OPINION OF ADVOCATE GENERAL MISCHO

delivered on 30 November 2000 [1]

1. In this reference for a preliminary ruling, the Tribunal Supremo (Supreme Court) (Spain) has asked the Court to interpret 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) [2] (hereinafter 'the Regulation') in order to enable it to render judgment on the compatibility with that regulation of Spanish 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) (hereinafter 'Royal Decree No 1466').

Legal framework

A — *Community law*

2. Article 1(1) of the Regulation provides that:

> '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 ...'.

3. Article 2(3) of the Regulation specifies that:

> '"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,

1 — Original language: French.
2 — OJ 1992 L 364, p. 7.

— 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'.

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.'

4. Article 2(4) states that 'public service obligations' are to 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 the Regulation provides that:

'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.

B — *National law*

6. Royal Decree No 1466 declares all regular lines between the peninsula and the islands, those connecting the peninsula with Ceuta or Melilla and those linking the non-peninsular territories to one another to be public-interest shipping.

7. Royal Decree No 1466 lays down three different systems:

— a system of notification for peninsular cabotage (Article 3),

— a system of public-interest contracts (Article 4),

— a system of prior administrative authorisation (Articles 6 and 8).

8. The administrative authorisation provided for in Royal Decree No 1466 is subject to two types of condition:

— a requirement to have no outstanding tax or social security debts (Article 6),

— requirements concerning regularity, continuity, capacity to provide the service, manning and, where appropriate, the ports to be served, frequency and, where relevant, rates (Article 8).

The questions referred for a preliminary ruling

9. The Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and Others (hereinafter 'Analir and Others') brought an action for annulment of Royal Decree No 1466 on the grounds that it is incompatible with Community law, and the national court has referred the following questions 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 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?'

10. The national court points out that, when Royal Decree No 1466, which the applicants in the main proceedings seek to annul, was adopted, the Kingdom of Spain enjoyed an exemption until 1 January 1999 from the obligation to liberalise maritime cabotage. That court adds, however, rightly in my view, that the questions raised have not become irrelevant *ratione temporis*. It notes in its order made on 12 May 1999, and therefore after the exemption had expired, that the national provisions whose validity it is called upon to adjudge were not amended when the exemption expired and were intended to be permanent provisions.

The first question

11. It should be noted, as a preliminary point, that the question raised refers to the possibility of a Member State using a system of prior authorisation linked to the imposition of public service obligations. The measures which a Member State may take in the interests of safeguarding the safety of shipping or the operational requirements of port infrastructure (access to quays, for example) are not therefore at issue in the present case.

12. It is not disputed that the Regulation seeks to implement the principle of freedom to provide services in relation to maritime cabotage.

13. That is evident from both the title of the Regulation, set out above, and its preamble, which states that 'the abolition of restrictions on the provision of maritime transport services within Member States is necessary for the establishment of the internal market', which comprises an area in which the free movement of goods, persons, services and capital is ensured. It follows that 'freedom to provide services should be applied to maritime transport within Member States'. [3]

14. That principle is embodied in Article 1(1) of the Regulation, cited above.

15. Nor do the parties dispute that the requirement of prior authorisation, which by definition implies that the services may not be provided until the authorisation is granted, is a restriction on freedom to provide services.

3 — See the third and fourth recitals in the preamble to the Regulation.

16. The divergence of views between the various parties involved concerns whether, and where relevant to what extent, a restriction of that nature may be justified by the public service needs to which the Regulation relates.

17. The applicants in the main proceedings accept that Member States may consider it necessary to impose public service obligations on operators, but do not believe that a Member State is bound as a result to make the provision of services conditional upon prior authorisation. In the applicants' view, compliance with such obligations could be ensured by a system of licences granted by category of line and by declaration procedures.

18. The Kingdom of Spain and the Hellenic Republic adopt a diametrically opposed position and contend that, quite evidently, a system of prior authorisation is necessary in order to guarantee the performance of public service obligations.

19. The Spanish Government lays emphasis on the following arguments in support of its proposition that the requirement of administrative authorisation does not hinder the liberalisation of island cabotage.

