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INTERNATIONAL AND REGIONAL ORGANISATIONS

REVIEW AND ANALYSIS

EUROPEAN UNION

Specialist Editors: Dr Vincent J G Power; Jason Chuah

IMPLEMENTATION OF THE DIRECTIVE CONCERNING THE ENFORCEMENT OF PROVISIONS IN RESPECT OF SEAFARERS' HOURS OF WORK

Case C-410/03 *Commission v Italy*

Jason Chuah

In Case C-410/03 *Commission v Italy*,¹ the Commission instituted enforcement procedures under Article 226 EU against Italy for the latter's alleged failure to transpose properly into national law the Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports (hereafter referred to as the Enforcement Directive).² That directive, as might be recalled, was intended to give practical effect to Council Directive 1999/63/EC of 21 June 1999 concerning the agreement on the organisation of working time of seafarers (commonly known as the Seafarers' Working Time Directive).³ That agreement is an agreement made between the European Community Shipowners' Association and the Federation of Transport Workers' Unions in the European Union.⁴ Under the directive at issue, Member States are required to take various measures to ensure that the protective provisions of the Seafarers' Working Time Directive are enforced and applied. The fourth recital in the preamble to Directive 1999/95 states that the agreement applies to seafarers on board every seagoing ship, whether publicly or privately owned, which is registered in the territory of any Member State and is ordinarily engaged in commercial maritime operations. According to the fifth recital in the preamble to Directive 1999/95, its purpose is to apply the provisions of Directive 1999/63 to any ship calling at a Community port, irrespective of the flag it flies, in order to identify and remedy any situation which is manifestly hazardous for the safety or health of seafarers. Article 10(1) of Directive 1999/95 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply therewith not later than 30 June 2002. Under Article 10(3), Member States are immediately to notify the Commission of all provisions of domestic law which they adopted in the field governed by that directive. The Commission is to inform the other Member States thereof.

In the present case, the Commission submitted that Article 4 of the Enforcement Directive requires specific inspections in order to obtain evidence that a ship does not conform to the requirements of Directive 1999/63. It states in detail the matters which the checks must cover and requires the

¹ Judgment of 28 April 2005.

² OJ 2000 L 14 p 29.

³ OJ 1999 L 167 p 33.

⁴ That Agreement mirrors to a substantial extent the provisions of Convention No 180 of the International Labour Organisation (ILO) concerning seafarers' hours of work and the manning of ships, adopted on 22 October 1996.

carrying out, in the course of inspections described as 'detailed', particularly of cross-checks between, on the one hand, the register of hours of work and rest and, on the other hand, other registers relating to the operation of the ship concerned. The Italian measures, according to the Commission, did not satisfy those requirements. It is clear that the fact that such inspections might have been carried out in fact or might have been provided for under other maritime or labour laws or administrative orders is irrelevant. As the ECJ had stated many times in the past, Member States must, in order to secure the full implementation of directives in law and not only in fact, establish a *specific legal framework* in the area in question.⁵ The breach of Article 4, it might be suggested, was quite incontrovertible, given that the Italian laws and administrative measures had clearly omitted to provide for those inspections and checks required under the Directive and it was not enough that comparable *general* measures might or could be used.

Less obvious is the alleged breach of Article 3 of the Directive. That article provides:

Preparation of reports

Without prejudice to Article 1(2), if a Member State in whose port a ship calls voluntarily in the normal course of its business or for operational reasons receives a complaint which it does not consider manifestly unfounded or obtains evidence that the ship does not conform to the standards referred to in Directive 1999/63/EC, it shall prepare a report addressed to the government of the country in which the ship is registered and, when an inspection carried out pursuant to Article 4 provides relevant evidence, the Member State shall take the measures necessary to ensure that any conditions on board which are clearly hazardous to the safety or the health of the crew are rectified.

The identity of the person lodging the report or the complaint must not be revealed to the master or the owner of the ship concerned.

It is immediately obvious that two obligations are placed on the Member States by Article 3 – first, the duty to prepare a report addressed to the country in which the ship is registered following the receipt of a complaint of a breach of the terms of the agreement, and secondly, the duty to take the necessary remedial action when an inspection reveals evidence of non-compliance.

The first duty is one which addresses the relationship between a Member State and other states – in general EU law, a provision which concerns only relations⁶ between a Member State and the Commission or the other Member States need not, in principle, be transposed.⁷ Such an exception might be rationalised on the basis that no rights of the individual intended to be protected by the EU (eg the EU citizen) have been affected. However, as the ECJ has emphatically pointed out in the present case, such rights have been affected by the failure to transpose the directive into Italian law. The ECJ referred to the objective of Directive 1999/95 which was to improve the shipboard living and working conditions of seafarers and safety at sea. It concluded that as the report addressed to the government of the country in which the ship is registered is vital to draw attention to a situation which is clearly hazardous to the safety or the health of the crew, the duty in Article 3 is thus not one merely on notification. Article 3 was essential to the *immediate* removal of that risk of harm.⁸

As for the second duty in Article 3, the ECJ found that, as Italian law did not provide for the positive obligation of anonymous reporting, there was no full transposition. Italy was thus liable for failure fully to implement the Enforcement Directive.

