

OPINION OF ADVOCATE GENERAL
TIZZANO

delivered on 19 May 2004¹

1. In this case the Commission of the European Communities claims that the Hellenic Republic has failed to fulfil its obligations under Articles 1, 3 and 6 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) ('Regulation No 3577/92' or simply 'the Regulation').²

'As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State ... '

3. Article 2 provides that:

I – Legal background

'For the purposes of this Regulation:

The relevant provisions of Community law

2. In order to abolish 'restrictions on the provision of maritime transport services within Member States' (third recital in the preamble), the Council adopted Regulation No 3577/92, Article 1(1) of which provides as follows:

1. "maritime transport services within a Member State (maritime cabotage)" shall mean services normally provided for remuneration and shall in particular include:

- (a) mainland cabotage: the carriage of passengers or goods by sea between

¹ — Original language: Italian.

² — OJ 1992 L 364, p. 7.

ports situated on the mainland or the main territory of one and the same Member State without calls at islands;

4. Article 3 goes on to provide that:

...

'1. For vessels carrying out mainland cabotage and for cruise liners, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State), except for ships smaller than 650 gt, where host State conditions may be applied.

(c) island cabotage: the carriage of passengers or goods by sea between:

— ports situated on the mainland and on one or more of the islands of one and the same Member State,

2. For 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).

— ports situated on the islands of one and the same Member State;

...'

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

....'

5. Finally, in order to limit the extent of the 'effort that certain economies in the Community' would have to sustain to implement the freedom to provide maritime transport services (eighth recital in the preamble),

Article 6 provided for a gradual opening up of the cabotage markets in the southern Member States. This article provides that:

to the Canary, Azores and Madeira archipelagos, Ceuta and Melilla, the French islands along the Atlantic coast and the French overseas departments shall be temporarily exempted from the implementation of this Regulation until 1 January 1999.

'1. By way of derogation, the following maritime transport services carried out in the Mediterranean and along the coast of Spain, Portugal and France shall be temporarily exempted from the implementation of this Regulation:

3. For reasons of socio-economic cohesion, the derogation provided for in paragraph 2 shall be extended for Greece until 1 January 2004 for regular passenger and ferry services and services provided by vessels less than 650 gt.'³

— cruise services, until 1 January 1995,

— transport of strategic goods (oil, oil products and drinking water), until 1 January 1997,

The relevant provisions of national law

6. Article 165 of the Greek Code of Public Maritime Law ('the KDND')⁴ provides that:

— services by ships smaller than 650 gt, until 1 January 1998,

— regular passenger and ferry services, until 1 January 1999.

'1. The right to carry passengers between Greek ports, including the right to carry

2. By way of derogation, island cabotage in the Mediterranean and cabotage with regard

3 — I should point out that Greece decided to open up to Community shipowners the island cabotage services referred to in Article 6(3) of the Regulation before the 2004 time-limit. Part 1 of Law No 2932/2001, published on 27 June 2001, provides that these services be liberalised as from 1 November 2002.

4 — Decree-Law No 187/1973 (FEK A 261), as amended by Presidential Decrees Nos 113/97 (FEK A 99) and 84/98 (FEK A 77).

between ports Greek passengers travelling to or from foreign ports, where they hold transit tickets, shall be reserved to Greek vessels pursuant to the provisions of this Chapter.

the conditions for providing cabotage services in those States.⁵

...

7. In so far as it is relevant here, reference should be made to three circulars addressed to the port authorities which were adopted in 1998 by the Ypourgeio Emporikis Naftilias (Ministry of the Merchant Marine).

6. The right to embark passengers in Greek ports, for cruises to other Greek ports, shall be reserved to Greek passenger ships. This shall apply also where a cruise continues on to foreign ports where the port of final disembarkation is a Greek port. The embarkation, cruising and disembarkation of passengers travelling on passenger ships flying foreign flags may be authorised by presidential decree, on the conditions laid down for that purpose. Tourist vessels (yachts and small tourist boats) shall be governed by specific provisions.