20. It stresses, first, how significant it is, both in terms of the Spanish Constitution and of Community law, that the destinations in question are islands, citing in particular in this regard Article 227(2) of the EC Treaty (now, after amendment, Article 299 EC) and Declaration No 30 on island regions, annexed to the Final Act of the Treaty of Amsterdam.

21. The Spanish Government infers that 'the existence of islands gives rise to characteristics and peculiarities which may, at the unfettered discretion of each State, warrant special systems of protection'.

22. Furthermore, Spanish law correctly considers that the cabotage in question is a public service. It satisfies the conditions set out by the case-law of the Court [4] in that it is universal, continuous, in the public interest and regulated by the public authorities.

23. The Commission points out, however, rightly in my view, that the question whether or not it is open to a Member State to classify certain cabotage services as public services is not raised in the present case. The dispute in fact concerns the consequences which a Member State is entitled to attribute to such a classification.

4 — Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 60.

24. According to the Spanish Government, a Member State may define all island cabotage as having the characteristics of a public service and thus having to be subject to public service obligations, compliance with which cannot be ensured other than by a system of prior authorisation.

25. The Commission, supported by the Norwegian Government, considers, on the contrary, that such a system may be used only in well-defined circumstances. I share that view.

26. Indeed, systematic analysis of the provisions of the Regulation leaves scant room for doubt as to the relationship between Article 1, which sets out the principle of freedom to provide services, and Article 4, which gives Member States power to conclude public service contracts or to impose public service obligations. This option is to be seen as the exception, and freedom to provide services as the rule.

27. Nor, moreover, do the various parties involved disagree on this point.

28. It follows that freedom to provide services can be restricted in the interests of public-service needs only if, and to the extent that, it is clearly imperative to do so in order to ensure adequate transport services.

29. That understanding is confirmed by the terms of the ninth recital in the preamble to the Regulation which states that 'the introduction of public services entailing certain rights and obligations for the shipowners concerned may be justified in order to ensure the adequacy of regular transport services to, from and between islands'.

30. The proposition according to which public service obligations must be used only where market forces are insufficient to provide adequate services is also articulated in Article 2(4) of the Regulation, from which it can be seen that 'public service obligations' are those 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'.

31. The foregoing analysis of the provisions of the Regulation is furthermore confirmed by the case-law of the Court on freedom to provide services, from which it is discernible that this is one of the fundamental freedoms under Community law, and that any derogation from that freedom must be interpreted strictly and must comply with the principles of proportionality and non-discrimination. [5]

32. In the circumstances of the present case, the effect of those principles is that

5 — As an example of settled case-law, see Case C-55/94 *Gebhard* [1995] ECR I-4165.

operators can be required to be in possession of prior authorisation only to the extent necessary to oblige them to provide services which they would not provide in an environment of free competition.

33. That can be established only by analysing each of the services in question, in order to identify which of them are liable to be inadequately provided under free market conditions.

34. Conversely, a Member State cannot stipulate, in advance and without analysis on a case by case basis, that an entire category of services, such as, in the present case, services with and between islands, if they are to be adequately provided, requires the adoption of measures which restrict freedom to provide services.

35. It is possible, admittedly, that the competent authorities of a Member State may reach the conclusion, on completion of such an analysis, that none of the services in that category can be adequately provided in an environment of free competition.

36. In the present case, however, the Spanish Government itself draws attention to the great diversity of lines operating between the peninsula and the islands and between islands. That statement suggests that some at least of those services could be adequately provided in an environment of free competition and that it is perhaps not necessary to impose public service obligations for all services with and between islands.

37. Nor can I see why the diversity of the lines in question should be an obstacle to each of those lines being analysed individually, as the Spanish Government seems to suggest. On the contrary, it is that very diversity which calls for examination on a case by case basis, since it means that a decision which is valid for one crossing will not necessarily be so for another. I would also comment that the aforementioned lines are not so numerous that a case by case analysis of that nature would be unfeasible.

38. The Spanish Government draws an analogy between maritime cabotage and the telecommunications sector, which is in its view an example of another liberalised economic sector in which the provision of services remains subject to a system of authorisation.

