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EU LEGAL DEVELOPMENTS

Jason Chuah

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Harbour dues and the freedom to provide services

This is yet another case involving the operation of Regulation 4055/86 which applies the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L378/1). The present case was the result of an application for a preliminary ruling from the European Court of Justice by the *Trimeles Diikitiko Protodikio Rodou* (Administrative Court of First Instance, Rhodes).

The factual background

The dispute arose from the imposition of certain harbour charges on shipowners and ship operators offering excursions to tourists in Rhodes. Under the relevant Greek law (Law No 2399/1996), ships sailing from a Greek port on international voyages must pay:

(a) a fixed charge of GRD 5,000 for ships sailing to an international destination (other than the EU, Cyprus, Albania, Russia, Ukraine, Moldova and Georgia);
(b) a fixed charge of GRD 500 for each passenger with a final destination in a country of the EU or Cyprus;
(c) a fixed charge of GRD 1,000 for each passenger with a final destination of any port in Albania, Russia, Moldova, the Ukraine or Georgia on the Black Sea; and,
(d) a fixed charge of GRD 2,000 for each passenger with a final destination of any overseas port,

while tourist ships are required to pay fixed dues of GRD 50 for each passenger taking a day trip between Greek ports, for every port at which the vessel calls. The law further provides that where the day trip is extended to a foreign port, the dues shall be calculated according to (a) to (d) above.

The defendants in the present case offered day excursions to Turkey for tourists staying in Rhodes. Under the Greek law, they were charged the flat fee of GRD 5,000. They argued that as the ships always returned to Rhodes, they should be charged the lower rate of GRD 50.

The law

Article 1 of Regulation 4055/86 provides:

(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.

(4) For the purposes of this Regulation, the following shall be considered as maritime transport services between Member States and between Member States and third countries where they are normally provided for remuneration:

(a) intra-Community shipping services: the carriage of passengers or goods by sea between any port of a Member State and any part or off-shore installation of another Member State;

(b) third-country traffic: the carriage of passengers or goods by sea between the ports of a Member State and ports or off-shore installations of a third country.

The issues

The Greek law in question was challenged on several grounds. First, that it was unlawful because it discriminated against maritime transport services to third countries. This is a novel and important issue. In the past, it has been established that the Regulation protected carriers from other Member States from being discriminated against by a Member State (Case C-381/93 *Commission v France* [1994] ECR I-5145) but the extent to which the Regulation guaranteed the freedom of maritime services between Member States and third countries has never been considered.

Secondly, the Greek law imposes different (higher) levels of harbour dues for passengers of vessels which call at, or have as a final destination, a port in a non-EU country. The issue is complicated by the fact that, as was pointed out by the Greek Harbour Fund, those higher dues were imposed on all passengers regardless of their nationality. On the other hand, could it be argued that, as the higher harbour dues would have an effect on the choice of routes to be taken by vessel operators and owners, their imposition would be contrary to Regulation 4055/86?

Finally, as harbour dues for non-EU destinations are also differentiated according to the distance and geographical location of the relevant final destination port, the issue arises as to whether such differentiation constitutes discrimination as regards maritime transport to a particular third country (or particular third countries) and therefore a restriction on maritime transport provided to that country (or those countries).

Construing Regulation 4055/86

A particular point of interest is how Regulation 4055/86, an instrument which has its genesis in the concept of EU free movement of services in Articles 49 to 51 EC, should be construed in relation to non-EU interests. Under Article 51(1) EC, freedom to provide services in the field of transport, unlike freedom of services in other fields of economic and commercial activity, is not only to be applied in accordance with the general rules in Articles 49 and 50 but must be applied subject to Title V (Articles 70 to 80) on Transport Policy. Title V makes provision for the liberalisation of international maritime transport between Member States (intra-Community transport) and Member States and third countries. Article 71 states quite explicitly that:

taking into account the distinctive features of transport, the Council, shall . . . lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions.

It is in this context that Regulation 4055/86 was made. The implication is thus that the rules in Regulation 4055/86 should be construed, teleologically, against two backdrops: the jurisprudence

on free movement of services and the EU transport policy for maritime transport. Free movement of services principles do not conventionally and normally apply to non-EU interests as the ECJ found that Regulation 4055/86 had in fact extended these rights to non-EU interests. The Court said:

> Since Article 1(1) of Regulation 4055/86 has extended the principle of the freedom to provide services as regards intra-Community traffic to traffic between a Member State and a third country, the rules established in relation to the former must be applied to the latter.

