GARRIGUES Newsletter

Transport & Shipping

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I. European Union

1. Legislation and legislative developments

1.1 Communication from the Commission on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of the freedom to provide services to maritime transport within Member States (maritime cabotage)

On April 22, 2014 the European Commission published the Communication on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of the freedom to provide services to maritime transport within Member States (maritime cabotage), after twenty years' application of that Regulation (EEC) No 3577/92, drawing on the experience gained while it has been in force.

The Communication, which is for information purposes only to help explain the Regulation, specifies, among other things, the scope of the freedom to provide services in the maritime cabotage sector, and who enjoys that freedom.

It explains how Regulation (EEC) No 3577/92 liberalized maritime cabotage in the countries where that economic sector was reserved for nationals and that freedom to operate between two ports in the same member state is ensured to all Union shipowners on the legally established terms. Member states cannot make this freedom subject to any restrictions, unless 1) such scheme is justified by overriding reasons in the public interest (e.g. ensuring safety of ships and order in port waters); 2) is necessary and proportionate to the aim pursued; and 3) is based on objective, non-discriminatory criteria which are known in advance to the shipowners concerned.

On who enjoys the freedom to provide maritime cabotage services, one of the types of 'Community shipowners' set out in the Regulation are 'shipping companies established in accordance with the legislation of a member state and whose principal place of business is situated, and effective control exercised, in a member state' (article 2 (2) (b)).

The Commission considers that the concept of 'effective control in a Member State' means in this context that the major decisions are taken and the day-to-day management performed from a place in the Union territory and that management board meetings are held in the territory of the Union.

On the concept of 'control by nationals of a Member State' referred to in that article, the Commission considers that it means that Union nationals are able to exercise a decisive influence on the shipping company, for example, if the majority of the company's capital or the majority of the voting rights is held by Union nationals, or if the Union nationals can appoint more than half of the members of that shipping company's administrative, management or supervisory body.

1.2 Extension of the term of the block exemption for liner shipping consortia

Commission Regulation (EU) No 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application to liner shipping consortia was published in the Official Journal on June 25, 2014.

Thus, Commission Regulation (EC) No 906/2009 grants a block exemption to liner shipping consortia from the prohibition contained in Article 101 (1) of the Treaty, subject to certain conditions. That Regulation will expire on April 25, 2015, in accordance with the maximum five-year term provided for in Article 2 (1) of Regulation (EC) No 246/2009.

On the basis of the Commission's experience in applying the block exemption, it appears that the justifications for a block exemption for consortia are still valid and that the conditions on the basis of which the scope and content of Regulation (EC) No 906/2009 were determined have not substantially changed.

Regulation (EU) No 697/2014 therefore extends the period of application of Regulation (EC) No 906/2009 for five years, until April 25, 2020.

And lastly, the recently approved Maritime Navigation Law (which is discussed below) has explicitly repealed the provisions on conference shipping lines contained in article 261 and article 262 of the Revised State Ports and Merchant Navy Law approved by Legislative Royal Decree 2/2011, of September 5, 2011 ("RSPMNL").

2. Recent case law

2.1 The CJEU declares that a cruise which starts and ends, with the same passengers, in the same port of the member state in which it takes place, is covered by the term 'maritime cabotage' within the meaning of Council Regulation No 3577/92

In its judgment of March 27, 2014, the Court of Justice of the European Union (CJEU) replied to a request for a preliminary ruling made by the Italian Council of State in case C-17/13 in which it confirmed that a sea carriage service consisting of a cruise which starts and ends, with the same passengers, in the same port of the member state in which it takes place, is covered by the term 'maritime cabotage' within the meaning of Council Regulation No 3577/92 applying the principle of the freedom to provide services to maritime transport within Member States (maritime cabotage).

The request for a preliminary ruling was made in relation to the appeal by the owner of a cruise ship flying the Swiss flag against the rejection of an application for authorization for the cruise ship to cross a stretch of Italian sea, on the ground that maritime cabotage was reserved for ships flying the flag of an EU member state.

