

OPINION OF ADVOCATE GENERAL

BOT

delivered on 20 November 2008¹

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

exclusive external competence and thereby undermining the principle of a united external representation for the Community, the Hellenic Republic acted in breach of Community law.

4. In this Opinion, I shall set out the reasons for which I consider the present infringement proceedings to be well founded.

2. By its proposal, the Hellenic Republic submitted to the IMO Maritime Safety Committee check lists and other tools which it considered appropriate for the purpose of assisting the Contracting States of the SOLAS Convention in monitoring whether ships and port facilities complied with the requirements laid down in that convention and the ISPS Code.

I — Legal framework

3. The Commission takes the view that, by acting on an individual basis in an area in which the European Community enjoys

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

¹ — Original language: French.

² — Proposal of 18 March 2005 (MSC 80/5/11).

³ — OJ 2004 L 129, p. 6.

'1. The main objective of this Regulation is to ...'
introduce and implement Community measures aimed at enhancing the security of ships used in international trade and domestic shipping and associated port facilities in the face of threats of intentional unlawful acts.

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

6. Article 9 of Regulation No 725/2004, entitled 'Implementation and conformity checking', is worded as follows:

'1. Member States shall carry out the administrative and control tasks required pursuant to the provisions of the special measures to enhance maritime security of the SOLAS Convention and of the ISPS Code. They shall ensure that all necessary means are allocated and effectively provided for the implementation of the provisions of this Regulation.

7. Annex I to Regulation No 725/2004 contains the amendments inserting the new chapter XI-2 into the Annex to the SOLAS Convention in its updated version. The updated version of the ISPS Code is to be found in Annex II to the regulation.

II — The pre-litigation procedure

8. On 10 May 2005, taking the view that the national proposal lodged on 18 March 2005 by the Hellenic Republic with the IMO Maritime Safety Committee encroached upon an area falling within the exclusive external competence of the Community, the Commission sent to that Member State a letter of formal notice, to which the latter responded on 7 July 2005.

9. Since it was unsatisfied with that response, the Commission issued a reasoned opinion on 19 December 2005, to which the Hellenic Republic responded on 21 February 2006.

10. Remaining unconvinced by the arguments put forward by the Hellenic Republic, the Commission decided to bring the present action.

12. The Hellenic Republic contends that the Court should:

— dismiss the action, and

III — The action

— order the Commission to pay the costs.

11. By its action, the Commission claims that the Court should:

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

— declare that, by submitting a proposal to the IMO for monitoring the compliance of ships and port facilities with the requirements laid down in Chapter XI-2 of the SOLAS Convention and the ISPS Code, the Hellenic Republic has failed to fulfil its obligations under Articles 10 EC, 71 EC and 80(2) EC, and

IV — The principal arguments of the parties

14. Relying on the case-law established in Case 22/70 *Commission v Council*, known as the ‘AETR’ judgment,⁴ the Commission argues that, since the adoption of Regulation No 725/2004, integrating Chapter XI-2 of the Annex to the SOLAS Convention and the ISPS Code into Community law, the Community has enjoyed exclusive competence to assume international obligations in the

— order the Hellenic Republic to pay the costs.

⁴ — Case 22/70 [1971] ECR 263.

domain covered by that regulation. It follows, in its view, that the Community has exclusive competence to ensure that that regulation is properly applied at Community level and to discuss with other IMO members the correct implementation of or subsequent developments in the standards laid down in the SOLAS Convention and the ISPS Code. The Member States therefore no longer have competence to submit to the IMO national positions on matters falling within the exclusive competence of the Community, unless expressly authorised to do so by the Community.

15. The Hellenic Republic's defence is based on the following arguments.

16. First of all, it considers that it complied with its obligation of genuine cooperation under Article 10 EC by submitting, on 1 March 2005, the contested proposal to the Marsec (Maritime Safety) Committee, established by Article 11 of Regulation No 725/2004, so that it could be discussed at the meeting held by that committee on 14 March 2005 and a Community position emerge. The Hellenic Republic states that the Commission, acting through its representative, who chairs the Marsec Committee, did not, however, include that proposal on the agenda for that meeting. It deduces from this that the Commission failed to comply with its obligation of genuine cooperation under Article 10 EC.

