

JUDGMENT OF THE COURT (Fifth Chamber)
27 November 1997*

In Case C-62/96,

Commission of the European Communities, represented by Frank Benyon, Legal Adviser, and Maria Condou Durande, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Hellenic Republic, represented by Aikaterini Samoni-Randou, Special Deputy Legal Adviser in the Special Department for Community Legal Affairs, Ministry of Foreign Affairs, assisted by Evi Skandalou, Principal Legal Assistant in the same department, and Stamatina Vodina, Special Scientific Assistant in the same department, acting as Agents, with an address for service in Luxembourg at the Greek Embassy, 117 Val Sainte-Croix,

defendant,

APPLICATION for a declaration that, by maintaining in force legislative provisions which restrict the right to registration in the Greek shipping registers to vessels more than half the shares in which are owned by Greek nationals or owned by Greek legal persons more than half of whose capital is held by Greek nationals, the Hellenic Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the EC Treaty, Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a

* Language of the case: Greek.

Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402) and Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10),

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the First Chamber, acting as President of the Fifth Chamber, J. C. Moitinho de Almeida, D. A. O. Edward, P. Jann (Rapporteur) and L. Sevón, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 25 September 1997,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 6 March 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by maintaining in force legislative provisions which restrict

the right to registration in the Greek shipping registers to vessels more than half the shares in which are owned by Greek nationals or owned by Greek legal persons more than half of whose capital is held by Greek nationals, the Hellenic Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the EC Treaty, Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402) and Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10).

- 2 On 13 June 1990, the Commission sent the Hellenic Republic a letter before action claiming, first, that Article 5 of Decree Law No 187 relating to the Greek Code of Public Maritime Law (*Official Journal of the Hellenic Republic* No 261 of 8 October 1973, hereinafter 'Article 5 of the Code') constituted a breach of Articles 7 (now Article 6 of the EC Treaty), 52 and 221 of the EEC Treaty by reason of the conditions for granting the Greek flag to fishing vessels. It claimed, secondly, that Article 11 of Royal Decree No 666/66 was contrary to Articles 7 and 52 of the Treaty in making the grant of a professional licence for sponge fishing subject to the condition that the owner of an authorized fishing vessel must have spent ten years as a crew member on a fishing vessel authorized to practise sponge fishing. Finally, it took the view that the reservation of a certain percentage of jobs on fishing vessels for Greek nationals constituted an obstacle to the free movement of workers.
- 3 In its reply of 29 January 1991, the Hellenic Republic disputed the allegations made against it.
- 4 On 9 July 1990, the Commission sent the Hellenic Republic a second letter before action claiming that the conditions for granting the Greek flag to pleasure craft laid down by Article 5 of the Code were also contrary to Articles 7, 48, 52 and 221 of the EEC Treaty.

- 5 The Hellenic Government replied to that letter on 28 January 1991.

- 6 On 5 June 1992, the Commission sent a third registered letter claiming that the conditions contained in Article 5 of the Code for granting the Greek flag to commercial vessels were contrary to Articles 7, 52 et seq. and 221 of the EEC Treaty.

- 7 As it received no reply to this last letter and was not satisfied with the replies to its other letters, the Commission issued a reasoned opinion on 27 July 1993 concerning the conditions for granting the Greek flag to vessels of all types in the Greek shipping register, the restrictions on the employment of crew members from other Member States on Greek fishing vessels and the conditions for granting licences for sponge fishing.

- 8 Although the Hellenic Republic replied to that reasoned opinion, the Commission was not satisfied with the reply concerning the conditions for granting Greek nationality to vessels of all types and lodged this application.

- 9 Article 5 of the Code, entitled 'Nationality of the Vessel', provides as follows:

'Conditions for granting Greek nationality

1. Without prejudice to specific legislation, Greek nationality shall be granted to vessels more than half the shares in which are owned by Greek nationals or owned

by Greek legal persons more than half of whose capital is held by Greek nationals, upon application by their owner and upon submission of the document of title.

2. If the document transferring title to a vessel was drawn up abroad, a certificate from the consular authority is required in order to enter the vessel in the registers.

