Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

8 July 2014*

(Maritime transport — Freedom to provide services — Regulation (EEC) No 4055/86 — Applicability to transport carried out from or to States that are parties to the Agreement on the European Economic Area (EEA) using vessels flying the flag of a third country — Industrial action taken in the ports of such a State in favour of third country nationals employed on those vessels — Nationality of those workers and vessels having no bearing on the applicability of EU law)

In Case C-83/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Arbetsdomstolen (Sweden), made by decision of 14 February 2013, received at the Court on 19 February 2013, in the proceedings

Fonnship A/S

v

Svenska Transportarbetareförbundet,

Facket för Service och Kommunikation (SEKO),

and

Svenska Transportarbetareförbundet

v

Fonnship A/S,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, M. Ilešič (Rapporteur), T. von Danwitz, C.G. Fernlund, J.L. da Cruz Vilaça, Presidents of Chambers, J. Malenovský, E. Levits, A. Ó Caoimh, A. Arabadjiev, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2014,

* Language of the case: Swedish.

after considering the observations submitted on behalf of:

— Fonnship A/S, by L. Boman, advokat,

— Svenska Transportarbetareförbundet and Facket för Service och Kommunikation (SEKO), by I. Otken Eriksson, advokat,

— the Swedish Government, by A. Falk and U. Persson, acting as Agents,

— the Greek Government, by S. Chala and E.-M. Mamouna, acting as Agents,

— the European Commission, by J. Enegren, L. Nicolae and H. Tserepa-Lacombe, acting as Agents,

— the EFTA Surveillance Authority, by X. Lewis and M. Moustakali, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 April 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1 of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1, and corrigendum OJ 1987 L 93, p. 17).

2 The request has been made in proceedings between (i) Fonnship A/S ('Fonnship'), a company incorporated under Norwegian law, on the one hand, and Svenska Transportarbetareförbundet (Swedish Transport Workers' Union, 'ST') and Facket för Service och Kommunikation (Union for Service and Communication; 'SEKO'), which are two unions incorporated under Swedish law, on the other, and (ii) ST and Fonnship, concerning industrial action which allegedly disrupted the provision of services provided using a vessel owned by Fonnship and flying the Panamanian flag.

Legal context

Agreement on the European Economic Area

3 Article 7 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement') states:

'Acts referred to or contained in the Annexes to this Agreement … shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

…'

4 Article 47 of the EEA Agreement provides:

'1. Articles 48 to 52 shall apply to transport by rail, road and inland waterway.

2. Annex XIII contains specific provisions on all modes of transport.'

5 Annex XIII to the EEA Agreement incorporates Regulation No 4055/86 in Section V, entitled 'Maritime Transport'.

Regulation No 4055/86

6 The seventh to ninth recitals in the preamble to Regulation No 4055/86 state that 'non-conference shipping liners should not be prevented from operating as long as they adhere to the principle of fair competition'; that 'the Member States affirm their commitment to a freely competitive environment as being an essential feature of the … bulk trades'; and that 'Community shipowners are increasingly faced with new restrictions, imposed by third countries'.

7 According to the twelfth recital of that regulation, 'the structure of the Community shipping industry is such as to make it appropriate that the provisions of this Regulation should also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation'.

8 Article 1(1) to (3) of that regulation states:

'1. Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

2. The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

3. The provisions of Articles 55 to 58 ... of the [EEC] Treaty [which became, respectively, Article 55 of the EC Treaty (then Article 45 EC), Articles 56 and 57 of the EC Treaty (then, after amendment, Articles 46 and 47 EC) and Article 58 of the EC Treaty (then Article 48 EC)] shall apply to the matters covered by this Regulation.'

Swedish law

9 The Swedish Constitution guarantees the right to take industrial action, subject to the limitations laid down by law.

10 The Law (1976:580) on workers' participation in decisions (lag (1976:580) om medbestämmande i arbetslivet) of 10 June 1976 lays down rules applicable to the right of association and of negotiation, collective agreements, mediation of collective labour disputes and the obligation of social peace, and contains provisions restricting the right to take industrial action.

The dispute in the main proceedings and the question referred for a preliminary ruling

11 Fonnship is a company incorporated under Norwegian law which has its seat in Fonnes (Norway). During the material time with regard to the disputes in the main proceedings, namely between 2001 and 2003, it owned the vessel *M/S Sava Star* ('*Sava Star*').

