Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

23 January 2014*

(Maritime transport — Directive 1999/32/EC — Marpol Convention 73/78 — Annex VI — Air pollution from ships — Passenger ships operating regular services — Cruise ships — Maximum sulphur content in marine fuels — Validity)

In Case C-537/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale di Genova (Italy), made by decision of 18 June 2011, received at the Court on 21 October 2011, in the proceedings

Mattia Manzi,

Compagnia Naviera Orchestra

v

Capitaneria di Porto di Genova,

intervening parties:

Ministero delle Infrastrutture e dei Trasporti,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fourth Chamber, M. Safjan, J. Malenovský (Rapporteur) and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: A. Impellizzeri, Administrator,

further to the hearing on 18 September 2013,

after considering the observations submitted on behalf of:

— Mr Manzi and the Compagnia Naviera Orchestra, by A. Rossi and S. Dameri, avvocati, instructed by B. O'Connor, Solicitor,

— the Italian Government, by G. Palmieri, acting as Agent, and G. Albenzio, avvocato dello Stato,

— the European Parliament, by I. Anagnostopolou, L. Visaggio and J. Rodrigues, acting as Agents,

* Language of the case: Italian.

— the Council of the European Union, by K. Michoel, S. Barbagallo and M. Moore, acting as Agents,

— the European Commission, by S. Boelaert, S. Petrova, L. Pignataro-Nolin and L. Prete, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(3g) and 4a(4) of Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC (OJ 1999 L 121, p. 13), as amended by Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 (OJ 2005 L 191, p. 59) ('Directive 1999/32').

2 The request has been made in proceedings between Mr Manzi and the Compagnia Naviera Orchestra against the Capitaneria di Porto di Genova (Genoa Port Authority) concerning the administrative penalty order made against them for failing to comply with the maximum sulphur content in marine fuels.

Legal context

International law

3 The International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 ('the Marpol Convention 73/78'), establishes rules to combat pollution of the marine environment.

4 The Protocol of 1997 amending the International Convention of 1973 for the Prevention of Pollution from Ships, as amended by the Protocol of 1978 relating thereto, signed in London on 26 September 1997 ('the 1977 Protocol') added Annex VI to that convention, entitled 'Prevention of Air Pollution from Ships' ('Annex VI').

5 Among the Contracting Parties to the 1997 Protocol are 25 Member States of the European Union. The Czech Republic, Hungary and the Republic of Austria are not Contracting Parties to that protocol.

6 At the material time, Rule 14(1) of Annex VI provided that, outside the emission control areas for sulphur oxide (SO_x), the content of sulphur oxide in marine fuels must not exceed 4.5% by mass.

European Union law

7 Recitals 1, 3 and 8 in the preamble to Directive 1999/32 state as follows:

'(1) Whereas the objectives and principles of the Community's environmental policy … aim in particular to ensure the effective protection of all people from the recognised risks from sulphur dioxide emissions and to protect the environment by preventing sulphur deposition exceeding critical loads and levels;

…

(3) Whereas emissions of sulphur dioxide contribute significantly to the problem of acidification in the Community; whereas sulphur dioxide also has a direct effect on human health and on the environment;

…

(8) Whereas sulphur which is naturally present in small quantities in oil and coal has for decades been recognised as the dominant source of sulphur dioxide emissions which are one of the main causes of "acid rain" and one of the major causes of the air pollution experienced in many urban and industrial areas'.

8 Under Article 1(1) of the same directive:

'The purpose of this Directive is to reduce the emissions of sulphur dioxide resulting from the combustion of certain types of liquid fuels and thereby to reduce the harmful effects of such emissions on man and the environment.'

9 Article 2(3f) of Directive 1999/32 states that, for the purpose of that directive:

'"passenger ships" means ships that carry more than 12 passengers, where a passenger is every person other than:

(i) the master and the members of the crew or other person employed or engaged in any capacity on board a ship on the business of that ship, and

(ii) a child under one year of age'.

10 Article 2(3g) of Directive 1999/32 states that, for the purpose of that directive:

'"regular services" means a series of passenger ship crossings operated so as to serve traffic between the same two or more ports, or a series of voyages from and to the same port without intermediate calls, either:

(i) according to a published timetable, or

(ii) with crossings so regular or frequent that they constitute a recognisable schedule'.

11 Article 4a(4) of that directive provides:

'From [11 August 2006], Member States shall take all necessary measures to ensure that marine fuels are not used in their territorial seas, exclusive economic zones and pollution control zones by passenger ships operating on regular services to or from any Community port if the sulphur content of those fuels exceeds 1.5% by mass. Member States shall be responsible for the enforcement of this requirement at least in respect of vessels flying their flag and vessels of all flags while in their ports.'

