maritime cabotage services within the Community. The conditions governing the application of the principle of freedom to provide services which is laid down *inter alia* in Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 61 of the Treaty have thus been defined in the maritime cabotage sector.

21 It is settled case-law that freedom to provide services 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, in particular, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14; Case C-272/94 *Guiot* [1996] ECR I-1905, paragraph 10; Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 56; and Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33).

22 It is clear that national legislation, such as Article 4 of Royal Decree No 1466, which makes the provision of maritime cabotage services subject to prior administrative authorisation, is liable to impede or render less attractive the provision of those services and therefore constitutes a restriction on the freedom to provide them (see, to that effect, *Vander Elst*, paragraph 15; and Case C-355/98 *Commission* v *Belgium* [2000] ECR I-1221, paragraph 35).

23 However, the Spanish Government argues that Article 4 of Regulation No 3577/92 permits Member States to impose public service obligations as a condition for the provision of maritime cabotage services and establish a prior administrative authorisation scheme to that end.

24 In that regard, it should be noted, first, that the wording of Article 4 of Regulation No 3577/92 provides no indication as to whether a prior administrative authorisation scheme may be used as a means of imposing the public service obligations to which that article refers.

25 Second, 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 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 (see, to that effect, *Säger*, paragraph 15; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; and *Guiot*, paragraphs 11 and 13).

26 Accordingly, it is necessary to consider whether the establishment of a prior administrative authorisation scheme may be justified as a means of imposing public service obligations.

27 First, it cannot be denied that the objective pursued, namely to ensure the adequacy of regular maritime transport services to, from and between islands, is a legitimate public interest.

28 The possibility of imposing public service obligations for maritime cabotage with, and between, islands was expressly afforded by Article 4 of Regulation No 3577/92. The Treaty, as amended by the Treaty of Amsterdam, also takes into account, in the conditions which it lays down, the particular nature of island regions, as is clear from the second paragraph of Article 158 EC and Article 299(2) EC. That particular nature was further referred to in Declaration No 30 on island regions, annexed to the Final Act of the Treaty of Amsterdam.

29 However, it cannot be inferred from those provisions that all maritime cabotage services with, or between, islands within a Member State must, by reason of the fact that islands are involved, be regarded as public services.

30 Second, the question thus arises of whether a prior administrative authorisation scheme is necessary having regard to the objective pursued.

31 The first point to note in that respect is that the purpose of imposing public service obligations is to ensure adequate regular transport services to, from and between islands, as the ninth recital in the preamble to Regulation No 3577/92 states.

32 Furthermore, public service obligations were defined in Article 2(4) of that regulation as obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

33 Moreover, the aim of the public service contract provided for in Article 4 of Regulation No 3577/92 was expressly defined in Article 2(3) thereof as being to provide the public with adequate transport services.

34 It follows that the application of a prior administrative authorisation scheme as a means of imposing public service obligations presupposes that the competent national authorities have first been able to determine, for specific routes, that the regular transport services would be inadequate if their provision were left to market forces alone. In other words, it must be possible to demonstrate that there is a real public service need.

35 Second, for a prior administrative authorisation scheme to be justified, it must also be demonstrated that such a scheme is necessary in order to be able to impose public service obligations and that it is proportionate to the aim pursued, inasmuch as the same objective could not be attained by measures less restrictive

of the freedom to provide services, in particular a system of declarations *ex post facto* (see, to that effect, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* [1995] ECR I-4821, paragraphs 23 to 28).

36 It is possible that prior administrative authorisation is a sufficient and appropriate means of enabling the content of the public service obligations to be imposed on an individual shipowner to be specified, taking account of his particular circumstances, or of enabling a prior check to be made on his ability to fulfil such obligations.

37 However, such a scheme cannot render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of Community law, in particular those relating to a fundamental freedom such as that at issue in the main proceedings (see, to that effect, Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 25; and *Sanz de Lera*, paragraph 25).

38 Therefore, if a prior administrative authorisation scheme is to be justified even though it derogates from a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily. Accordingly, the nature and the scope of the public service obligations to be imposed by means of a prior administrative authorisation scheme must be specified in advance to the undertakings concerned. Furthermore, all persons affected by a restrictive measure based on such a derogation must have a legal remedy available to them.