39. The fact is, however, that such an analogy, confined as it is to the fact that both are economic sectors in the process of liberalisation, does not, in the light of what has been said above, constitute a ground for concluding that a system of prior authorisation is acceptable without restriction in relation to maritime cabotage.

40. The Spanish Government, supported by the Greek Government, further points out in support of its proposition that Article 4(1) of the Regulation provides that Member States may impose public service obligations *as a condition* for the provision of cabotage services to and between islands.

41. That argument undoubtedly carries considerable weight, but it does not follow as a matter of course that compliance with those conditions must necessarily be checked beforehand. It is no less conceivable that the competent authorities could make the necessary checks using a system of declaration. The case-law of the Court, furthermore, contains examples of solutions of that type relating to fundamental freedoms under Community law, such as the free movement of capital. [6]

42. Is it right to conclude, therefore, that it is permissible to require prior authorisation in relation to public service obligations provided it is confined to those services which would not be adequately provided in an environment of free competition and provided it is applied in a non-discriminatory manner?

6 — Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821.

43. The Commission makes a number of relevant observations in that regard.

44. It points out first of all that, even in such circumstances, the national authorities have a duty not to use a system of prior authorisation unless due performance of the public service cannot be supervised by other means.

45. It adds that the purpose of the system of prior authorisation must not be to restrict access to the market, but exclusively to safeguard the public service. I fully share that view. It is, therefore, public-service needs which constitute the only requirement which can justify such a system. That system must, accordingly, have no aim other than to maintain the public service, and competition must be impeded only in so far as is necessary for that end. Conversely, no restriction on access to the market can be justified which is not necessary in terms of the requirements of the public service.

46. It necessarily follows, as the Commission moreover states, that the conditions for the grant of the authorisation must not involve any discretion on the part of the competent authorities. Any undertaking which satisfies the public service obligations laid down, which obligations must, of course, fall within the scope of what is permitted under Article 4(2) of the Regula-

tion, must be able automatically to obtain authorisation.

47. Furthermore, for access to the market in question to be genuine, the conditions for authorisation must be transparent and legal certainty must be ensured. The conditions for obtaining authorisation must therefore be known in advance, justified according to objective criteria and applicable in the same way to all operators entitled to access. Otherwise, an operator would be unable to predict the liabilities it will have to bear and would thus be deterred from applying for authorisation.

48. The Commission also refers to a letter of formal notice sent to the Spanish authorities on 22 October 1997, which stated, in any event, that Royal Decree No 1466 brings in new restrictions on freedom to provide services, in particular by setting up a system of prior authorisation for all services with and between islands. Accordingly, it constitutes an infringement of Article 7 of the Regulation which, by reference to Article 62 of the EC Treaty (repealed by the Treaty of Amsterdam), enacts a standstill clause in relation to restrictions on maritime cabotage.

49. It should be noted, however, that the national court has not asked the Court for a preliminary ruling on whether Article 7 is applicable to the present case.

50. Having regard to the foregoing, the reply to the first question must be as follows:

'Article 1 and Article 4(2) of the Regulation must be interpreted as not permitting the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation, unless the Member State can demonstrate that:

— in an environment of free competition the public service could not be ensured, in an adequate manner, on the lines subject to authorisation;

— operators' compliance with the public service obligations can be supervised only by means of a system of prior authorisation;

— the conditions for issue of the authorisation are defined, predictable, transparent and non-discriminatory;

— operators who satisfy the public service obligations set by the Member State are automatically granted authorisation.'

The second question

51. This question is clearly raised only for the eventuality that the reply to the first is in the affirmative. Since I have given a qualified response to the first question, I find it necessary to answer the second.

52. The national court seeks to ascertain whether the grant and continuation of the authorisation may be made subject to conditions, such as having no outstanding tax or social security debts, other than those listed in Article 4(2) of the Regulation and having no specific connection with the services which are the subject-matter of the authorisation.

53. The applicants in the main proceedings claim that the grant and continuation of the prior authorisation required under Royal Decree No 1466 for island cabotage cannot be made subject to the condition of having no outstanding tax or social security debts.