3. The conditions for recognition of Greek vessels as vessels for the transport of passengers shall be determined by presidential decree issued on a proposal from the minister following consultation of the Council for the merchant navy.'

- 10 The Commission claims that the conditions for granting Greek nationality to fishing vessels and commercial vessels, laid down by that provision, are contrary to Community law and, in particular, to Articles 6, 48, 52, 58 and 221 of the EC Treaty. With regard to pleasure craft which do not constitute a means for pursuing an economic activity, the Commission takes the view that Article 5 of the Code is in breach of Articles 6, 48 and 52 of the Treaty, Article 7 of Regulation No 1251/70 and Article 7 of Directive 75/34.
- 11 The Hellenic Republic considers, first of all, that, in the light of the judgment in *Factortame and Others* (Case C-221/89 [1991] ECR I-3905, paragraph 17), it is entitled to apply Article 5 of the 1958 Geneva Convention on the High Seas and Article 91 et seq. of the 1982 United Nations Convention on the Law of the Sea, which provide that each State is to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag, to ensure the existence of a genuine link between the State and the ship. The reason why such a link is required is that States must meet a large number of obligations with regard to ships flying their flag. The chief criterion for granting the right to fly a flag is the nationality of the shipowner. In that connection the Hellenic Government also refers to the 1986 United Nations Convention on Conditions for Registration of Ships which, in Articles 7 to 10 thereof, gives a very clear definition of the factors constituting a genuine link. It argues that the

Greek legislation is in line with Article 8, which lists the criteria for the determination of ownership of ships.

- 12 Secondly, the Hellenic Republic contends that Greek law does not prevent nationals of other Member States from acquiring and using in Greece vessels flying the flag of another State.
- 13 It argues, further, that there are certain activities which are reserved to ships flying the national flag, as provided for by Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1) and 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). Although it concerns the provision of services, the latter regulation, it is argued, also has an impact on freedom of establishment if it is to have any effect at all. The concept of establishment includes the provision of services, which should be liberalized gradually. Furthermore, special arrangements are provided for the Hellenic Republic in Article 6(3) of Regulation No 3577/92 for reasons of socio-economic cohesion.
- 14 Finally, the Hellenic Republic contends that the rules on registration are justified by the requirements of its military defence organization, which are of a specific character for historical and geo-political reasons, and that the State must be able to requisition ships where necessary.
- 15 The Commission disputes the Hellenic Government's arguments on the basis of the case-law of the Court. In the judgment in *Factortame and Others*, cited above, the Court did not accept an argument similar to that advanced by the Hellenic

Republic in this case. Moreover, the Commission takes the view that the provisions of Regulation No 3577/92, which the Hellenic Government relies on to justify reserving the exercise of the activity in question to ships flying the Greek flag, are intended to apply the principle of the free movement of maritime transport services within Member States but do not affect the rights of natural and legal persons under Articles 52 and 221 of the Treaty. Similarly, Article 5 of the Code does not affect the area governed by Regulation No 3760/92 which, in any event, does not authorize Member States unilaterally to adopt measures in breach of the Treaty.

- 16 The Commission also contests the view that the Hellenic Republic can maintain in force legislation allowing derogations from the principle of freedom of movement on the ground that it must be able to requisition ships for reasons of national defence. All owners of ships flying the Geek flag could be made subject to the same obligations as Greek nationals. There is no need to restrict freedom of movement for this purpose.
- 17 In this connection the first point to note is that national legislation similar to the Greek legislation in issue is the subject of well-established case-law of the Court (see, primarily, *Factortame and Others*, cited above, and Case C-93/89 *Commission v Ireland* [1991] ECR I-4569, Case C-246/89 *Commission v United Kingdom* [1991] ECR I-4585, Case C-334/94 *Commission v France* [1996] ECR I-1307 and Case C-151/96 *Commission v Ireland* [1997] ECR I-3327).
- 18 It is clear from those decisions that as regards vessels used for the pursuit of an economic activity, each Member State must, in exercising its powers for the purpose of defining the conditions for the grant of its 'nationality' to a vessel, comply with the prohibition of discrimination against nationals of Member States on grounds of nationality, and that a condition which stipulates that where a vessel is

owned or chartered by natural persons they must be of a particular nationality and, in the case of a company, the shareholders and directors must be of that nationality is contrary to Article 52 of the Treaty. A condition relating to registration or management of a vessel in the case of a secondary establishment such as an agency, branch or subsidiary is contrary to Articles 52 and 58 of the Treaty (see, in particular, *Commission v Ireland*, cited above, paragraph 12).