39 It is for the national court to consider and determine whether the prior administrative authorisation scheme at issue in the case before it satisfies those conditions and those criteria.

40 In the light of the foregoing, the answer to the first question must be that the combined provisions of Articles 1 and 4 of Regulation No 3577/92 permit the provision of regular maritime cabotage services to, from and between islands to be made subject to prior administrative authorisation only if:

— a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated;

— it is also demonstrated that that prior administrative authorisation scheme is necessary and proportionate to the aim pursued;

— such a scheme is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned.

The second question

41 By its second question, the national court asks, in the event of the first question being answered in the affirmative, whether the grant and continuation of prior administrative authorisation may be made subject to conditions, such as having no outstanding tax or social security debts, other than those set out in Article 4(2) of Regulation No 3577/92.

42 Analir and Others, supported by the Norwegian Government, claim that the obligation of having no outstanding tax or social security debts has no specific connection with the maritime traffic which is the subject-matter of the prior administrative authorisation. Furthermore, such an obligation does not fall within the public service obligations set out in Article 4(2) of that regulation. They infer that national legislation making the grant and continuation of prior administrative authorisation subject to conditions other than those set out in Regulation No 3577/92 is a national measure which constitutes a new restriction on the freedom already in fact attained, within the meaning of Article 62 of the EC Treaty (repealed by the Treaty of Amsterdam), and which is, accordingly, contrary to the EC Treaty.

43 The Spanish Government submits that the conditions relating to the absence of outstanding tax or social security debts set out in Article 6 of Royal Decree No 1466 constitute general conditions for the grant of prior administrative authorisation and are not 'public service obligations' within the meaning of Regulation No 3577/92. Accordingly, in its submission, that national provision does not go beyond the requirements of Article 4(2) of the regulation and is thus compatible with Community law.

44 The Commission, for its part, submits that the conditions mentioned in Article 6 of Royal Decree No 1466 may be regarded as covered by the reference to 'capacity to provide the service' in Article 4(2) of Regulation No 3577/92, which includes not only the economic capacity of the Community shipowner, but also his financial capacity.

45 The first point to be noted here is that it follows from the answer to the first question that the public service obligations imposed by Member States for certain maritime cabotage services by means of prior administrative authorisation may be compatible with Community law provided that certain conditions are satisfied.

46 The national court is essentially asking, by its second question, whether in such a case a Member State may, where it intends to impose public service obligations for maritime cabotage to, from and between islands, make authorisation relating to such a service subject to the condition that the shipowner have no outstanding tax or social security debts.

47 In that regard, it must be borne in mind that the public service obligations which may be imposed under Article 4(2) of Regulation No 3577/92 relate to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel. No condition according to which the shipowner must have no outstanding tax or social security debts is expressly mentioned among those requirements. Clearly, such a condition, taken in isolation, cannot itself be characterised as a public service obligation.

48 However, where public service obligations for maritime cabotage are imposed on Community shipowners by means of prior administrative authorisation, the checks carried out by a Member State in order to ascertain whether the shipowners have any outstanding tax or social security debts may be regarded as being a requirement coming within the notion of 'capacity to provide the service', as mentioned in Article 4(2) of the regulation.

49 Where a Community shipowner is subject to public service obligations, such as ensuring the regularity of the maritime cabotage service to be supplied, the fact that he is in a precarious financial position — of which failure to pay his tax or social security debts could be an indication — may show that he would not be capable, in the more or less long term, of providing the public services imposed on him.

50 It follows that the Member State may take account of the solvency of a Community shipowner who performs public service obligations in the field of maritime cabotage in order to assess that shipowner's financial capacity to supply the services which have been entrusted to him, by requiring that he have no outstanding tax or social security debts. It goes without saying that such a condition must be applied on a non-discriminatory basis.

51 Accordingly, the answer to the second question must be that Community law permits a Member State to include in the conditions for granting and maintaining prior administrative authorisation as a means of imposing public service obligations on a Community shipowner a condition enabling account to be taken of his solvency, such as the requirement that he have no outstanding tax or social security debts, thus giving the Member State the opportunity to check the shipowner's 'capacity to provide the service', provided that such a condition is applied on a non-discriminatory basis.