17. Secondly, the Hellenic Republic states that the submission of its proposal to the IMO was an act undertaken in the context of its participation in that international organisation. In its view, active participation in an international organisation as a member of that organisation is not tantamount to entering into international commitments, which alone is covered by the case-law established in the *AETR* judgment. The submission of the Greek proposal did not, therefore, undermine the Community's exclusive competence.

18. Thirdly, the preparation and submission of proposals to the IMO is governed by a gentleman's agreement adopted by the Council of the European Union in 1993. Under that agreement, Member States are permitted to submit proposals to the IMO not only collectively but also individually, where no Community position exists on the issue in question.

19. Fourthly, the Hellenic Republic is of the view that, in a case such as the present, in which there is no consensus on a Community position, the protection of the Community interest is ensured by the active participation of the Member States within the IMO, and not by an obligation to refrain from active participation. Any obligation requiring passive participation, which in practice

entails abstaining from any involvement in procedures for drawing up IMO rules, culminates in restricting, devaluing and, ultimately, losing its status as member of that organisation. Moreover, in a case such as the present, in which the Community does not enjoy the status of member of the IMO, an obligation to abstain from active involvement is even less likely to ensure the protection of the Community interest precisely because the fact that the Member States are not involved in procedures for drawing up legislation means that it is not possible for that interest to be defended, which is to the advantage of non-member countries.

20. Fifthly, the Hellenic Republic points out that Article 9(1) of Regulation No 725/2004 itself confers exclusive responsibility on the Member States for implementing, by means of their own conditions, the security requirements laid down by that regulation, which are based on amendments to the SOLAS Convention and the ISPS Code. Both the wording and the content of the contested proposal are consistent with the spirit of Community legislation, which confers wide discretion on the Member States to develop best practice concerning technical issues.

21. Sixthly, it was apparent at the hearing that, according to the Hellenic Republic, Article 307 EC confirms that its argument is well founded.

22. The United Kingdom puts forward three specific arguments. It contends that the Community's exclusive competence in the field of maritime security is confined to the areas falling within the scope of Regulation No 725/2004 and Directive 2005/65/EC of the European Parliament and of the Council of 26 October 2005 on enhancing port security.⁵ The United Kingdom also states that the duty of cooperation under Article 10 EC does not extend to imposing an obligation upon the Member States to facilitate the Community's accession to international organisations, especially where, as in the case of the IMO, an international organisation is not permitted under the terms of its constitution to admit as parties entities such as the Community. Lastly, the United Kingdom is of the view that, in order to fulfil its obligation of genuine cooperation in accordance with Article 10 EC, the Commission should have endeavoured to submit the Greek proposal to the Marsec Committee so that it was possible for that issue to be debated.

V — Assessment

23. It is appropriate, first of all, to recall the principles established by the Court in the *AETR* judgment and the contributions of subsequent case-law concerning, first, the question whether there is an implied external competence and, second, whether that competence is exclusive.

⁵ — OJ 2005 L 310, p. 28.

24. At paragraphs 16 to 18 and 22 of the *AETR* judgment, the Court held that the competence of the Community to conclude international agreements arises not only from an express conferment by the EC Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that in particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules; that as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal order; and that to the extent to which Community rules are adopted for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.⁶

25. The Court stated that, if the Member States were free to enter into international obligations affecting the common rules, that would jeopardise the attainment of the objective pursued by those rules as well as

the attainment of the Community's tasks and the objectives of the Treaty.⁷

26. The circumstances in which the scope of common rules may be affected or distorted by international commitments undertaken by the Member States and, therefore, the circumstances in which the Community acquires exclusive external competence by virtue of the exercise of its internal competence have been summarised by the Court in what are known as the 'Open skies' judgments⁸ and reiterated in its judgments in Case C-266/03 *Commission v Luxembourg* and Case C-433/03 *Commission v Germany*.