54. According to the applicants, the Treaty permits restrictions on the fundamental principle of freedom to provide services only where they are justified by non-economic public-interest requirements which are proportionate and non-discriminatory.

55. In their view, that is not so in the present case, since the obligation at issue has no direct connection with the maritime traffic subject to authorisation.

56. Furthermore, Article 5 of the EC Treaty (now Article 10 EC) prohibits Member States from introducing new restrictions on freedom to provide services, such as the conditions at issue.

57. The Norwegian Government shares the view of Analir and Others that Article 4(2) of the Regulation does not permit the obligations at issue to be imposed. Indeed, that provision makes no mention of them whereas it is evident from both the wording and the purpose of the Regulation that that text is exhaustive.

58. The Spanish Government points out, however, that the conditions at issue are not 'public service obligations', but are general conditions for the grant of administrative authorisation.

59. It follows that they would not infringe Article 4 of the Regulation, even if that provision were to be regarded as exhaustive.

60. The Spanish Government also contends, in line with the Commission's view, that an obligation to have no outstanding tax or social security debts is essential in order to ensure a degree of solvency on the part of the undertakings called upon to provide public services and is therefore such as to ensure that provision of that service will not be jeopardised by the provider's insolvency.

61. The Commission states, in that regard, that capacity to provide the service, within the meaning of Article 4(2) of the Regulation, must be understood to include economic and financial capacity.

62. It emerges both from the observations of the national court and from the arguments put forward by the Spanish Government that a distinction must be made here between two types of consideration.

63. First, the question arises whether, in general, Member States are entitled to make exercise of the activity in question subject to conditions relating to matters not referred to in Article 4(2).

64. It follows from the actual wording of the Regulation that this is so.

65. The Regulation states in Article 1(1), cited above, that 'freedom to provide ... services ... 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*'. [7]

66. Similarly, Article 3(2) provides that '[f]or vessels carrying out island cabotage, *all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State)*'. [8]

67. It necessarily follows that a Member State may, under those two provisions, impose conditions relating to matters not covered by Article 4(2).

68. It follows in particular from Article 1(1) cited above that, where a shipowner wished to provide cabotage services in Spain using ships registered in, and flying the flag of, that State, those ships would be bound to comply with the conditions required, under Spanish law, for carrying out cabotage in Spain. In such circumstances, there would be nothing to prevent those conditions from including, where

7 — Emphasis added.
8 — Emphasis added.

appropriate, an obligation for the shipowner to have no outstanding tax or social security debts.

69. That consideration brings me to the second issue which it is my duty to examine in the context of this reference for a preliminary ruling.

70. Even if, as has been seen, the obligations relating to tax and social security debts, to which the national judge refers, can, in the circumstances described above, have their basis in provisions other than Article 4(2), this does not preclude those obligations from also being treated as public service obligations within the meaning of that provision, which may on that basis be imposed by the host Member State on shipowners, whether they are established in Spain or in another Member State.

71. As the Commission and the Spanish Government rightly point out, a shipowner's inability to pay its tax and social security debts may be an indication of serious financial difficulties liable to lead to insolvency and interruption of the public service.

72. Accordingly, inclusion amongst the conditions for authorisation of a criterion enabling the shipowner's solvency to be assessed does not amount to an unduly broad interpretation of the wording of Article 4(2) of the Regulation, even though, as has been seen, since that provision is an exception to the principle of freedom to provide services, it must be interpreted strictly.

73. Nor is that conclusion shaken by the fact, pointed out both by Analir and Others and by the national court, that the conditions at issue are not specifically connected with the services to be provided. They are in a more general way, as has been seen, an indication of the financial ability to perform services of that nature in the long-term.

74. Furthermore, a company should not obtain a competitive advantage over others which duly pay their taxes and social security contributions.

75. I would also comment in this regard that, as the Spanish Government points out, conditions of this sort are not unknown in Community law. They are in

fact explicitly laid down by the public procurement directives.[9] These, however, relate primarily to more ad hoc relationships between economic operators and authorities.

76. There is all the more reason, therefore, to accept the imposition of such conditions in the present case, which concerns public services which must be provided over a certain length of time, and not merely episodically.

