

JUDGMENT OF THE COURT (Second Chamber)

6 April 2006 *

In Case C-456/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale amministrativo regionale per la Sicilia (Italy), made by decision of 20 July 2004, received at the Court on 29 October 2004, in the proceedings

Agip Petroli SpA

v

Capitaneria di porto di Siracusa,

Capitaneria di porto di Siracusa — Sezione staccata di Santa Panagia,

Ministero delle Infrastrutture e dei Trasporti,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Schintgen, P. Küris and J. Klučka (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 10 November 2005,

after considering the observations submitted on behalf of:

- Agip Petroli SpA, by R. Longanesi Cattani, G. Pitruzzella and A. Cariola, avvocati,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,
- the Greek Government, by E.-M. Mamouna, acting as Agent,
- the French Government, by A. Hare, acting as Agent,

- the Norwegian Government, by A. Eide, acting as Agent, assisted by C. Galtung, Attorney General for civil affairs,

- the Commission of the European Communities, by K. Simonsson, acting as Agent, assisted by G. Conte and E. Boglione, avvocati,

after hearing the Opinion of the Advocate General at the sitting on 8 December 2005,

gives the following

Judgment

- ¹ The reference for a preliminary ruling concerns the interpretation of Article 3(3) 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) (OJ 1992 L 364, p. 7, the ‘regulation’).

- ² The reference was made in the context of a dispute between Agip Petroli SpA (‘Agip Petroli’) and the Capitaneria di porto di Siracusa (Port of Syracuse Harbour Office), the Capitaneria di porto di Siracusa — Sezione staccata di Santa Panagia (Port of Syracuse Harbour Office — Santa Panagia Division) (the ‘Harbour Office’) and the Ministero delle Infrastrutture e dei Trasporti (Department of Infrastructure and Transport), concerning a decision by which the Harbour Office refused a Greek-registered tanker permission to carry out island cabotage between Magnisi and Gela.

Legal context

- 3 The third, fourth, seventh and eighth recitals in the preamble to the regulation read as follows:

‘... the abolition of restrictions on the provision of maritime transport services within Member States is necessary for the establishment of the internal market; ... the internal market will comprise an area in which the free movement of goods, persons, services and capital is ensured;

... therefore freedom to provide services should be applied to maritime transport within Member States;

...

... in order to avoid distortion of competition, Community shipowners exercising the freedom to provide cabotage services should comply with all the conditions for carrying out cabotage in the Member State in which their vessels are registered; ... Community shipowners operating ships registered in a Member State who do not have the right to carry out cabotage in that State should nevertheless be beneficiaries of this regulation during a transitional period;

... the implementation of this freedom should be gradual and not necessarily provided for in a uniform way for all services concerned, taking into account the nature of certain specific services and the extent of the effort that certain economies in the Community showing differences in development will have to sustain;’.

4 Article 1(1) of the regulation provides:

‘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 ...’.

5 Article 2 of the regulation provides:

‘For the purposes of this regulation:

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

...

(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,

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

...'

6 Under Article 3 of the regulation:

'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.

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).

3. However, from 1 January 1999, for cargo vessels over 650 gt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State).

...'

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

- 7 It is apparent from the order for reference that Agip Petroli chartered the Greek-registered tanker *Theodoros IV* to ship a cargo of crude oil from Magnisi to Gela, both in Sicily. In order to justify the derogation from the legislation of the host State, the Italian Republic, and the application instead of the legislation of the flag State, the Hellenic Republic, Agip Petroli relied on Article 3(3) of the regulation. In its application for permission to carry out this island cabotage, that company stated that the vessel had subsequently to make a voyage directly to a foreign State without cargo on board ('voyage in ballast').
- 8 By decision of 6 December 2001, the Harbour Office refused the *Theodoros IV* the said permission on the ground that the crew of the vessel included, contrary to Article 318 of the Codice delle navigazione (Italian Shipping Code), sailors who were nationals of the Philippines.
- 9 In its decision, the Harbour Office justified the application of Italian law, having regard to Circular No TMA3/CA/0230 of 31 January 2000 of the Ministero dei Trasporti et della Navigazione (Department of Transport and Shipping), according to which Article 3(3) of the regulation, providing for the application, by way of exception, of the law of the flag State, applies only to cases in which 'the voyage which follows or precedes the cabotage ... is functionally and commercially autonomous, that is to say, the vessel has cargo on board destined for or coming from a foreign port'. That provision could not, consequently, be invoked if 'the ship has already completed or will complete after the voyage of island cabotage ... a voyage in ballast or a voyage with a cargo of goods which, in terms of quality and quantity, cannot render the voyage autonomous ...'.

- 10 Agip Petroli brought an action against that decision before the referring court, which takes the view that two interpretations of Article 3(3) of the regulation are possible. According to that court, the need to prevent circumvention of Article 3(2) of the regulation by means of consecutive sham cabotage voyages argues in favour of a restrictive interpretation. However, there is nothing in the wording of these provisions to indicate that their scope is limited to voyages with cargo on board.
- 11 Under these circumstances, the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court of Sicily) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does “voyage which follows or precedes the cabotage voyage” in Article 3(3) of [the regulation] mean only a voyage which is “functionally and commercially autonomous, that is to say, with cargo on board destined for or coming from a foreign port”, as stated in the measures at issue in the [main proceedings], or does it also include a voyage without cargo on board (that is, a “voyage in ballast”)?’

On the question referred for a preliminary ruling

- 12 By its question, the referring court asks in substance whether, in the area of maritime transport of goods within Member States, ‘voyage which follows or precedes’ the cabotage voyage (the ‘international voyage’) in Article 3(3) of the regulation means only voyages with cargo on board or whether it also includes voyages in ballast.