27. That occurs where the international commitments fall within the scope of the common rules or, in any event, within an area which is already largely covered by such rules, even if there is no contradiction between those rules and the commitments.⁹

6 — See, also, Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4805, paragraph 40, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, paragraph 42.

7 — *Commission v Luxembourg*, paragraph 41, and *Commission v Germany*, paragraph 43.

8 — Judgments of 5 November 2002 in Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-9627; Case C-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission v Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; and Case C-476/98 *Commission v Germany* [2002] ECR I-9855.

9 — See, inter alia, *Commission v Germany*, paragraph 45.

28. Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts.¹⁰

29. According to the Court, the same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected, within the meaning of the *AETR* judgment, if the Member States retained freedom to negotiate with non-member countries.¹¹

30. I consider that those aspects of the Court's case-law should lead it to find that the present action for failure to fulfil obligations is well founded.

31. I am of the opinion that, by submitting to the IMO Maritime Safety Committee check lists and other tools which it considered appropriate for the purpose of assisting the Contracting States of the SOLAS Convention

in monitoring whether ships and port facilities complied with the requirements laid down in that convention and the ISPS Code, the Hellenic Republic intervened in an area falling within the exclusive external competence of the Community. That area is concerned with enhancing the security of ships and port facilities and is specifically delimited by Regulation No 725/2004.

32. By adopting that regulation on the basis of Article 80(2) EC, the Community legislature intended that the objective of ensuring, at all times, '[t]he security of ... Community shipping and of citizens using it and of the environment in the face of threats of intentional unlawful acts such as acts of terrorism, acts of piracy or similar'¹² should be met by common rules at Community level within the framework of that part of the common transport policy relating to sea transport.

33. As stated in recital 5 in the preamble to Regulation No 725/2004, that security objective 'should be achieved by adopting appropriate measures in the field of maritime transport policy establishing *joint standards* for the interpretation, *implementation and monitoring* [¹³] within the Community of the

10 — Ibid., paragraph 46.

11 — Ibid., paragraph 47.

12 — Recital 2 in the preamble to Regulation No 725/2004.

13 — Emphasis added.

provisions adopted by the Diplomatic Conference of the IMO on 12 December 2002', namely the special measures to enhance maritime security of the SOLAS Convention and the ISPS Code. From that point of view, Article 1(2) of that regulation provides that that provision is intended to 'provide a basis for the *harmonised* interpretation and *implementation* and *Community monitoring* [¹⁴] of [those] special measures'.

34. By virtue of the fact that the Community exercises its internal competence in the area of sea transport and, more especially, on account of the fact that common rules were adopted for enhancing ship and port facility security, exclusive external competence was conferred to that extent upon it.

35. It is clear that, since the Community harmonised the conditions for interpreting, implementing and monitoring special measures adopted under the auspices of the IMO, which are incorporated into Regulation No 725/2004, the common rules established by that regulation could be affected if a Member State retained the possibility, on an individual basis, of proposing to the IMO the

adoption of new rules for implementing and monitoring the requirements laid down in Chapter XI-2 of the SOLAS Convention and the ISPS Code.

36. In particular, where a proposal such as that at issue in this case is submitted to the IMO, a procedure is initiated which could lead to the adoption by that international organisation of new rules on the implementation and monitoring of the standards established in Chapter XI-2 of the SOLAS Convention and the ISPS Code. As an indirect result, such new rules could have an impact on Regulation No 725/2004 precisely because that regulation incorporates Chapter XI-2 of the SOLAS Convention and the ISPS Code into Community law and harmonises the implementation and monitoring of those measures at Community level.

37. It follows that, in the area governed by Regulation No 725/2004, the Member States no longer have competence to act on an individual basis at international level, either by undertaking new contractual obligations or indeed by proposing amendments or additions to the existing rules. Having made the choice, when adopting that regulation, to establish common rules at Community level, the Member States cannot be given the possibility of altering their scope, even indirectly, unless such a step represents the intention of the Community.