8. The first is Circular No 1151.65/1/98 of 4 August 1998 entitled 'Activities of cargo vessels and tankers flying Community flags which carry out maritime cabotage'. This circular points out in particular that Regulation No 3577/92 forms an integral part of Greek legislation and prevails over any conflicting provision. Furthermore, it lists the ports of the Peloponnese as island ports (Article 2.1.1). Finally, this circular provides that in order to be able to carry out cabotage in Greek waters an operator using vessels entered in a second register or international register is required to furnish proof that the vessel in question is able to pursue the transport activity concerned in the flag State (Article 2.1.2).

The right to carry out cruises between n Greek mainland ports, without calls at islands, shall be extended to passenger vessels over 650 gt entered in the registers of other Member States of the European Union and flying the flags of those States, provided that those vessels comply with all

9. After reaffirming the provisions of the first circular relating to the Peloponnese, the next circular, No 1151.65/2/98 of 18 December 1998 entitled 'Activities of passenger,

5 — Unofficial translation.

tourist and cruise ships flying Community flags which operate tours (cruises) in Greek waters', states as follows in Article 2.4.1:

31 December 2003; 'Decree No 344/2003') which amends various provisions of the KDND, including Article 165 referred to above.

'In general, Greek legislation (as the legislation of the host State) is to apply to the composition of the crews of Community passenger, tourist and cruise ships authorised to carry out cruises between mainland ports and the islands or between island ports of our country, whilst the legislation of the flag State is to apply to cruises between ports situated on the mainland.'⁶

10. Lastly, Circular No 2311.10/10/98 of 21 December 1998 entitled 'Manning of cargo vessels, tankers and cruise liners flying Community flags which carry out maritime cabotage' states that the national authorities are to issue, at the request of the shipowner, a measurement certificate pursuant to national provisions relating to tonnage on the basis of which the Greek port authorities will calculate the necessary number of crew members.

11. It should be noted finally that in order to bring Greek legislation into line with Regulation No 3577/92 Greece adopted Presidential Decree No 344/2003 (FEK 314 A of

II — Facts and procedure

12. After requesting from the Greek authorities information about the state of implementation of Regulation No 3577/92 after 1 January 1999, the Commission sent the Hellenic Republic, on 3 May 2000, a letter of formal complaint pointing out various areas in which national Greek legislation was incompatible with the provisions of that regulation.

13. On 18 July 2001 that letter was followed by a reasoned opinion.

14. Since it was not satisfied by the replies and clarifications provided by the Hellenic Republic, the Commission claimed, by an application lodged on 9 August 2002, that the Court should declare that by:

'— expressly conferring the right to carry passengers between Greek mainland

6 — Unofficial translation.

ports solely upon Greek passenger ships and the right to carry out tours with passenger ships of a gross tonnage exceeding 650 gt by way of island cabotage solely upon Greek passenger ships,

the Hellenic Republic has failed to fulfil its obligations under Articles 1, 3 and 6 of Council Regulation (EEC) No 3577/92.'

- requiring in the case of Community ships entered in a second or international register a certificate from the competent authority of the flag State declaring that that ship is allowed to provide cabotage services,

15. During the written proceedings the Commission dropped the second part of the fourth complaint in the light of certain clarifications provided by the Greek Government.

- considering that the Peloponnese constitutes an island,

and

- applying to Community tankers, freighters, passenger ships and tourist ships, and to cruise ships which carry out sea tours by way of island cabotage its rules as host State relating to manning conditions, and requiring the ship-owners to submit an application to the competent authorities for measurement of the gross tonnage of the ship, in order for the Greek authorities to calculate the basic composition of the crew,

16. At the hearing before the Court on 25 March 2004 the Commission went on to declare that it was also dropping the first complaint following the approval by the Hellenic Republic of Decree No 344/2003. In that connection the Commission also pointed out that the first part of the fourth complaint alleges that the Hellenic Republic applies its own legislation on manning, as the host State, only to Community cruise liners over 650 gt which carry out island cruises.

17. Following these clarifications by the Commission the Court is therefore called upon to assess the merits of the second and third complaint and the first part of the fourth complaint.