The Greek Authorities' argument that the harbour dues were fair because they did not discriminate on the ground of nationality was not relevant, given that the Regulation had extended the benefits of free movement of services to third-country carriers and users (passengers and cargo interests). This is welcome to the extent that it would clearly contribute to the Community's desire for full liberalisation of international maritime transport.

What does 'restriction on free movement' mean?

The central question was whether the harbour dues could impede the free movement of services in the context of the Regulation. Although the court did not expressly consider the question, simply deeming that it did, using tests established elsewhere, it is clearly conceivable that as the dues were many times higher in journeys to third countries than to domestic (and EU) destinations, they are liable to dissuade travellers (users of service) from taking part in a trip to a non-EU country and thus render the provision of that service less attractive than comparable services provided only within Greece.

It was also asked in the proceedings whether there would be a manifest difference if the harbour dues were absorbed by the shipping companies or operators and were not exacted and invoiced separately against the passenger. The argument was that if it were the shipping companies paying the dues, then it could not be held that the passenger would feel aggrieved and not travel to destinations in Turkey. Again, the court did not address the question directly (although the Advocate General did discuss it). It might be said that the contention does not carry much weight because, in either case, the dues would still constitute a factor which makes provision of the service more expensive thus discouraging passengers from using it. The increase in price, as the Advocate General opined:

> may result in a reduction in demand, to the disadvantage of the shipping company and the tour operator. Thus, both persons who provide the services and the passengers as the persons for whom they are intended are affected by the restriction.

Could the harbour dues be justified?

The ECJ ruled that it was unlawful to impose different harbour dues for domestic or intra-Community traffic and traffic between a Member State and a third country, if that difference could not be objectively justified. The imposition on passengers of vessels that call at, or whose final destination is, a port in a third country with different harbour dues from those imposed on passenger of vessels whose destination is domestic or in another Member State would be prohibited by the Regulation where there is no correlation between that difference and the cost of the harbour services enjoyed by such passengers. As far as the court was concerned, under the Regulation the imposition of harbour dues for journeys to ports in third countries merely on the basis of the geographical distances involved was not allowed. There is no true correlation between harbour dues and geographical distances – the imposition of harbour charges should be based on objective criteria, such the objective difference in services offered by the carriers to passengers travelling from Rhodes to different destinations.

The ruling from the ECJ demonstrates a reiteration of the general principle in free movement of services and establishes that any derogation from these freedoms could only be permitted to the extent they are proportionate to the aims to be achieved and justifiable on objective grounds. It

seems quite obvious that the Rhodes harbour dues were imposed as a tourist tax and could not be rationally justified on objective factors.

So what are the aims to be achieved and are they legitimate aims given the Greek government's EU obligations? Where the aims are vital for the general or public interest, a measure which detracts from the general remit of the Regulation but is defensible on such an ground could be vindicated. In maritime transport services, it appears from Joined Cases C-430/99 and C-431/99 *Sea-Land Services and Nedlloyd Lijnen* (2002) that where the dues were to finance the costs of providing services essential to the maintenance of public security at ports and harbours they could be said to serve the general interest.

Once that is proved, the Member State seeking a derogation from its Regulation duties must further show that there was in fact a correlation between the costs of the services from which the user benefits and the amount of the dues he has to pay. The difficulty the Greek Government had in the present case was that the structure of the harbour dues in Rhodes did not reveal such a connection. Where such a connection is not seen, the presumption is that the charge or measure was unlawful. Moreover, the Greek authorities could not demonstrate clearly the benefits to be attained by the imposition of the harbour dues. The Greek tribunal, for example, had accepted without demur that the harbour dues went towards meeting the costs of upkeep and port improvement, port facilities and 'other connected objectives relating to improving services to passengers'. It is immediately obvious that such benefits have not been adequately identified or described. What was even more questionable was the fact that some of the dues went to the Merchant Seamen's Fund under Greek law. There was clearly no direct or proximate link between such a payment and passenger benefit. On that basis alone, the Greek law authorising the collection of the different levels of harbour charges would be contrary to the Regulation and EU principles of freedom of movement.