14 — *Idem*.

38. It also seems to me that conduct on the part of a Member State such as the conduct challenged by the Commission in these proceedings constitutes an infringement of Article 10 EC. It is to be borne in mind that Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.¹⁵ It should also be recalled that, according to the Court, this duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries.¹⁶

39. In circumstances such as those in the present case, I consider that a Member State is under an obligation to abstain from any involvement, which can be disregarded only where concerted action agreed at Community level is taken.

40. The Hellenic Republic does not accept that it has failed to fulfil its obligations under Article 10 EC, 71 EC and 80(2) EC. However, I do not find the arguments put forward by that Member State in its defence convincing.

41. In the first place, as regards the objection that the Commission itself failed to comply with its obligation of genuine cooperation by failing to include the Greek proposal on the agenda for the Marsec committee meeting on 14 March 2005, I am inclined to the view, in the light of the documents on the file, that the Hellenic Republic was endeavouring to inform the other Member States of the national proposal it had submitted to the IMO rather than to establish a Community position on that matter. The chair of that committee was therefore entitled to take the view that it was not appropriate to include that proposal on the agenda for the meeting on 14 March 2005 and, by declining to do so, did not infringe Article 10 EC.

42. Moreover, it is apparent from the observations submitted to the Court that the Commission put in place Community measures specifically for the purpose of coordinating the application of Chapter XI-2 of the SOLAS Convention and the ISPS Code, with the aim of presenting a Community position at the 80th session of the IMO Maritime Safety Committee. Accordingly, on 27 April 2005, the Commission submitted to the Council a working document entitled 'IMO — European Community position to be adopted by the Council on maritime issues for the 80th session of the Maritime Safety Committee (MSC 80) meeting in London from 11 to 20 May 2005'.¹⁷ That document was considered by a group of experts convened by the presidency on 29 April 2005 and was approved by the Council Shipping Working Party on 3 May 2005.¹⁸ At the same time, it is apparent from the case-file that, on a number of occasions, the

15 — See, *inter alia*, *Commission v Germany*, paragraph 63, and Case C-523/04 *Commission v Netherlands* [2007] ECR I-3267, paragraph 74.

16 — *Commission v Germany*, paragraph 64 and the case-law cited.

17 — SEC(2005) 586.

18 — See Annexes 2 and 3 to the Commission's reply.

Hellenic Republic was requested by the Commission to withdraw the national proposal which it lodged with the IMO on 18 March 2005, but to no avail. The fact that the document setting out the Community position does not refer to that proposal may be perceived to be the result of that approach on the part of the Hellenic Republic.

43. In those circumstances, I consider that the Commission cannot be criticised for having failed in its duty to promote coordination at Community level.

44. Moreover, I share the Commission's view that, since the Community legal order is not based on the principle of reciprocity, any breach by that institution of the duty of genuine cooperation binding upon it by virtue of Article 10 EC cannot, in any event, entitle a Member State to justify its own breaches of Community law, which, in this instance, consist of a breach of the exclusive external competence of the Community.

45. Secondly, unlike the Hellenic Republic, I do not take the view that the case-law established by the *AETR* judgment can be confined to cases in which a Member State has acted in breach of the exclusive external competence of the Community by entering into an international commitment. The reasoning followed by the Court in the progression of cases that were brought

before it was that the Member States should be precluded from encroaching, either individually or collectively, on an area that falls within the exclusive external competence of the Community. That is the case where intervention on the part of a State is liable to affect common rules or distort their scope. As I indicated above, action such as that taken by the Hellenic Republic in its approach to the IMO initiates a procedure which could lead to the adoption by that international organisation of new rules, which are themselves liable to have an effect on existing Community legislation.