III — Legal analysis

Second complaint

18. By the second complaint the Commission claims that the Hellenic Republic unlawfully requires operators which use vessels entered in second registers or the international registers of another Member State and intend to provide cabotage services in Greek waters to present a certificate showing that those vessels are permitted to carry out cabotage in the flag State.

19. In that respect I note first that under Article 1 of Regulation No 3577/92 only Community shipowners who 'have their ships registered in, and flying the flag of a Member State' which 'comply with all conditions for carrying out cabotage in that Member State' may exercise the freedom to provide maritime transport services. Therefore, to be free to provide this kind of service entry in a register is not sufficient, it is also necessary for the vessel concerned to be permitted, by this entry, to carry out national cabotage.

20. I also note that in addition to 'first registers' there are also so-called 'second registers' and 'international registers' of ships

in the Member States. In all the Member States the vessels entered in the first registers are permitted to carry out national cabotage and, consequently, comply with the conditions laid down by the regulation for carrying out cabotage in the other Member States. However, the situation is different as regards vessels entered in second or international registers. Whereas in certain States entry in these registers grants full permission to carry out national cabotage, in other States such permission is limited or even completely denied.

21. Having said that, I would observe that the Commission and the Greek Government are agreed in considering that the Member States are authorised to take the necessary measures correctly to implement Regulation No 3577/92, in particular measures to determine whether the vessel intends to provide maritime transport services in another Member State and is permitted to carry out cabotage in the flag State for the purposes of Article 1. They also agree that such measures must observe the principle of proportionality, that is to say 'must be suitable for securing the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it'.⁷

⁷ — See Case C-205/99 *Analir* [2001] ECR I-1271, paragraph 25. See also Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior e Publivia* [1991] ECR I-4151, paragraph 16; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

22. However, the parties' assessment as regards the observation of this principle by the measure adopted specifically by Greece is obviously different.

23. In the view of the Commission, the imposition of the obligation to present the certificate in question is unnecessary since the Member States are already sufficiently well-informed about the state of national legislation relating to second registers and international registers through the biennial reports on the implementation of Regulation No 3577/92 which the Commission has to submit to the Council every two years pursuant to Article 10 thereof.⁸

24. The applicant considers that there are, in any event, other means of safeguarding the correct implementation of the regulation which are less restrictive than the obligation to present such a certificate.

25. The following *inter alia* could be envisaged:

- an obligation on shipowners to present to the authorities of the host country a copy of the legislation of the flag State showing that vessels entered in second registers or international registers are authorised to provide cabotage services in that State;
- the introduction of annual consultation between the competent authorities of the Member States on the development of legislation in the sector in question;
- informal consultation with the Commission.

26. In my view, however, this proposal by the Commission cannot be accepted.

27. Firstly, I am unable to concur with the contention that the request for a certificate is rendered superfluous by the information which the Member States already possess on account of the reports on the implementation of Regulation No 3577/92.

⁸ — Four reports have been submitted to date: Report from the Commission to the Council — Implementation of Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States — 1993-1994, of 7 September 1995 [COM(1995) 383]; Report from the Commission to the Council on the implementation of Council Regulation 3577/92 applying the principle of freedom to provide services to maritime cabotage (1995-1996) and on the economic and social impact of the liberalisation of island cabotage, of 187 June 1997 [COM(1997) 296]; Report from the Commission — Third report of the implementation of Council Regulation 3577/92 applying the principle of freedom to provide services to maritime cabotage (1997-1998), of 2 March 2000 [COM(2000) 99]; and Report from the Commission — Fourth report on the implementation of Council Regulation 3577/92 applying the principle of freedom to provide services to maritime cabotage (1999-2000), of 24 April 2002 [COM(2002) 203].

28. As the Greek Government has correctly observed, these reports are published biennially and set out the legislative amendments introduced in the Member States in the two years preceding publication. Therefore, the Member States are informed of amendments to national law, in particular those relating to the registers in question, after their adoption and with a time delay of up to two years.

State would, on the basis of the information provided by the most recently available report, have to deny the Community vessel permission to carry out cabotage. However, such an occurrence is prevented by the presentation of the certificate which demonstrates that the possibility of carrying out maritime transport has arisen in the flag State.