Italian law

12 The provisions of Directive 1999/32 concerning the maximum sulphur content authorised in marine fuels were transposed into Italian law by Articles 295 and 296 of Legislative Decree No 152 of 3 April 2006 (Ordinary supplement to GURI No 88 of 14 April 2006) as amended, in particular, by Legislative

Decree No 205 of 6 November 2007 implementing Directive 2005/33/EC amending Directive 1999/32/EC as regards the sulphur content of marine fuels (Ordinary Supplement to GURI No 261 of 9 November 2007 ('Legislative Decree No 152/2006').

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

13 On 13 July 2008, the Capitaneria di Porto di Genova found, in the Port of Genoa, that the cruise ship MSC Orchestra, flying the Panamanian flag, used marine fuels with a sulphur content in excess of 1.5% by mass.

14 By order No 166/2010, the Capitaneria di Porto di Genova issued an administrative penalty order against Mr Manzi, as the captain of the vessel, jointly and severally with the Compagnia Naviera Orchestra, the owner of the vessel, for infringing Articles 295 and 296 of Legislative Decree No 152/2006.

15 Mr Manzi and the Compania Naviera Orchestra brought an appeal against that order, arguing that:

— there is a discrepancy between Directive 1999/32 and Annex VI as regards the maximum amount of sulphur contained in marine fuels;

— MSC Orchestra, as a ship flying the flag of a State Party to the Marpol Convention 73/78 and the Protocol of 1997, is authorised to use a fuel with a sulphur content of less than 4.5% by mass where it is in the port of another State Party to the same protocol, in this case the Italian Republic;

— Article 4a(4) of Directive 1999/32 and, therefore, Legislative Decree No 152/2006 transposing that provision apply only to ships which operate 'regular services', a category to which cruise ships do not belong.

16 In those circumstances, the Tribunale di Genova decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'1. Is Article 4a of [Directive 1999/32], which was adopted in the light of the entry into force of [Annex VI], to be interpreted, in accordance with the international principle of good faith and the principle of cooperation in good faith as between the Community and its Member States, as meaning that the limit, fixed by that provision, of 1.5% m/m of sulphur in marine fuels does not apply to ships flying the flag of a non-European Union State which is party to the Marpol Convention 73/78, where such ships are in the port of a Member State which is itself a party to [Annex VI]?

2. If Article 4a of [Directive 1999/32], is not to be interpreted as having the meaning proposed in Question 1, is that provision – in so far as it limits to 1.5% m/m the sulphur content of fuel for use by passenger ships operating regular services to or from a Community port, including ships flying the flag of a non-European Union State which is party to [Annex VI], pursuant to which, outside [the emission control areas for SO_x] the 4.5% m/m sulphur content limit applies – invalid on the basis that it is contrary to the general principle of international law *pacta sunt servanda* and to the principle of cooperation in good faith as between the Community and its Member States, in that it requires Member States which have agreed to and ratified Annex VI to act in breach of the obligations entered into towards the other States which are party to [Annex VI]?

3. Is the term "regular services" in Article 2(3g) of [Directive 1999/32], to be interpreted as meaning that cruise ships also count as ships operating "regular services"?'

The questions referred

The third question

17 By its third question, which it is appropriate to examine in the first place, the referring court asks essentially whether a cruise ship, such as that at issue in the main proceedings, falls within the scope of Article 4a(4) of Directive 1999/32 with regard to the criterion of 'regular services' as laid down in Article 2(3g) thereof.

18 In that connection, it must be held that, in order to be covered by the system established by Article 4a(4) of Directive 1999/32, cruise ships must satisfy the criterion relating to 'regular services' laid down by Article 2(3g) thereof applicable to passenger ships. It is common ground that cruise ships fall within the latter category of ships.

19 According to the first condition of that provision, a passenger ship operates regular services if it makes 'a series of … crossings operated so as to serve traffic between the same two or more ports' or 'a series of voyages from and to the same port without intermediate calls'.

20 A cruise ship therefore satisfies the first condition if it operates cruises which end at the port of departure without making intermediate calls.

21 In order to determine whether a cruise ship may also satisfy the first condition in other situations, it must be ascertained whether such a ship may be regarded as operating crossings so as to 'serve traffic between the same two or more ports'.

