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JUDGMENT OF THE COURT (Second Chamber)

28 October 2010 (*)

(Failure of a Member State to fulfil obligations – Freedom to provide maritime transport services – Regulation (EEC) No 3577/92 – Articles 1 and 4 – Cabotage services within a Member State – Obligation to conclude public service contracts on a non-discriminatory basis – Conclusion of an exclusive contract, without a prior call for tenders, before the date of accession of a Member State to the European Union)

In Case C-508/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 November 2008,

European Commission, represented by J. Aquilina and K. Simonsson, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Malta, represented by S. Camilleri, L. Spiteri and A. Fenech, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, U. Lõhmus (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 May 2010,

after hearing the Opinion of the Advocate General at the sitting on 1 July 2010,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities has asked the Court to declare that, by signing an exclusive public service contract with Gozo Channel Co. Ltd ('GCCL') on 16 April 2004, without having undertaken a prior call for tenders, the Republic of Malta has failed to fulfil its obligations under 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), in particular Articles 1 and 4 thereof.

Legal context

Act of Accession

- 2 Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; 'the Act of Accession') provides:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

Regulation No 3577/92

- 3 Article 1(1) of Regulation No 3577/92 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, including ships registered in Euros, once that Register is approved by the Council.'

- 4 Article 4(1) of that regulation states:

'A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands.

Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.'

Background to the dispute and the pre-litigation procedure

- 5 During the negotiations for the accession of the Republic of Malta to the European Union, on 26 October 2001 the European Union adopted a common position (Conference on accession to the European Union – Malta – doc. 20766/01 CONF-M 80/01) in relation to the chapter on transport policy. The common position stated: 'the EU notes that Malta intends to conclude explicit public service obligation contracts both with Sea Malta Co. Ltd and [with GCCL] of 5 years' duration each by 30 June 2002 and that upon termination of these contracts tendering procedures will apply in line with the relevant *acquis*'.

- 6 By letter of 7 March 2005, in response to a request for information to it from the Commission, the Republic of Malta confirmed that the Maltese Government had on 16 April 2004 concluded two six-year exclusive public service obligation contracts with GCCL and with Sea Malta Co. Ltd for the provision of maritime transport services between the islands of Malta and Gozo.

- 7 The Commission therefore decided to initiate the procedure under Article 226 EC. By letter of formal notice dated 10 April 2006, that institution stated that the contracts, which had been concluded without a prior call for tenders, were not in compliance with Community law since, first, they had not been concluded by means of a non-discriminatory procedure and, second, it had not been demonstrated that they were either necessary or proportionate.

- 8 On 12 June 2006, the Republic of Malta replied to that letter of formal notice.
- 9 Since it was not satisfied with that reply, the Commission issued a reasoned opinion on 15 December 2006, stating that, by signing an exclusive contract with GCCL on 16 April 2004 for the provision of the maritime transport service between the islands of Malta and Gozo, without having undertaken a prior call for tenders, the Republic of Malta has failed to fulfil its obligations under Regulation No 3577/92, in particular Articles 1 and 4 thereof. The Commission called on the Republic of Malta to adopt, within two months of receiving the reasoned opinion, the measures necessary to comply with it.
- 10 The Republic of Malta replied to the reasoned opinion by letter of 15 June 2008, in which it informed the Commission that preparations had been commenced for the issuing of a call for tenders for the provision of maritime transport services between the islands of Malta and Gozo, which was to take place no later than October 2008.
- 11 In those circumstances, the Commission brought the present action.

The action

- 12 In support of its action, the Commission submits that, first, it follows from the second subparagraph of Article 4(1) of Regulation No 3577/92 that the conclusion of a public service maritime cabotage contract must be preceded by a tendering procedure conducted on a non-discriminatory and open basis at Community level, whereas the contract concluded on 16 April 2004 between the Maltese Government and GCCL did not result from such a procedure.
- 13 Second, it is apparent from Case C-205/99 *Analir and Others* [2001] ECR I-1271 that a public service contract complies with the requirements of Regulation No 3577/92 only if a real public service need can be demonstrated. However, with regard to the contract concluded with GCCL, the Republic of Malta did not demonstrate sufficiently either that there was such a need or that an exclusive contract was necessary and proportionate.
- 14 The Republic of Malta argues, as its principal plea in defence, that Regulation No 3577/92 was not applicable to that contract, since it was concluded before 1 May 2004, the date of the Member State's accession to the European Union.
- 15 In its reply, the Commission does not dispute that that regulation was not applicable to the Republic of Malta on the date on which the contract at issue was signed, that is to say, on 16 April 2004. However, it contends that it is precisely from 1 May 2004 that, as regards that contract, the Member State was not in compliance with its obligations under the regulation. At the hearing, the Commission further stated that that non-compliance consists in having maintained the contract in force after the date of accession of the Republic of Malta to the European Union.
- 16 In that regard, it should be borne in mind that it is clear from Article 38(1)(c) of the Rules of Procedure of the Court of Justice and from the case-law relating to that provision that an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, and that that statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application. It is therefore necessary for the essential points of law and of fact on which a case is based to be indicated coherently and intelligibly in the application itself and for the heads of claim to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on an objection (see Case C-412/04 *Commission v Italy* [2008] ECR I-619, paragraph 103, and Case C-211/08 *Commission v Spain* [2010] ECR I-0000, paragraph 32 and case-law cited).

- 17 In the present case, it is quite clear both from the wording of the reasoned opinion and from the form of order sought in the Commission's application that the failure of the Republic of Malta to fulfil obligations arising under Regulation No 3577/92, alleged by the Commission, consists in having signed the contract at issue on 16 April 2004.
- 18 It follows that the contention that the Republic of Malta was not in compliance with its obligations under that regulation as from 1 May 2004 does not correspond to the form of order sought in the application.
- 19 Consequently, after examining its merits, the Court cannot adjudicate on such a contention without ruling *ultra petita*.
- 20 As regards the subject-matter of the infringement as set out in the Commission's application, it must be observed that, pursuant to Article 2 of the Act of Accession, Regulation No 3577/92 was applicable to the Republic of Malta, as the Commission acknowledges, only as from 1 May 2004, the date of the accession of that State to the European Union (see, by analogy, Case C-168/08 *Hadadi* [2009] ECR I-6871, paragraph 26).
- 21 In those circumstances, as the Advocate General stated at point 57 of her Opinion, the Commission's action could succeed only if Regulation No 3577/92 nevertheless required the Republic of Malta to comply with certain obligations before that date. In the context of the present case, such obligations would require, in particular, that the Member States refrain from concluding a public service contract in a manner inconsistent with Articles 1 and 4 of Regulation No 3577/92 during the period before which that regulation was applicable to them.
- 22 It is, however, clear that the Commission in no way based the pleas put forward in support of its action on the possible existence of such obligations. On the contrary, as observed at paragraph 15 above, it stated, both in its reply and at the hearing, that it was from 1 May 2004, the date on which Regulation No 3577/92 entered into force in respect of the Republic of Malta because of its accession to the European Union, that that Member State was not, in the Commission's view, in compliance with its obligations under that regulation.
- 23 In the light of the foregoing, and without there being any need to rule on the alternative pleas of the Republic of Malta in its defence, the Commission's action must be dismissed.

Costs

- 24 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Republic of Malta applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs.**

[Signatures]