29. Unlike the presentation of a certificate, these reports do not enable the host State to establish with certainty whether a Community vessel is permitted to carry out cabotage in the flag State pursuant to the legislation actually in force at that time in that State.

32. As regards the less restrictive means which, in the view of the Commission, the Hellenic Republic could have used as an alternative to the obligation to present a certificate, I observe as follows.

30. Not only that. As the Greek Government has demonstrated, in some cases the certificate-based system can be more advantageous to shipowners than that based on reports from the Commission and thus more suitable for securing the freedom to provide cabotage services.

33. In line with the Greek Government, I doubt above all that the imposition on Community shipowners of an obligation to provide the Greek authorities with a copy of the legislation in force in the flag State would constitute a solution which was less restrictive than that provided by the Greek rules. Such legislation would first have to be translated by the party concerned and then interpreted by the authorities of the host State. That would most likely be more onerous on the party concerned and in any case certainly take up more time in addition to providing greater scope for errors than simply producing a certificate which merely states whether or not a particular vessel entered in a second register is permitted to carry out cabotage.

31. This is so in particular where, after the publication of a report, national legislation which did not permit, or only partially permitted, vessels entered in second registers or international registers to carry out national cabotage, is amended to allow them to provide such services. In that case the host

34. Furthermore, I do not consider that annual consultation between the national authorities would be less restrictive. In the same way as the biennial reports referred to above, such consultation would not make it possible to establish whether a Community vessel was permitted to carry out cabotage in the flag State pursuant to the legislation actually in force at that time in that State. Moreover, this proposed measure could also place Community shipowners at a disadvantage where, following the consultation, legislation was amended to permit their vessels to carry out national cabotage.

37. However, in more general terms, I consider that in comparison with the alternative measures proposed by the Commission the presentation of a certificate provides a greater degree of certainty that the conditions laid down have been complied with. By contrast, in the other cases certainty would be sacrificed, as has been seen, in the name of simplification which is most unlikely, if not non-existent.

38. Therefore, for the reasons set out above I consider that the Commission's second complaint should be dismissed.

35. Finally, as regards the possibility of consulting the Commission directly, I should first observe that, as the Commission has itself acknowledged, it is able to provide the States concerned with the information on the legal development of second and international registers only when the Member States have notified amendments to legislation to it in due time.

Third complaint

39. By its third complaint the Commission claims that the Hellenic Republic considered that the Peloponnese constituted an island and thereby unlawfully applied to the ports in that region Article 6(3) of the regulation which excluded certain cabotage services between the Greek *islands* from the liberalisation until 1 January 2004.

36. Furthermore, whilst the presentation of a certificate enables the host State immediately and unequivocally to verify that the conditions for carrying out national cabotage provided for in Article 1 have been complied with, a request for information from the Commission and the wait for a response from it might take longer and, for that reason, be more onerous.

40. The Commission considers that the Peloponnese cannot be regarded as constituting an island since although it is separated from the rest of Greece by a man-made canal it remains permanently linked to it by road and rail.

41. By contrast, the Greek Government considers that the Peloponnese constitutes an actual island since it is entirely surrounded by water, albeit as a result of human action. It also adds that Article 2 of the regulation treats the ports of Ceuta and Melilla situated on mainland Africa as 'island ports'. Therefore, it would be contradictory to regard those ports as 'island ports' but to consider that those located on the Peloponnese, which is entirely surrounded by water, constitute mainland ports.

quently separated from the rest of Greece by a man-made canal. However, the peninsular nature of this region remains unaltered even after this action. Irrespective of the fact that the dividing canal is only a few dozen metres wide, I should observe that the Peloponnese, unlike the islands, is linked structurally by land communications and therefore has permanent links with the rest of the Greek mainland. Consequently, in spite of the man-made division, I consider that the Peloponnese should still be regarded as constituting a peninsula.

42. Moreover, the Greek Government emphasises that the derogation from the liberalisation of certain cabotage services between the Greek islands contained in Article 6(3) is justified by reasons of socio-economic cohesion. It would therefore be consistent with this objective to apply the derogation also to the Peloponnese which is a region with a very low development index.