Finally, even where there is a clear connection between the measure and the aim to be achieved, the Member State is then required to demonstrate that the measure was not disproportionate to the aim as expressed.

In summary, the objective justification test borrowed from general principles of freedom of movement and applied to the situations involving maritime transport services (Regulation 4055/86) entails:

- first, identification of the aims to be achieved or general interests to be served;
- secondly, whether there is a genuine need for the aims or interests;
- thirdly, whether there is a genuine link between the measures in question (for example, the harbour dues) and the aims or interests; and
- finally, if there is a genuine link, whether the measures taken are proportionate or appropriate in achieving those aims.

Conclusion

Harbour dues and port charges are coming under increasing scrutiny by the EU – whether the intervention lies in the laws of competition or State Aid (Joined Cases C-34/01 and 38/01 *Enirisorse SpA v Ministero delle Finanze* (2003) (judgment pending from the ECJ)), or market access to port services (the Proposal for a Directive on Market Access to Port Services (COM (2002) 0101 final) (OJ 2002 C 181 E, at 160) , or free movement of services (the present case). These developments, although clearly welcome, are not entirely tension-free, as can be seen in the present case where some Member States see protection of their ports and port interests as legitimate public interests which could justify derogation from the provisions of general EU law (such as State Aid, competition law, or in the present case, free movement of services) but they should be particularly aware that such derogations although permitted are subject to very strict objective constraints.

Comment on the proposal to improve the Double Hull Regulation (Regulation 297/94)

On 20 December 2002 the Commission published a Proposal for a *Regulation amending Regulation 417/2002 on the accelerated phasing in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation 2978/94* (COM (2002) 780 final). This move was entirely motivated by the serious concerns following the sinking of the *Prestige*, a Bahamas-registered and Liberian-owned 26-year-old single hull oil tanker, 270 km off the coast of Galicia in Spain on 19 November 2002. Back in March 2002, the Council had made a Regulation (No 417/2002) introducing an accelerated phasing-in scheme for the application of the double hull or equivalent design requirements of the MARPOL 73/78 Convention to single hull oil tankers. After the sinking of the *Prestige*, the EU was seriously concerned that the age limits for the operation of single hull oil tankers in that Regulation were not sufficiently stringent and that certain grades of oil should only be carried by double hull oil tankers. Hence, the swift proposal to amend Regulation 417/02.

There are three principal proposals in the amending legislation:

- heavy grades of oil should only be carried by double hull oil tankers;
- revision of the phasing-out scheme to ensure that single hull tankers of category 1[2] will not operate beyond 23 years and 2005, or 28 years and 2010 for category 2[3] and 28 and 2015 for category 3;[4]
- broader application of the special inspection regime for tankers designed to assess the structural soundness of single hull tankers that are more than 15 years old.

'Heavy grades of oil' is defined in the amended Article 3 of Regulation 417/02 as 'heavy fuel oil, heavy crude oil, waste oils, bitumen and tar'. These oils are extremely polluting as they evaporate much more slowly than lighter grades of oil and degrade only very slowly, thereby causing severe damage to marine ecology. Article 1 of the Regulation is amended to empower Member States to 'ban the transport to or from ports[5] of the Member States of heavy grades of oil in single hull oil tankers'. It seems clear that this provision places both a right and a duty on the Member State concerned: a right to prevent the carriage of heavy grades of oil to its territory, and a duty to prevent the carriage of such oils to other countries. However, what is less obvious is first the test Member States are required to apply in identifying the cargo of the single hulled vessel, in other words, the composition of that duty of care, and secondly, to whom that duty is owed.

The new Article 1(2)(b), if approved, would extend the scope of the Regulation to oil tankers of 600 tons dead-weight and over. This is to ensure that the ban on the carriage of heavy grades of oil in single hull tankers shall equally apply to small tankers of between 600 and 5,000 tons dead-weight.

Incidentally, it might also be noted that, in respect of ships on the EU's 'blacklist' (not necessarily single hull tankers), Directive 95/21 on Port State Control allows a Port State to refuse access on the basis of the type of vessel (for example, whether the ship is a chemical or gas tanker, a bulk tanker, an oil tanker or a passenger ship), the flag, and the number of detentions in the preceding 24 or 36 months.[6] The blacklist does not, however, form the legislative basis for refusal; Member States still have to refer to their national legislation[7] for that power.