The third question

52 By its third question, the national court asks whether Article 4(1) of Regulation No 3577/92 is to be interpreted as permitting a Member State to impose public service obligations on some shipping companies and, at the same time, to conclude public service contracts within the meaning of Article 2(3) of the regulation with others for the same line or route, in order to ensure the same regular traffic to, from or between islands.

53 It should be noted at the outset that there is an obvious typing error in this last question. The reference to 'Article 1(3)' of Regulation No 3577/92 must be

understood as meaning 'Article 2(3)' of the regulation, since Article 1 is not relevant for the purposes of the answer to the question. There is, in any event, no paragraph (3) in Article 1.

54 As regards this question, Analir and Others claim, essentially, that concluding a public service contract or imposing public service obligations on economic operators under Article 4 of Regulation No 3577/92 are alternative options available to the Member States, which cannot be exercised simultaneously. Having a 'public service contract' for certain lines whilst imposing 'public service obligations' on other economic operators serving the same lines is contradictory, and constitutes a distortion of free competition under the relevant Treaty provisions.

55 More specifically, Analir and Others submit that the operator which concludes a 'public service contract' with the competent authorities receives, unlike the other operators, specific subsidies in respect of the transport services provided. In view of the fact that, in addition, the operators which enter into such 'public service contracts' are either public operators or undertakings which formerly enjoyed monopolies, the resulting situation constitutes a breach of Article 90(1) of the EC Treaty (now Article 86(1) EC) on the ground of discrimination and distortion of the rules of free competition.

56 On the other hand, the Spanish Government submits that the two methods by which maritime cabotage services may be carried out, namely the 'public service contract' and 'public service obligations', mentioned in Article 4 of Regulation No 3577/92, may be used concurrently. The two systems which make it possible to ensure the provision of the public service, namely the conclusion of a contract or the imposition of public service obligations on the shipowner, have very

different purposes. According to the Spanish Government, the Member State imposes public service obligations in order to ensure a minimum provision of a specific public service. It could, where appropriate, supplement that regime by concluding a contract.

57 The French Government, whose written observations deal only with the third question, supports the Spanish Government's argument. It submits that the criteria for using the public service contract or public service obligations are different and that those two methods may therefore be used simultaneously in relation to one route, regardless of which method was established first.

58 At the hearing, the Norwegian Government refined its written observations by submitting that each Member State should, first of all, define the level of maritime cabotage services which it seeks to have in its territory in respect of certain, or all, of the maritime cabotage lines to, from or between islands. Next, it should examine whether, without public authority intervention, the market can, by itself, meet such a level in respect of the lines or routes to be served. If it cannot, the Member State concerned should, finally, determine whether public service obligations imposed on Community shipowners would be likely to ensure the level of maritime cabotage services which it deems desirable. It is only where such a level could not be ensured by imposing public service obligations on those shipowners that the Member State would be able to resort to the method of concluding a public service contract with one of them.

59 The Commission considers that, in principle, there is nothing to prevent a Member State from deciding to impose public service obligations generally and from concluding a public service contract in respect of one or more lines subject to those obligations in order to ensure an adequate level of service. However, where the two methods are used at the same time, the Commission submits that the level of the public service obligations should be as low as possible in order not to create obstacles which might result in distortion of competition.

60 In that regard, it must be noted that Article 4(1) of Regulation No 3577/92 does not expressly indicate whether the two methods of performing the public service laid down in those provisions, namely the public service contract or the imposition of public service obligations on the shipowners, may be used by Member States at the same time or only as alternatives.

61 Furthermore, the two methods pursue the same objective, namely to ensure an adequate level of regular maritime transport services to, from and between islands, as stated in the ninth recital in the preamble to Regulation No 3577/92.

62 However, it is important to specify that those two methods differ both in nature and degree.

63 First, use of the contractual method enables the public authority to obtain an undertaking from the shipowner to provide the transport services stipulated in the contract. Second, the shipowner will generally be prepared to be bound by such stipulations only if the Member State agrees to grant him a quid pro quo, such as financial compensation.

64 On the other hand, where public service obligations are imposed in the absence of a contract, the shipowner remains generally free to withdraw from the provision of the transport services in question. It is only if he wishes to provide those services that he must comply with the obligations imposed. Moreover, that

method could also be combined with a scheme of financial compensation under the second subparagraph of Article 4(2) of Regulation No 3577/92, as evidenced by the Spanish legislation at issue in the main proceedings.