Another duty under the Enforcement Directive which Italy had no excuse for not implementing was Article 5 – that article requires for the adoption of 'measures for rectification of the deficiencies established may and, in certain conditions, must include, for the ship concerned, a prohibition on leaving the port until those deficiencies have been corrected'.⁹

⁵ See Case C-360/87 *Commission v Italy* [1991] ECR I-791, para 13, and Case C-429/01 *Commission v France* [2003].

⁶ Especially duties to notify or report data.

⁷ See Case C-296/01 *Commission v France* [2003] ECR I-0000, para 92, and Case C-429/01 (n 5) para 68.

⁸ Para 40 of the judgment.

⁹ Para 46 of the judgment.

The Commission also asserted that there had been a complete failure to transpose Article 6 into national law. That article imposes on the competent authority of the Member State concerned a notification obligation if a ship is prohibited from leaving the port under Article 5.¹⁰ Again, it might be argued that these are mere notification duties affecting the relations between the Member State and the Commission and/or between the Member State and third countries. Here, the ECJ approached the subject, not by reference to the rights of individuals, but by reliance on public international law principles. It held that in the event of a ship being prevented from leaving port, the obligation to notify the administration of the flag state or its representative is the corollary of that state's responsibilities under public international law. The court referred to Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 which placed various obligations on the flag state.¹¹ The court considered that if the port state does not properly notify the flag state, the flag state would be hindered from performing its obligations under public international law. Such a reasoning, it is submitted, makes a derogation to the general rule that laws on the relations between Member States and the Commission, and/or relations between Member States and third states need not be transposed on the basis of mutual obligations between states under public international law. The ECJ did not, in the present case, explain the relationship between the directive and public international law – it proceeded on the basis that the general rule should be departed from because wider interests or responsibilities were involved (those interests and responsibilities in Article 94 of the UNCLOS 1982) that the directive would have impacted. On the whole, it would appear that the more important the rights intended to be protected by the relevant directives are, the more precise the transposition should be.¹² In the present case, the reliance on the state's implicit duties in public international law is another plank to support and justify a derogation from the general rule that no transposition is needed for laws on relations between states.

Another breach which the Commission considered to be incontestable was in relation to Article 7. That article requires the Member State to provide for a right of appeal to the shipowner whose ship was placed under the conditions and constraints of the Seafarers' Working Time Directive. The court considered that although there are some general aspects of Italian civil law and procedure enabling persons affected by administrative orders to appeal against those orders, there was a lack of specificity in those provisions. As such, Article 7 could not be said to have been fully implemented.

The final alleged breach was with reference to Article 8. Here the ECJ found against the Commission. Article 8 provides for cooperation between the relevant authorities of the Member State in question and the relevant competent authorities of other Member States. Additionally, the Member State is required to notify the Commission as to such cooperative measures taken. The terms of Article 8 are fairly vague and it is also clear that they relate primarily to relations between Member States, and between the Member States and the Commission. The general rule that no transposition is needed in respect of such notification duties should be applied – there was no justification for its derogation.

Italy's general defence was that the Enforcement Directive was not as prescriptive as the Commission had made out – that as long as, in a general way, the objectives of the directive could be achieved by the national measures already in place, there was no breach. That argument has been used many times in the past and has been rejected by the ECJ many times. It is wondered why such a strategy was even considered, given the weight of case law against its contention. The only argument worth any mass was in relation to the alleged breach of the duty to notify under Articles 3, 6 and 8 – that

¹⁰ The addressees of such notification are, first, the master, owner or operator of the ship and, secondly, the administration of the flag state or the state where the ship is registered or the consul, or in the consul's absence the nearest diplomatic representative of that state (art 6).

¹¹ That article provides that 'every State is effectively to exercise its jurisdiction and control in administrative, technical and social fields over ships flying its flag'. In particular, under paras 2(b) and 3(b) of that article, every state is to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship, and every state is to take such measures for ships flying its flag as are necessary to ensure safety at sea, with regard, inter alia, to the manning of ships, labour conditions and training of crews, taking account of the applicable international instruments.

¹² Case C-410/98 *Metallgesellschaft & Hoechst v Inland Revenue* [2001] ECR I-1727 (paras 93-95) and Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297 (paras 25-28).

said, it is also fairly obvious that the ECJ is entirely committed to looking at the wider social objectives of a duty to notify. Thus, in relation to Articles 3 and 6, the ECJ refused to characterise the issue as merely one of notification between Member States and/or between Member States and the Commission. It is clear from the judgment that much significance is paid to the ILO Agreement on working time. That is certainly to be welcomed. This judgment might also be credited with the contribution it makes to the jurisprudence on the rule that transposition is not needed for EU legal provisions which deal primarily with the relations between Member States and third states, relations between Member States and the Commission and relations between the Member States themselves. There is now the recognition that a directive provision (eg Article 6) which addresses, whether directly or indirectly, substantive public international law duties, should not be characterised as a duty which concerns only relations between the Member States and relations between them and the Commission. Where, on the other hand, the duties of notification or cooperation has little to do with the substantive rights in question and are expressed in a general and vague way, there is no need for transposition.