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[2] Single hull crude oil tankers of 20,000 tons dead-weight and over, and single hull oil product carriers of 30,000 tons dead-weight and over and having no segregated ballast tanks in protective locations, collectively known as pre-MARPOL single hull tankers (generally constructed before 1982).

[3] Single hull oil tankers of the same size as category 1 but which are equipped with segregated tanks in protective locations.

[4] Single hull oil tankers below the size limits of categories 1 and 2 but above 5,000 tons dead-weight.

[5] The Regulation is also being amended to extend coverage to 'anchorage areas' (see also Directive 95/21 OJ L157, 7 July 1995, at 1, as amended).

[6] Article 7(b).

[7] Which should conform to the requirements of the Port State Control Directive.

Under the current Regulation 417/02 single hull oil tankers are to be phased out by 2007 for Category 1 tankers and 2015 for Category 2 and Category 3 oil tankers. The Commission argues in its Proposal that these age limits, although well within those recommended by the IMO,[8] are not satisfactory, particularly after the sinking of the *Erika* and the *Prestige*. Both vessels, it will be remembered, were 26-year-old Category 1 tankers when they broke up. The phasing-out scheme affects not only vessels flying an EU flag but also the world tanker fleet calling at EU ports.

As far as the inspection system is concerned, Regulation 417/02 introduces a scheme known as the Condition Assessment Scheme ('CAS') which is enforced and implemented by the Flag State and by Classification Societies acting on their behalf. Under the scheme, inspections are carried out every two and a half years specifically to detect structural weaknesses of single hull tankers. The rule is that single hull oil tankers of Category 1 and Category 2 which have not reached their age limit should only be allowed to continue operating beyond the cut-off date.[9] The scheme does not currently apply to Category 3 oil tankers but the Commission proposes that, as these ships are not entirely free of the risk of pollution, the scheme should be extended to all remaining categories of single hull oil tankers that are more than 15 years old. It should, however, be noted that the general scheme would only take place with effect from 2005, as an extensive programme of inspection of this magnitude would clearly place a severe strain on inspectors.

The proposal is to be scrutinised by the Economic and Social Committee, the Committee of Regions, the Council and the Parliament before it becomes law. It is anticipated that the final draft of the proposal could be brought before the Transport Council[10] on 27 March 2003.

The proposed changes are only a part of a bigger legislative framework – the EU has up until the *Prestige*'s incident adopted two packages of legislative measures, the *Erika I*[11] and *Erika II*[12] packages. The former deals primarily with the tightening of Port State Control by amending the Directive on Port State Control,[13] the monitoring and supervision of Classification Societies[14] and the setting in motion of the programme to phase out single hull oil tankers.[15] The latter establishes a European Maritime Safety Agency[16] which is charged with improving the enforcement of EU maritime safety rules. The package also proposes an information system to improve the monitoring of traffic in EU waters[17] and a legislative mechanism to enable victims of oil spills to claim compensation.[18] These measures are intended to work in tandem. These are interesting times for EU maritime lawyers – there is much manoeuvring but it is rather sad that all this activity has come about only after so much environmental damage had already been done.

[8] See revised Regulation 13 G, Annex I, MARPOL Convention.
[9] 2005 for tankers coming under Regulation 417/02 and 2010, under IMO legislation.
[10] The Transport Council is composed of Member States ministers responsible for transport.
[11] Tabled by the Commission in March 2000.
[12] Tabled by the Commission in December 2000.
[13] Directive 95/21/EC
[14] By imposing strict prior authorisation requirements and monitoring the Classification Societies in the performance of their duties.
[15] Which culminated in the making of Regulation 417/02 in March 2002.
[16] The Maritime Safety Agency Regulation came into force in August 2002. Administrative mechanisms however are still being fleshed out and are not due to be set in place until later in 2003.
[17] The Directive on the Monitoring of Maritime Traffic is due for implementation by Member States by February 2004.
[18] The proposal by the Commission for a regime to provide for compensation for oil spills victims has not been accepted by the Council. If accepted, the Commission's proposal would have raised the upper limits on the amounts payable in the event of a serious oil spill in EU waters from the current ceiling of €200 million to €1 billion.