- 19 As regards vessels not used for the pursuit of an economic activity, the Court held in *Commission v Ireland*, cited above, paragraph 13, that, under Community law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an activity as an employed or self-employed person and to reside there after having pursued such an activity. Access to leisure activities available in that State is a corollary to freedom of movement.

- 20 In paragraph 14 of that judgment, the Court concluded that registration by such a national of a pleasure craft in the host Member State falls within the scope of the Community provisions relating to freedom of movement for persons.

- 21 An appraisal of the arguments relied on by the Hellenic Republic in the light of that case-law is thus called for.

- 22 In that connection, the first point to note is that the argument of the Hellenic Government based on the international law of the sea is not supported by the judgment in *Factortame and Others*, cited above, paragraph 17. In that judgment the Court expressly stated that, in exercising their power to determine the conditions which must be fulfilled in order for a vessel to be entered in their registers and granted the right to fly their flag, Member States must comply with the rules

of Community law. Although this finding related only to Article 5 of the 1958 Geneva Convention, it cannot be invalidated by the two United Nations Conventions of 1982 and 1986, both signed after the accession of the Hellenic Republic to the Communities.

- 23 Secondly, the argument of the Hellenic Government that its legislation is not an obstacle to the activities of nationals of other Member States is not relevant under the second paragraph of Article 52 of the Treaty. As the Court found in its judgment in *Factortame and Others*, cited above, at paragraph 25, freedom of establishment includes, in the case of nationals of a Member State, 'the right to take up and pursue activities as self-employed persons ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected ...'.
- 24 As for the argument of the Hellenic Republic based on Regulation No 3760/92, suffice it to note that the purpose of national legislation on the registration of vessels, such as that in issue, is not to determine the arrangements for the use of quotas or access to waters at the disposal of fishermen from a Member State. Moreover, national legislation concerning the registration of all vessels cannot be justified by the existence of a Community fisheries system authorizing reserved national zones.
- 25 As regards Regulation No 3577/92, which in Article 6(3) grants a temporary exemption to the Hellenic Republic, it should be pointed out that that exemption cannot be taken to authorize discriminatory conditions for the registration of vessels. Whilst the regulation defers until January 2004 the application of the principle

of freedom to provide services to certain maritime transport services, it cannot constitute a basis for imposing additional restrictions on freedom of establishment.

26 Finally, as regards organization of the military defence of the Hellenic Republic, suffice it to note that the Greek authorities could decide to requisition for military purposes any ship flying the Greek flag, whatever the nationality of its owner.

27 It follows from the foregoing that, by maintaining in force legislative provisions which restrict the right to registration in the Greek shipping registers to vessels more than half the shares in which are owned by Greek nationals or owned by Greek legal persons more than half of whose capital is held by Greek nationals, the Hellenic Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the EC Treaty, Article 7 of Regulation No 1251/70 and Article 7 of Directive 75/34.

Costs

28 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. The Commission has asked for the Hellenic Republic to be ordered to pay the costs. Since the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares that, by maintaining in force legislative provisions which restrict the right to registration in the Greek shipping registers to vessels more than half the shares in which are owned by Greek nationals or owned by Greek legal persons more than half of whose capital is held by Greek nationals, the Hellenic Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the EC Treaty, Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State and Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity.
2. Orders the Hellenic Republic to pay the costs.

Wathelet

Moitinho de Almeida

Edward

Jann

Sevón

Delivered in open court in Luxembourg on 27 November 1997.

R. Grass

C. Gulmann

Registrar

President of the Fifth Chamber

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