65 It therefore follows from a comparison of the features of the two methods of performing the maritime cabotage service that the contract gives more guarantees to the State that that service will actually be provided. Furthermore, as the Spanish Government rightly pointed out, the contractual method makes it possible to ensure that, if the contract is terminated, the provider will continue to carry out the service until a new contract is concluded, assuming that such a guarantee will normally be obtained only by granting a quid pro quo.

66 In the light of the features of the two methods in question and their shared purpose, there is no reason why they should not be used concurrently in respect of one line or transport route in order to ensure a certain level of public service. For the reasons given by the Advocate General in points 109 to 111 of his Opinion, where the level of service attained, even after public service obligations have been imposed on the shipowners, is not regarded as adequate or where there are still specific gaps, complementary services could be provided by concluding a public service contract, as laid down in the Spanish legislation.

67 Therefore, although Regulation No 3577/92, and more specifically Article 4 thereof, does not preclude national legislation such as that at issue in the main proceedings, which allows the public service contract method to be employed where the public service obligations imposed on the shipowner in respect of the regular maritime cabotage transport services on a certain line or route to, from and between islands have proved to be insufficient to ensure an adequate level of transport, such application of those two methods concurrently in a concrete case

will be compatible with Community law only if a number of specific conditions are met.

68 In the first place, it is clear from paragraph 34 of this judgment that Member States may impose public service obligations on Community shipowners only if a real public service need can be demonstrated. The same must also be true of the conclusion of a public service contract. Any combination of the two methods in respect of one line or route would be justified only if the same condition were met.

69 Second, as is also clear from Article 4(1) and (2) of Regulation No 3577/92, any application of the two methods concurrently must be on a non-discriminatory basis in respect of all Community shipowners.

70 Third, as an obstacle to the freedom to provide maritime cabotage services is involved, any application of the two methods concurrently must, if it is to be justified and compatible with Article 1 in conjunction with Article 4(1) and (2) of that regulation, be consistent with the principle of proportionality. In other words, the combination of the two methods of having those services performed must be such as to ensure an adequate level of the services and not have restrictive effects on the freedom to provide maritime cabotage services which would go beyond what is necessary in order to attain the objective pursued.

71 Accordingly, the answer to the third question must be that Article 4(1) of Regulation No 3577/92 is to be interpreted as permitting a Member State to impose public service obligations on some shipping companies and, at the same time, to conclude public service contracts within the meaning of Article 2(3) of the regulation with others for the same line or route in order to ensure the same

regular traffic to, from or between islands, provided that a real public service need can be demonstrated and in so far as that application of the two methods concurrently is on a non-discriminatory basis and is justified in relation to the public-interest objective pursued.

Costs

72 The costs incurred by the Spanish, Greek, French and Norwegian Governments 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Supremo by order of 12 May 1999, hereby rules:

1. The combined provisions of Article 1 and Article 4 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) permit the provision of regular maritime cabotage services to, from and between islands to be made subject to prior administrative authorisation only if:

— a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated;

— it is also demonstrated that that prior administrative authorisation scheme is necessary and proportionate to the aim pursued;

— such a scheme is based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned.

2. Community law permits a Member State to include in the conditions for granting and maintaining prior administrative authorisation as a means of imposing public service obligations on a Community shipowner a condition enabling account to be taken of his solvency, such as the requirement that he have no outstanding tax or social security debts, thus giving the Member State the opportunity to check the shipowner's 'capacity to provide the service', provided that such a condition is applied on a non-discriminatory basis.

3. Article 4(1) of Regulation No 3577/92 is to be interpreted as permitting a Member State to impose public service obligations on some shipping companies and, at the same time, to conclude public service contracts within the meaning of Article 2(3) of the regulation with others for the same line or route in order to ensure the same regular traffic to, from or between islands, provided that a real public service need can be demonstrated and in so far as that application of the two methods concurrently is on a non-discriminatory basis and is justified in relation to the public-interest objective pursued.

Rodríguez Iglesias		Gulmann	Wathelet
Edward	Jann	Sevón	Schintgen
Macken	Colneric	von Bahr	Timmermans

Delivered in open court in Luxembourg on 20 February 2001.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President