45. Nor can it be objected that Article 2 of the regulation treats the ports of Ceuta and Melilla as 'island ports'. Although it is true that in relation to the African mainland the ports of those towns are certainly mainland ports, it is also true that in relation to the European mainland, and in particular to the Iberian peninsula, they are entirely comparable with 'island ports' precisely because they have no land links with Spain. Consequently, the situation of such ports differs from that of those situated in the Peloponnese which, as has been stated several times, is permanently linked to the rest of Greece.

43. For my part, I would first observe that, in the absence of different and specific indications in Regulation No 3577/92 regarding the term 'island', the Commission's view that the Peloponnese does not constitute an island would appear to be more convincing and reasonable.

44. There is no doubt that historically the Peloponnese was, from a geographical point of view, a peninsula and that it was subse-

46. In my view, it is likewise not possible to disprove the proposed interpretation by relying on the economic grounds which

justify the derogation in favour of the islands and which would also apply to the Peloponnese on account of its low development indices.

cerning manning to Community cruise liners over 650 gt carrying out cruises to the islands of that State.

47. If the derogation from liberalisation provided for in respect of cabotage between the islands in the Mediterranean until 1 January 1999 and in respect of certain transport services between the Greek islands until 1 January 2004 (Article 6(2) and (3)) were extended to all the regions of the southern Member States which cannot be regarded as 'islands' in the technical sense but have low economic development indices, the opening of the national cabotage markets sought by the Community legislature would, contrary to the objectives of Regulation No 3577/92, be subjected to a limitation that was both considerable and unjustified since there is no legal basis for it.

50. In the view of the Commission, that is incompatible with Article 3(1) of the regulation. That provision provides that all matters relating to the manning of cruise liners be governed by the legislation of the flag State, irrespective of whether they provide mainland or island cruise services.

51. By contrast, the Greek Government maintains that under Article 3(1) the flag State's rules relating to manning apply only to cruise liners which call at mainland ports, whilst under Article 3(2) the provisions of the host State apply to those which call at island ports.

48. Therefore, I consider that the Commission's third complaint should be upheld.

52. For my part, I consider that the Commission's view is more consistent with the wording of the provision under consideration.

First part of the fourth complaint

49. By the first part of the fourth complaint the Commission claims that Greece, as the host State, applied its own legislation con-

53. As the plaintiff has correctly observed, this wording clearly states that all matters relating to manning are to be the responsi-

bility of the flag State '[f]or vessels carrying out mainland cabotage *and* for *cruise liners*'.⁹ Therefore, the wording of the provision attributes to the flag State responsibility for *all* cruise ships and does not limit it to those which call at mainland ports.

attributes to the flag State the responsibility for laying down rules on matters relating to manning also for cruise ships which call at island ports with the sole exception — as that provision makes clear — of ships smaller than 650 gt.

54. Moreover, if that were not the case the clarification 'for cruise liners' contained in the provision under consideration would be devoid of any meaning. Had the Community legislature intended to attribute to the flag State responsibility for 'mainland' cruises and to the host State responsibility for 'island' cruises, it could have simply referred, in the first paragraph, to ships carrying out mainland cabotage (which also include those carrying out cruises calling at the mainland) and, in the second, to those carrying out island cabotage (which include cruises calling at the islands).

56. Therefore, in my view the first part of the Commission's fourth complaint must be upheld.

IV — Costs

55. Consequently, the clarification added to the first paragraph takes on an independent legislative scope of its own in that it

57. Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that the parties bear their own costs. Since, as was seen above, I consider that the Hellenic Republic and the Commission are each partially unsuccessful, I think it is fair to propose that each party should bear its own costs.

⁹ — Emphasis added.

V — Conclusion

58. In view of the foregoing I therefore propose that the Court declare that:

- (1) By considering that the Peloponnese constitutes an island and applying, as host State, its national rules relating to manning to Community cruise liners over 650 gt which carry out island cruises, the Hellenic Republic has failed to fulfil its obligations under Articles 1, 3 and 6 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).
- (2) The remainder of the application is dismissed.
- (3) The parties shall each bear their own costs.