22 The applicants in the main proceedings claim, first, that a cruise ship, such as that at issue in the main proceedings does not 'serve traffic'. Cruise passengers do not purchase a package to be transported from one place to another; they do so with the broader purpose of tourism, the service provided being also the entertainment of those persons.

23 However, such an interpretation of the concept of 'traffic', laid down in Article 2(3)(g) of Directive 1999/32, cannot be accepted.

24 It must be observed that cruise ships transport passengers from one port to another in order for them to visit those ports and various places nearby. Since the European Union legislature has not specified the aims for which transport is carried out, it follows that such aims are irrelevant for the purpose of Article 2(3g) of Directive 1999/32. Thus, a series of crossings for the purpose of tourism must be regarded as traffic within the meaning of that provision.

25 In so far as that directive intends to contribute to the protection of human health and the environment by reducing sulphur dioxide emissions, including those produced on sea voyages, that finding cannot be invalidated by the fact that those passengers enjoy additional services during the crossings, such as accommodation, catering services and entertainment.

26 Second, the applicants in the main proceedings submit that a ship such as that at issue in the dispute before the referring court, does not operate crossings 'between the same two or more ports', since the port of departure is the same as the port of arrival and since it often happens that the intermediate calls planned in the itinerary are not made, whereas calls which have not been planned in the itinerary may be made when passengers so request in the interests of tourism.

27 That argument also cannot be accepted.

28 In order to satisfy the criterion relating to 'traffic between the same two or more ports', which is specific to cases involving transport with intermediate calls, it is necessary that the traffic operated by a cruise ship be between 'the same two or more ports'. A cruise between two or more ports must be regarded as a transport operation between 'the same two or more ports'.

29 The list of ports contained in the itinerary for a normal cruise will necessarily consist of at least two ports which cannot be avoided, that is the port of departure and the port of arrival. The transport is thus made between 'the same two or more ports', even where the transport ends at the port of departure.

30 Furthermore, it must be observed that that interpretation is supported by the objective underlying Directive 1999/32, as set out in paragraph 25 of the present judgment. Whether or not cruise ships return to the port of departure is not such as to alter the rate of sulphur dioxide emissions.

31 Consequently, if there are intermediate calls, the issue as to whether or not certain intermediate calls planned when the package is bought are made, while other unscheduled calls may be made in their place, is irrelevant with regard to the concept of 'traffic' within the meaning of Article 2(2g) of Directive 1999/32.

32 It follows that a cruise ship which operates crossings with intermediate calls between two separate ports or finishing in the port of departure serves traffic between the same two or more ports within the meaning of that provision.

33 According to the second condition laid down in Article 2(3g) of Directive 1999/32, which is cumulative with the first, a passenger ship must operate a series of crossings or voyages in accordance with a published timetable or with crossings so regular or frequent that they constitute a recognisable schedule.

34 That condition is satisfied, in particular, where a shipping company proposes to the public a list of sea crossings on a cruise ship of a frequency determined, in particular by the capacity of that company and by public demand, on specific dates and, in principle, with specified times of departure and arrival, interested persons being able to choose freely between the various cruises offered by that company.

35 Accordingly, the answer to the third question is that a cruise ship, such as that at issue in the main proceedings, falls within the scope of Article 4a(4) of Directive 1999/32 with regard to the criterion of 'regular services', as laid down in Article 2(3g) thereof, provided that it operates cruises, with or without intermediate calls, finishing in the port of departure or another port, provided that those cruises are organised at a particular frequency, on specific dates and, in principle, at specified departure and arrival times, with interested persons being able to choose freely between the various cruises offered, which is a matter for the referring court to ascertain.

The second question

36 By its second question, the referring court asks the Court essentially whether Article 4a(4) of Directive 1999/32 is valid in the light of the general principle of international law *pacta sunt servanda* and the principle of cooperation in good faith laid down in the first subparagraph of Article 4(3) TEU, on the ground that that provision of the Directive may lead to an infringement of Annex VI and thereby require Member States party to the 1997 Protocol to infringe their obligations with regard to the other Contracting Parties thereto.

37 It must be held at the outset that the validity of Article 4a(4) of Directive 1999/32 cannot be determined in the light of Annex VI since the European Union is not a contracting party to the Marpol 73/78 Convention, including Annex VI, and is not bound by it (see, by analogy, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraphs 47 and 52).

38 Nor can the validity of Article 4a(4) be examined in the light of the general principle of international law *pacta sunt servanda*, since that principle applies only to those subject to international law who are contracting parties to a specific international agreement and which, as a result, are bound by it.