12 The vessel is a bulk carrier which, during that period, principally sailed between States that are parties to the EEA Agreement. It was registered on the Panama Ship Registry and therefore flew the Panamanian flag. Its crew consisted of four Polish officers and two Russian seamen. Fonnship was the crew's employer.

13 According to Fonnship, the crew members' wages were governed by a collective agreement concluded between Fonnship and a Russian trade union called, in the English translation, 'Murmansk Area Committee of Seamen's Union'. According to Fonnship, the wages, which were approximately USD 550 per month for the seamen, were equal to, or even better than, the wages recommended by the International Transport Workers' Federation.

14 On 26 October 2001, when the vessel lay at the port of Holmsund (Sweden), ST, being of the opinion however that the wages of the *Sava Star* crew were not equitable, called on Fonnship to enter into a collective agreement approved by the International Transport Workers' Federation ('Special Agreement'). Following the rejection of that demand by Fonnship, industrial action took place which consisted of, inter alia, preventing the loading and unloading of that vessel.

15 On 29 October 2001, a collective agreement in the form of a 'Special Agreement' was signed by Fonnship and ST ('the 2001 Agreement'). Fonnship paid USD 1 794 to ST, in accordance with a provision of that agreement relating to membership fees and welfare fund contributions. The *Sava Star*'s captain prepared a letter of protest and the crew members signed a document stating that they did not approve of the measures taken by ST. The vessel was subsequently able to leave the port of Holmsund.

16 On 29 January 2002, Fonnship brought legal proceedings against ST before the Arbetsdomstolen (Labour Court) seeking an order that ST, first, repay it USD 1 794 and, second, pay it damages of approximately USD 10 000 for the economic loss caused by the abovementioned industrial action.

17 On 8 March 2002, ST brought legal proceedings against Fonnship before the Arbetsdomstolen seeking an order that Fonnship pay it USD 10 000 in damages for breach of the 2001 Agreement. According to ST, when the vessel lay in port at Reykjavik (Iceland) on 5 March 2002, Fonnship had refused, in breach of the 2001 Agreement, to send certain documents to a person appointed by a trade union federation and had prevented that person from contacting the crew.

18 On 18 February 2003, the *Sava Star* lay in port at Köping (Sweden). At that time, the 2001 Agreement had expired. SEKO required, in the same way that ST had done in 2001, that Fonnship sign a 'Special Agreement'. After industrial action had been taken, such a collective agreement was signed on 19 February 2003 ('the 2003 Agreement'). Fonnship paid, in accordance with the 2003 Agreement, USD 1 794 to SEKO for 'service fees' and welfare-fund contributions. The crew members signed a protest document. The vessel was subsequently able to leave that port.

19 On 11 March 2003, Fonnship brought legal proceedings against SEKO before the Arbetsdomstolen seeking an order that the union, first, repay it USD 1 794 and, second, pay damages of EUR 6 000 for the economic loss caused by the abovementioned industrial action.

20 On 17 June 2003, ST brought legal proceedings against Fonnship before the Arbetsdomstolen seeking an order that that company pay it damages of approximately USD 256 000, on the ground that it had not paid, during the period covered by the 2001 Agreement, the wages stipulated therein. The amount corresponds to the difference between the wages paid by Fonnship to the crew and the wages stipulated under the agreement.

21 In the context of the four cases pending before the Arbetsdomstolen, Fonnship claims that it was not bound by the 2001 and 2003 Agreements and that ST and SEKO must pay it damages and not the other way round. In this respect, it submits, first, that those two agreements are invalid, on the grounds of the lack of consent and the existence of unfair terms, and second, that the industrial action giving rise to the signing of those agreements was unlawful.

22 The Arbetsdomstolen considers that the question of the lawfulness of that industrial action is of decisive importance for the outcome of the disputes in the main proceedings and that, to answer that question, it has to rule on whether Swedish law on industrial action is compatible with the rules of EU law on the freedom to provide services. Since the parties are, however, in dispute as to whether those rules may be relevant in a situation such as that in those disputes, in which the vessel at issue flies the Panamanian flag, it is necessary, according to that court, first to examine the question of the applicability of EU law.