- 13 As a preliminary point, it should be recalled that the regulation's objective of liberalisation, as described in the third and fourth recitals in the preamble in particular, and which is to abolish restrictions on the provision of maritime transport services within Member States, has not yet been fully achieved. One of the limits to the liberalisation provided for by the regulation concerns island cabotage. While Articles 1 and 3(1) of the regulation specify that, in principle, the law of the flag State applies, Article 3(2) of the regulation lays down an exception in respect of island cabotage, providing that, for vessels carrying out that type of transport, all matters relating to manning come under the law of the host State. The principle of the application of the law of the flag State to the composition of the crew is however laid down in Article 3(3) of the regulation, when the island cabotage is preceded or followed by an international voyage carried out by a cargo vessel over 650 gt.
- 14 As regards the meaning of 'international voyage', it should be noted at the outset that Article 3(2) of the regulation only requires that the cabotage voyage be preceded or followed by an international voyage, without giving any guidance as to what is meant by 'voyage' or as to the presence or not of cargo on vessels over 650 gt.
- 15 Under these circumstances, and as the regulation contains no definition of 'voyage' and nothing to indicate that the Community legislator intended to allow other factors to be taken into account, such as the requirement that there be cargo on board or that the international voyage be functionally and commercially autonomous, it must be understood as covering, in principle, all voyages whether or not the vessel has cargo on board.

- 16 This interpretation is moreover in accordance with the objective of the regulation, which is to implement freedom to provide services for maritime cabotage under the conditions and subject to the exceptions which the regulation lays down (see, in particular, Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 19). In fact, it allows the full application of Article 3(3) of the regulation which, by stipulating for its part the application of the law of the flag State, is directly in line with that objective.
- 17 Moreover, this interpretation is also supported by the fact that, in the area of maritime transport, it is not uncommon for voyages in ballast to take place.
- 18 However, in spite of that finding, it is not possible to accept sham voyages in ballast carried out to circumvent Article 3 of the regulation and the objective of the regulation itself, as recalled at paragraph 13 of this judgment.
- 19 It should be noted in this respect that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (see, in particular, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33, and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68).
- 20 The scope of Community law must in no case be extended to cover abuses on the part of a trader, that is to say, activities which are not carried out in the context of normal commercial transactions, but only with the aim of circumventing the rules of Community law (see to this effect, in particular, Case 125/76 *Cremer* [1977]

ECR 1593, paragraph 21; Case C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21, and *Halifax*, paragraph 69).

- 21 The national courts may, consequently, on the basis of objective evidence, take account of abuse on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provision of Community law on which they seek to rely. In that respect, they must nevertheless take into account the objectives pursued by that provision (see *Diamantis*, paragraph 34, and the case-law cited).
- 22 Consequently, shipowners cannot be allowed to have set up artificially an international voyage in ballast in order that Article 3(3) of the regulation, and therefore the legislation of the flag State, instead of Article 3(2) of the regulation, and therefore the legislation of the host State, be applicable.
- 23 Such an abuse can be found to exist only if, first, notwithstanding that technically the conditions laid down by Article 3(3) of the regulation apply, the result of the international voyage in ballast is that the shipowner benefits, for all matters relating to manning, from the application of the law of the flag State, frustrating the aim of Article 3(2) of the regulation, which is to allow the application of the law of the host State to all matters relating to manning in the case of island cabotage. Second, there must also be objective evidence to show that the essential aim of the international voyage in ballast is to avoid the application of Article 3(2) of the regulation, in favour of Article 3(3) (see, to this effect, *Halifax*, paragraph 86).

- 24 It is for the national court, however, to verify in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined, whether action constituting an abusive practice has taken place in the case before it (Case C-515/03 *Eichsfelder Schlachtbetrieb* [2005] ECR I-7355, paragraph 40, and *Halifax*, paragraph 76).
- 25 Having regard to the foregoing considerations, the reply to the question referred must be that an international voyage, as referred to in Article 3(3) of the regulation, means in principle any voyage to or from another State, whether or not the vessel has cargo on board. However, sham voyages without cargo on board carried out to circumvent the rules laid down in the regulation cannot be permitted. Such an abuse can be found to exist only if, first, notwithstanding that technically the conditions laid down by Article 3(3) of the regulation apply, the result of the international voyage in ballast is that the shipowner benefits, for all matters relating to manning, from the application of the law of the flag State, frustrating the aim of Article 3(2) of the regulation, which is to allow the application of the law of the host State to all matters relating to manning in the case of island cabotage. Second, there must also be objective evidence to show that the essential aim of the international voyage in ballast is to avoid the application of Article 3(2) of Regulation (EEC) No 3577/92, in favour of Article 3(3).

Costs

- 26 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Second Chamber) hereby rules:

A ‘voyage which follows or precedes’ the cabotage voyage, as referred to in Article 3(3) 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), means in principle any voyage to or from another State, whether or not the vessel has cargo on board. However, sham voyages without cargo on board carried out to circumvent Regulation (EEC) No 3577/92 cannot be permitted. Such an abuse can be found to exist only if, first, notwithstanding that technically the conditions laid down by Article 3(3) of the regulation apply, the result of the international voyage in ballast is that the shipowner benefits, in respect of all matters relating to manning, from the application of the law of the flag State, frustrating the aim of Article 3(2) of the regulation, which is to allow the application of the law of the host State to all matters relating to manning in the case of island cabotage. Second, there must also be objective evidence to show that the essential aim of the international voyage in ballast is to avoid the application of Article 3(2) of Regulation (EEC) No 3577/92, in favour of Article 3(3).

[Signatures]