39 Furthermore, it does not appear that Annex VI constitutes an expression of the customary rules enshrined by general international law which, are binding upon the institutions of the Union and form part of the legal order of the Union (see, to that effect, Case C-386/08 *Brita* [2010] ECR I-1289, paragraph 42).

40 Finally, it must be stated that the principles laid down in paragraphs 47 to 52 of *Intertanko and Others*, according to which the validity of Directive 1999/32 cannot be examined in the light of Annex VI may not be circumvented by relying on the alleged infringement of the principle of cooperation in good faith laid down in the first subparagraph of Article 4(3) TEU.

41 In those circumstances, the answer to the second question is that the validity of Article 4a(4) of Directive 1999/32 cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI and thereby oblige the Member States party to the 1997 Protocol to infringe their obligations with respect to the other contracting parties thereto.

The first question

42 By its first question, the referring court essentially seeks guidance concerning the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32 with respect to the general principle of international law which requires international agreements to be implemented and interpreted in good faith.

43 Annex VI was inserted into the Marpol 73/78 Convention by the 1997 Protocol. It contains, in particular, Rule 14(1) which provides that the sulphur content in marine fuels must not exceed 4.5% by mass.

44 Directive 1999/32 provides, in Article 4a(4), that the maximum sulphur content in marine fuels must not exceed 1.5% by mass. Neither that article nor any other provision of the Directive makes any reference, as regards the maximum sulphur content, to Annex VI.

45 In that connection, the Court has already held that, although the European Union is not bound by an international agreement, the fact that all its Member States are contracting parties to it is liable to have consequences for the interpretation of European Union law, in particular the provisions of secondary law which fall within the field of application of such an agreement. Therefore, it is incumbent upon the Court to interpret those provisions taking account of the latter (see, to that effect, *Intertanko and Others*, paragraphs 49 to 52).

46 That case-law cannot therefore be applied as compared with an international agreement to which only some Member States are contracting parties while others are not.

47 To interpret the provisions of secondary law in the light of an obligation imposed by an international agreement which does not bind all the Member States would amount to extending the scope of that obligation to those Member States which are not contracting parties to such an agreement. The latter

Member States must however be regarded as 'third countries' for the purposes of that agreement. Such an extension would be incompatible with the general international law principle of the relative effect of treaties, according to which treaties must neither harm nor benefit third countries ('*pacta tertiis nec nocent nec prosunt*').

48 It is clear from the case-law of the Court that the latter is required to observe that principle since it constitutes a customary rule of international law which, as such, is binding upon the European Union institutions and forms part of its legal order (see, to that effect, *Brita*, paragraphs 42 to 44).

49 Furthermore, such an interpretation of secondary law would not be consistent with the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU.

50 In the present case, the 1997 Protocol is an international agreement to which only certain Member States are contracting parties while others are not.

51 Therefore, the Court is not required to interpret Article 4a(4) of Directive 1999/32 in the light of Annex VI and, in particular, Rule 14(1) thereof.

52 In those circumstances, the general principle of international law of good faith cannot usefully be relied upon before the Court.

53 Even assuming that the Court could interpret Article 4a(4) of Directive 1999/32 in the light of the sulphur content laid down in Annex VI, it suffices to state that, in the light of the objective pursued by that annex and set out in the title thereof, namely to protect the atmosphere by a reduction in harmful emissions produced by marine transport, that provision, in so far as it fixes a maximum limit on the sulphur content of marine fuel lower than that provided for by that annex, does not appear to be incompatible with such an objective.

54 Having regard to the foregoing, the answer to the first question is that it is not for the Court to rule on the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32.

Costs

55 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 (Fourth Chamber) hereby rules:

1. **A cruise ship, such as that at issue in the main proceedings, falls within the scope of Article 4a(4) of Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, as amended by Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 with regard to the criterion of 'regular services', as laid down in Article 2(3g) thereof, provided that it operates cruises, with or without intermediate calls, finishing in the port of departure or another port, provided that those cruises are organised at a particular frequency, on specific dates and, in principle, at specified departure and arrival times, with interested persons being able to choose freely between the various cruises offered, which is a matter for the referring court to ascertain.**

2. **The validity of Article 4a(4) of Directive 1999/32, as amended by Directive 2005/33, cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of**

Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI to the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 and thereby oblige the Member States party to the Protocol of 1997 amending the International Convention of 1973 for the Prevention of Pollution from Ships, as amended by the Protocol of 1978 relating thereto, signed in London on 26 September 1997, to infringe their obligations with respect to the other contracting parties thereto.

3. **It is not for the Court to rule on the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32.**

[Signatures]