77. It should also be made clear, as the Commission does, that application of those conditions must be non-discriminatory.

78. As I have already had occasion to say on examining the first question, it emerges both from the case-law of the Court and from general principles of Community law that a restriction on an inherent freedom under that law can be justified only where it does not lead to discrimination.

79. The Commission is likewise well-founded in pointing out that the conditions at issue were already in existence, under other instruments, prior to Royal Decree No 1466, and are not therefore a new restriction and accordingly incompatible with the provisions of the Regulation.

80. In the light of the foregoing, I propose that the Court reply as follows to the second question referred for a preliminary ruling:

'Article 4(2) of the Regulation does not preclude the grant or continuation of the authorisation referred to in the first question from being made subject to the condition that the service provider have no outstanding tax or social security debts, provided that this condition is applied on a non-discriminatory basis.'

The third question

81. By this question,[10] the Tribunal Supremo asks the Court whether the Regulation permits public service obligations to

9 — Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ 1993 L 199, p. 1), Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p. 54) and Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p.1).

10 — As several of the parties involved have pointed out, this question contains a typing error by referring to Article 1(3) of the Regulation, whereas it sets out the terms of Article 2(3).

be imposed on some companies and, at the same time, public service contracts to be concluded with others for the same line or route. It states that that is the situation in Spain, by virtue of Royal Decree No 1466.

82. The applicants in the main proceedings believe that the reply to the question should be in the negative. In their view, the authorities' intervention should be confined to ensuring that the services in question are provided adequately, continuously and satisfactorily. It follows from the case-law of the Court that those authorities should pursue that triple objective at the lowest possible cost to the public body.

83. Consequently, they assert, the adoption of measures such as concluding a public service contract or imposing public service obligations would be possible only if the services offered did not meet those three criteria.

84. In such a situation, it would be appropriate to impose public service obligations if the inadequacy of the services offered affected only one of those criteria. If, on the other hand, none of those criteria was satisfied, it would be appropriate to conclude a public service contract.

85. Analir and Others also consider it to be contradictory for a Member State to make the same traffic subject simultaneously to the contract system and the system of public service obligations.

86. Furthermore, the existence of a contract entails the grant of special rights and, accordingly, the need to comply with Article 90 of the EC Treaty (now Article 86 EC). By granting such advantages to one company whilst at the same time imposing public service obligations on other service providers who might offer a competing service, a Member State is acting in a disproportionate manner and infringing Article 86 of the EC Treaty (now Article 82 EC), which should be applied in conjunction with Article 90.

87. The conditions for applying the derogation laid down in Article 90(2) are not satisfied, since that derogation presupposes that the measures adopted are proportionate to the objective relied on, and that is not so in the present case.

88. On that point, Analir and Others cite a study which, according to them, shows that regular services to the islands are adequate. There is therefore no justification for grouping all those services together to make them the subject-matter of a single public service contract.

89. The applicants in the main proceedings believe that, in reality, the sole purpose of Royal Decree No 1466, which permits the

imposition of public service obligations concurrently with the conclusion of a public service contract, is to protect the company Transmed, which could not survive without the grant of public subsidies.

90. The Norwegian Government, which in its written observations had defended the view that the two means of ensuring public service provision set out in Article 4(2) of the Regulation are mutually exclusive, changed its position at the hearing.

91. It considers ultimately that both mechanisms can be used simultaneously in relation to a single line or route, but that the two in combination must not cause a distortion of competition which would not have occurred had only one of the mechanisms been used.

92. The French Government defends a diametrically opposed point of view. It distinguishes two possible situations.

93. First, it maintains that a Member State is entitled to conclude a public service contract in relation to traffic already covered by public service obligations.

94. According to that government, it might be found, despite the imposition of public service obligations by the authorities, that the service offered remains below the level which the State considers adequate. Such a situation would require the conclusion of a public service contract, and the principle of proportionality might dictate that the subject-matter of that contract be limited to what would be necessary to meet the unsatisfied needs of the public service.

95. In such a situation, on a single route, regular lines covered by public service obligations would therefore exist alongside an operator bound by a public service contract which would contain the same public service obligations (and, possibly, others).