46. Thirdly, as regards the argument alleging that a gentleman's agreement adopted by the Council in 1993 permits Member States to submit proposals to the IMO not only collectively but also individually where no common position exists, it is difficult to ascribe to that agreement the legal effects which the Hellenic Republic wishes to confer upon it. It is, in fact, apparent from the observation submitted to the Court by the Commission that that 'gentleman's agreement' is a declaration made by that institution and recorded in the minutes drawn up by the Council for the Transport Working Group meeting on 14 December 1993. It is therefore not a binding measure and, moreover, cannot be treated in the same manner as an inter-institutional agreement. In addition, the content of that declaration, in the same way as the other extracts of minutes of meetings referred to in the documents submitted to the Court, rather confirms the Commission's argument, to which I subscribe, which may be summarised as follows: the exclusive competence of the Community does not

preclude the Member States from actively participating in the IMO, provided that the positions adopted by those states within that international organisation are coordinated at Community level beforehand.

priate, a common position or approach in the competent international fora’.

47. Fourthly, it does not follow, in my view, from the fact that the Community is not a member of the IMO that Member States can submit national proposals to that international organisation in an area falling within the exclusive external competence of the Community. I concur with the Commission’s view that, if an international organisation does not permit it to act as the Community’s lawful representative in a domain in which the Community has exclusive competence, such competence may be exercised through the medium of the Member States acting jointly in the interest of the Community and with that body’s authorisation.¹⁹ A Community position, such as that I have referred to above, may therefore be put to an international organisation of which the Community is not a member. The Community legislature drew attention to the need for such a position, moreover, in Article 10(4) of Regulation No 725/2004, which provides that; ‘[f]or the purposes of this Regulation and with a view to reducing the risks of conflict between Community maritime legislation and international instruments, Member States and the Commission shall cooperate, through coordination meetings and/or any other appropriate means, in order to define, as appro-

48. Fifthly, I do not accept the argument that the effect of Article 9(1) of Regulation No 725/2004 is that the Community’s exclusive competence does not extend to the implementation by the Member States of the requirements laid down in Chapter XI-2 of the SOLAS Convention and the ISPS Code, as incorporated in that regulation.

49. It should be recalled that the harmonisation of the conditions for implementing and monitoring special measures to enhance maritime security adopted by the Diplomatic Conference of the IMO on 12 December 2002 is, indeed, according to Article 1(2) of Regulation No 725/2004, one of the main objectives of that regulation. Moreover, Article 9(1) of Regulation No 725/2004 is a classic provision of that type of regulation, which has to be implemented via the administrative machinery of the Member States. The effect of the decentralised implementation of Community law cannot, in my opinion, be to confer upon the Member States, in an area in which the Community alone has competence,

¹⁹ — See, to that effect, Opinion 2/91 [1993] ECR I-1061, paragraph 5.

the competence to develop harmonised monitoring rules at international level, which, by virtue of Regulation No 725/2004, must first be agreed at Community level.

obligations arising under the convention previously concluded at the time of the accession of the Hellenic Republic to the European Community. In particular, the object of the present action is not to prevent that Member State from participating in the work of the IMO as an active member of that organisation. The purpose is simply to indicate to the Hellenic Republic that, in an area in which the Community has exclusive external competence, its participation in the IMO cannot circumvent the constraints imposed by the adoption, at Community level, of rules common to the Member States.

50. Sixthly and finally, I consider that the argument relating to Article 307 EC is irrelevant. The present case is not concerned with calling into question the rights and

VI — Conclusion

51. In the light of the foregoing considerations, I propose that the Court should:

- (1) declare that, by submitting to the International Maritime Organisation a proposal for monitoring the compliance of ships and port facilities with the requirements laid down in Chapter XI-2 of the 1974 International Convention for the Safety of Life at Sea and the International Ship and Port Facility Security Code, the Hellenic Republic has failed to fulfil its obligations under Articles 10 EC, 71 EC and 80(2) EC and Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security;
- (2) order the Hellenic Republic to pay the costs of the proceedings, and the United Kingdom of Great Britain and Northern Ireland to bear its own costs.