23 In those circumstances the Arbetsdomstolen decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is the rule in the EEA Agreement on free movement of services, maritime transport services — which rule has an equivalent in the EC Treaty — applicable to a company with its seat in an EFTA State [European Free Trade Association] as regards its activity in the form of transport services to an [European Community] Member State or an EFTA State using a vessel which is registered and flagged in another country outside the [European Community] and/or [the] EEA?’

Consideration of the question referred

24 The provisions of Regulation No 4055/86 are an integral part of the legal order of all of the States that are parties to the EEA Agreement by virtue of Article 7(a) of the EEA Agreement and Annex XIII thereto. That regulation and those provisions of the EEA Agreement contain rules relating to the applicability of the freedom to provide services in the shipping industry between States that are parties to the EEA Agreement and between those States and third countries (see, to that effect, *Corsica Ferries (France)*, C-49/89, EU:C:1989:649, paragraph 13; *Commission* v *Italy*, C-295/00, EU:C:2002:100, paragraph 9; and *Sea-Land Service and Nedlloyd Lijnen*, C-430/99 and C-431/99, EU:C:2002:364, paragraph 30).

25 Article 1(1) and (2) of that regulation determines which operators enjoy the freedom to provide services.

26 Therefore, by its question, the referring court asks, in essence, whether Article 1 of Regulation No 4055/86 must be interpreted as meaning that a company established in a State that is a party to the EEA Agreement and which is proprietor of a vessel flying the flag of a third country, by which maritime transport services are provided from or to a State that is a party to the EEA Agreement, may rely on the freedom to provide services in carrying out that economic activity.

27 Fonnship, the Greek Government and the European Commission consider that that question must be answered in the affirmative. The EFTA Surveillance Authority endorses that position but states that it is necessary to ensure that the company relying on the freedom to provide services, in this case Fonnship, is in fact the provider of the services at issue.

28 According to ST and SEKO, the question must be answered in the negative. Where a vessel flies the flag of a third country, the employment conditions of the crew of that vessel and the industrial action taken to improve them do not have any connecting factor with EU law and cannot therefore be examined in the light of that law.

29 Furthermore, ST and SEKO dispute that Fonnship may be considered to be a provider of maritime transport services established in the EEA. They claim to have information according to which Fonnship had, in essence, conferred the running of *Sava Star* to another company which, while being a company incorporated under Norwegian law, was controlled by a company established in Panama.

30 According to the Swedish Government, Article 1 of Regulation No 4055/86 must be interpreted with caution with regard to companies established in the EEA and using flags of third countries to avoid the employment conditions which are normal in the EEA.

31 Where the crew members of the vessel at issue are nationals of a third country, that fact could, according to the Swedish Government, also render Regulation No 4055/86 inapplicable to transport using that vessel.

32 It should be noted, first, that it is apparent from the wording and structure of Article 1 of Regulation No 4055/86 that, in defining the scope *ratione personae* of the freedom to provide services in the shipping industry from or to States that are parties to the EEA Agreement, that article identifies two categories of persons who enjoy, if certain conditions are satisfied, that freedom to provide services, namely, first, nationals of a State that is a party to the EEA Agreement who are established in the EEA and, second, nationals of a State that is a party to the EEA who are established in a third country, as well as shipping companies established in a third country and controlled by nationals of a State that is a party to the EEA Agreement.

33 Next, it is apparent from the seventh to ninth and twelfth recitals of Regulation No 4055/86 and from the *travaux préparatoires* thereof, as set out in the observations submitted to the Court, that, by including in that scope *ratione personae* the nationals of a Member State established in a third country or controlling a shipping company there, the EU legislature wished to ensure that a significant part of the commercial fleets owned by nationals of a Member State come under the liberalisation of the shipping industry established by that regulation, so that Member States' shipowners could better face, inter alia, the restrictions imposed by third countries.

34 Finally, the legislature set out a requirement that there be a connection by providing — in using the words 'if their vessels are registered in that [State that is a party to the EEA Agreement] in accordance with its legislation' in Article 1(2) of Regulation No 4055/86 — that the nationals of a State which is a party to the EEA Agreement who operate from an establishment situated in a third country are excluded from the freedom to provide services if their vessels do not fly the flag of that State.

35 The absence in Article 1(1) of a similar requirement for the nationals of a State that is a party to the EEA Agreement who operate from an establishment situated in the EEA shows that the legislature considered that that category of persons displays in itself a sufficiently close connection with the law of the EEA to be included in the scope *ratione personae* of that regulation, and regardless of the flag flown by their vessels (see, to that effect, *Corsica Ferries*, C-18/93, EU:C:1994:195, paragraph 29).