96. Secondly, the French Government asserts that it is also possible to impose public service obligations where the route in question is already covered by a public service contract. Otherwise, it contends, the contract-holding operator might withdraw from the market as soon as it was faced with competition from other companies not subject to public service obliga-

tions. Accordingly, the adequacy of the service, supposedly guaranteed by conclusion of the contract, might be jeopardised.

97. The Commission's analysis contains interesting similarities with that of the French Government, but also a number of significant refinements.

98. The Commission maintains that there is nothing, in principle, to prevent a Member State from deciding to impose public service obligations generally, either by means of a system of notification or by a system of authorisation, and from concluding a public service contract for one or more lines subject to those obligations in order to ensure an adequate level of service.

99. It points out that, just as public service obligations must be imposed in a transparent and non-discriminatory manner, with no exercise of discretion, public service contracts must be concluded on the basis of a public call for tenders ensuring equal treatment and an equal chance of success for all operators.

100. The Commission considers it necessary to invoke a further condition. Public service obligations imposed in the context of a general system must in any event be less onerous than those required by a public service contract, so as not to distort competition between operators.

101. The existence of a system of public service obligations alongside one of public service contracts thus ensures access to the market for all operators, whilst preventing competitors of the contract-holding company from damaging its interests by capturing the market during the tourist season. Conversely, according to the Commission, the presence of a number of different operators also enables a reduction in the level of financial compensation paid to the contract-holder.

102. Finally, the Commission reiterates that, in any event, a system of public service obligations existing alongside public service contracts is preferable to a system of exclusive contracts having the effect of closing the market for several years.

103. The Spanish Government, for its part, considers public service contracts and public service obligations to be two complementary mechanisms. There is nothing, therefore, to preclude using them concurrently, although contracts should remain

exceptional, given the environment of liberalisation of which they form part.

104. In the view of the Spanish Government, a contract gives the authority greater security in terms of public service provision, particularly since it generates reciprocal rights and obligations, or enables the authority to include terms which, if the contract is terminated, ensure the provision of services until a new contract is granted.

105. It may therefore be necessary, in respect of particularly important services, to conclude contracts in order better to safeguard the continuity, regularity and quality of the service.

106. What should one make of those arguments?

107. At first sight, the wording of Article 4(1) of the Regulation suggests that it offers an alternative, since it provides that 'a Member State may conclude public service contracts ... *or*[11] impose public service obligations'. That said, it is true that the term 'or' ('*ou*') can also be inclusive in meaning and there is still, therefore, room for doubt.

11 — Emphasis added.

108. Nor is the definition of a 'public service contract' in Article 2 of the Regulation such as to lend absolute certainty. That definition makes it clear that such a contract is concluded 'in order to provide the public with adequate transport services'. The most one can infer from this, as the national court does, moreover, is that if, by means of concluding a contract, adequate services are provided, further intervention by the authorities, such as the imposition of public service obligations, is no longer necessary and is, therefore, an unjustified restriction on the freedom to provide services which the Regulation seeks to establish.

109. The definition referred to does not imply, however, that the adequacy of the services provided arises from existence of the contract alone. Of itself, the definition in no way precludes the contract from being additional to public service obligations, in such a way that use of both mechanisms concurrently enables adequate services to be guaranteed.

110. The list in Article 2(3) of the Regulation also, to an extent, supports that possibility, since the matters which may be covered by the contract include 'additional transport services'. From that viewpoint, the contract is, as the French and Spanish Governments and the Commission maintain, with the qualifications already

noted, a mechanism which is additional to public service obligations and intended to supplement the arrangements of which those obligations form the basis.

111. Lastly, one can also cite in support of the same argument the ninth recital in the preamble to the Regulation, which reads, let us recall, as follows:

'[w]hereas the introduction of *public services* [12] entailing certain rights and obligations for the shipowners concerned may be justified in order to ensure the *adequacy of* regular transport *services* [13] to, from and between islands, provided that there is no distinction on the grounds of nationality or residence'.

112. One can deduce from that wording that the *aim pursued* by the legislature, in permitting recourse to the public service concept, is to ensure the adequacy of services, and that the only *condition* which it imposes in that respect is that there be no discrimination.