36 In the light of that distinction, it is necessary, in cases where a national of a State that is a party to the EEA Agreement who is established in the EEA or a company established in the EEA rely on Article 1(1) of Regulation No 4055/86 in a dispute relating to the question whether maritime transport services carried out using a vessel flying the flag of a third country fall within the scope of the freedom to provide services, to ascertain whether that national or that company may be considered to be a service provider.

37 Situations should not exist in which a shipping company established in a third country and providing maritime transport services from or to States that are parties to the EEA Agreement using vessels flying the flag of a third country enjoys, despite not meeting the connection requirement laid down in Article 1(2) of Regulation No 4055/86, the freedom to provide services by claiming that benefit

through a company established in the EEA which it controls, under the pretext that that company is a provider of the services at issue, where, in reality, it is the company established in the third country which provides them.

38 As the Advocate General noted at points 44 to 50 of his Opinion, for a company to be classed as a provider of maritime transport services, it must operate the vessel by which the transport is carried out.

39 In this case, Fonnship claimed, in reply to ST's and SEKO's contentions referred to in paragraph 29 above, that it operated the *Sava Star* itself during the relevant period. It is within the exclusive jurisdiction of the referring court to assess the truth of that assertion.

40 Assuming that its assessment shows that Fonnship must be classed as a provider of the maritime transport services at issue in the disputes in the main proceedings and, since it is not disputed that the persons for whom the services were intended were, in this case, established in a Member State which is a party to the EEA Agreement other than the Kingdom of Norway, the referring court would be led to conclude that that company falls, for the purposes of the outcome of those proceedings, within the scope *ratione personae* of Regulation No 4055/86, pursuant to Article 1(1) thereof.

41 In that case, any restriction which, without objective justification, is liable to prohibit, impede or render less attractive the provision of those services must be declared incompatible with EU law. Where it is applicable, Regulation No 4055/86 transposes, in essence, the rules of the treaty relating to the freedom to provide services and the case-law relating thereto (*Commission* v *France*, C-381/93, EU:C:1994:370, paragraphs 13 and 16; *Commission* v *Italy*, EU:C:2002:100, paragraphs 9 and 10; *Sea-Land Service and Nedlloyd Lijnen*, EU:C:2002:364, paragraphs 31 and 32; *Geha Naftiliaki and Others*, C-435/00, EU:C:2002:661, paragraphs 20 and 21; and *Commission* v *Spain*, C-18/09, EU:C:2010:58, paragraph 12). That case-law includes the judgment in *Laval un Partneri* (C-341/05, EU:C:2007:809) relating to the compatibility of industrial action with the freedom to provide services.

42 The application of Regulation No 4055/86 is in no way affected by the fact that the vessel carrying out the maritime transport at issue, and on which the workers in whose favour that industrial action was taken are employed, flies the flag of a third country, nor by the fact that the crew members of the vessel are, as in the present case, third country nationals.

43 For Article 1(1) of Regulation No 4055/86 to be applicable, it is sufficient for a provider of the maritime transport service to be a national of a State that is a party to the EEA Agreement who is established in a State that is a party to the EEA Agreement other than that of the person for whom the services are intended.

44 In the light of all of the foregoing considerations, the answer to the question is that Article 1 of Regulation No 4055/86 must be interpreted as meaning that a company established in a State that is a party to the EEA Agreement and which is proprietor of a vessel flying the flag of a third country, by which maritime transport services are provided from or to a State that is a party to the EEA Agreement, may rely on the freedom to provide services, provided that it can, due to its operation of that vessel, be classed as a provider of those services and that the persons for whom the services are intended are established in States that are parties to the EEA Agreement other than that in which that company is established.

Costs

45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 1 of Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries must be interpreted as meaning that a company established in a State that is a party to the Agreement on the European Economic Area of 2 May 1992 and which is proprietor of a vessel flying the flag of a third country, by which maritime transport services are provided from or to a State that is a party to the EEA Agreement, may rely on the freedom to provide services, provided that it can, due to its operation of that vessel, be classed as a provider of those services and that the persons for whom the services are intended are established in States that are parties to the EEA Agreement other than that in which that company is established.

[Signatures]