113. The wording of Article 4 also seems to me to confirm the fact that non-discrimination is the only condition imposed. Article 4(1) states that '[w]henever a Member State concludes public service contracts ... it shall do so on a non-discriminatory basis in respect of all Community shipowners'. The second subparagraph of Article 4(2) provides, furthermore, that '[w]here applicable, any compensation for public service obligations must be available to all Community shipowners'.

114. I consider, accordingly, that it is possible to combine public service obligations and conclusion of a contract, provided that this does not give rise to either discrimination or distortion of competition between shipowners.

115. The foregoing means first of all that, from the time the Member State concludes with a shipowner a contract ensuring adequate services on a specific route and giving rise to a subsidy, public service obligations can no longer be imposed on maritime shipping companies serving the same line.

116. In other words, public service obligations relating to the continuity, regularity, capacity and quality of transport cannot be imposed on all companies, whilst only the company with which a contract has been or

12 — Emphasis added.

13 — Emphasis added.

is being concluded is granted financial compensation in respect of the same obligations.

117. On the other hand, the issue would be different if the company with which a contract is concluded were granted financial compensation in respect of services which it provides in addition to those required, as public service obligations, of all companies, such as additional services during the winter season.

118. None the less, a contract concluded with one company alone in order to ensure certain additional services cannot give rise to subsidies giving that company a financial advantage such as to enable it to offer all its services at a price which would protect it from competition from other operators (cross-subsidies).

119. In other words, combined use of both mechanisms on a single maritime route is acceptable only if, first, the same public service obligations are imposed on all companies, including the contract-holder, and, second, the contract-holder assumes, additionally, supplementary liabilities for which it is remunerated in strict proportion to those liabilities. Such remuneration must not have the effect of giving it a competitive advantage in respect of all its activities.

120. The Commission expressed the same view, stating that public service obligations imposed in the context of a general system must in any event be less onerous than those required by a public service contract, so as not to distort competition between operators. Public service obligations must also be imposed on the basis of transparency and non-discrimination, with no exercise of discretion. Public service contracts, for their part, must be concluded on the basis of a public call for tenders ensuring equal treatment and equal chances of success for all operators.

121. I propose, therefore, that the Court reply to the third question as follows:

'Article 4(1) of the Regulation must be interpreted as permitting public service obligations to be imposed on some shipping companies and, at the same time, a public service contract within the meaning of Article 2(3) of the Regulation to be concluded with another company for the same line or route, provided that the public service contract includes liabilities in addition to the public service obligations imposed on all companies, that the financial compensation granted is proportionate to those liabilities and that it is not, accordingly, such as to distort competition to the detriment of companies which are not parties to such a contract.'

Conclusion

122. I propose that the Court reply as follows to the questions referred by the Tribunal Supremo:

(1) Article 1 and Article 4(2) 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) must be interpreted as not permitting the provision of island cabotage services by undertakings covering regular shipping lines to be made subject to prior administrative authorisation, unless the Member State can demonstrate that:

— in an environment of free competition the public service could not be ensured, in an adequate manner, on the lines subject to authorisation;

— operators' compliance with public service obligations can be supervised only by means of a system of prior authorisation;

— the conditions for issue of the authorisation are defined, predictable, transparent and non-discriminatory;

— operators who satisfy the public service obligations set by the Member State are automatically granted authorisation.

(2) Article 4(2) of Regulation No 3577/92 does not preclude the grant or continuation of the authorisation referred to in the first question being made subject to the condition that the service provider have no outstanding tax or social security debts, provided that this condition is applied on a non-discriminatory basis.

(3) Article 4(1) of Regulation No 3577/92 must be interpreted as permitting public service obligations to be imposed on some shipping companies and, at the same time, a public service contract within the meaning of Article 2(3) of that regulation to be concluded with another company for the same line or route, provided that the public service contract includes liabilities in addition to the public service obligations imposed on all companies, that the financial compensation granted is proportionate to those liabilities and that it is not, accordingly, such as to distort competition to the detriment of companies which are not parties to such a contract.