In its judgment, the court held that, although it is true that the transport services listed in Article 2(1)(a) to (c) of Regulation No 3577/92 are described as having different departure and arrival ports, that list, which is introduced by the term 'in particular', is not exhaustive, and therefore where a cruise starts and ends, with the same passengers, in the same port, the fact that the departure and arrival ports are one and the same and that the passengers are the same throughout the itinerary cannot render Regulation No 3577/92 inapplicable.

In short, since that concept is defined, in Article 1(1) and Article 2(1) of Regulation No 3577/92, by the phrase 'maritime transport services within a Member State', according to the CJEU it must be considered that all cruise services normally provided for remuneration in the maritime waters of a member state fall within the ambit of that regulation, even in the case of a cruise that starts and ends, with the same passengers, in the same port of the member state in which it takes place.

2.2 The CJEU looks at the interpretation of 'provider of maritime transport services' for the purpose of applying the principle of the freedom to provide services to maritime transport between member states and between member states and third countries under Regulation No 4055/86

In its judgment of July 8, 2014, the CJEU replied to a request for a preliminary ruling made by the Swedish labor court in case C-83/13, in which the issue was whether, in the context of industrial action which disrupted the services of a vessel with the resulting losses for the shipowner, a company established in a state that is party to the EEA Agreement and owns a vessel flying the flag of a third country can rely on the principle of the freedom to provide services where it supplies shipping services from or to states that are parties to the EEA Agreement.

The Court of Justice notes first that, in defining the scope *ratione personae* of the freedom to provide services in the shipping industry from or to states that are parties to the EEA Agreement, EU law (especially, Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of the freedom to provide services to maritime transport between Member States and between Member States and third countries) identifies two categories of persons who enjoy freedom to provide services, namely, first, nationals of a state that is a party to the EEA Agreement who are established in the EEA, and, second, nationals of a state that is a party to the EEA who are established in a third country, as well as shipping companies established in a third country and controlled by nationals of a state that is a party to the EEA Agreement.

To be able to apply the Regulation, the shipping companies must be established outside the Community and use vessels registered in a member state and controlled by nationals of a member state; or shipping companies established in a state that is a party to an EEA Agreement, who own a vessel flying the flag of a third country, provided that they can, due to their operation of the vessel, be classed as a provider of maritime transport services and that the persons for whom the services are intended are established in states that are parties to the EEA Agreement other than that in which that company is established.

The key factors for being able to rely on the principle, according to the CJEU, will be that it will be the court of each member state that has to assess whether the company intending to apply the principle by relying on the Regulation can be classed as a provider of those transport services, in other words, if it is the person who operates the vessel.

Further, the CJEU considers that the application of Regulation No 4055/86 is in no way affected by the fact that the vessel carrying out the maritime transport at issue, and on which the workers in whose favor that industrial action was taken are employed, flies the flag of a third country, nor by the fact that the crew members of the vessel are third country nationals. As found in the judgment on Laval un Partneri (case C-341/05), industrial action measures must also be analyzed from the standpoint of compatibility with the principle of the freedom to provide services.

In short, the CJEU replied to the reference for a preliminary ruling to the effect that a company established in a state that is a party to the EEA Agreement, owning a vessel flying the flag of a third country providing shipping services from or to a state that is a party to that Agreement, can rely on the principle of the freedom to provide service, provided it is that company that operates the vessel.

II. Spain

1. Legislation and legislative developments

1.1 Approval of the Maritime Shipping Bill

On July 8, 2014, the lower house of the Spanish parliament gave final approval to the Maritime Shipping Bill which will provide the long-awaited exhaustive update of the law on the scenarios and legal relationships arising in connection with maritime navigation to resolve the existing contradictions between the international treaties in force in Spain and Spanish law, and will repeal Book III of the 1885 Commercial Code, among other provisions.

The new Law will come into force two months after its publication in the Official State Gazette. We will take a look at the specific contents of the law in future Newsletters on this subject, after the wording has been published in the Official State Gazette.

1.2 Term for port concessions lengthened

On July 5, 2014 the Official State Gazette published Royal Decree-Law 8/2014, of July 4, 2014, on the approval of urgent measures for growth, competitiveness and efficiency. This instrument makes important amendments concerning transport and the port infrastructure sector, adopted on an urgent basis within the program of measures for growth, competitiveness and efficiency, approved by the Cabinet of Ministers on June 6.

Concerning port infrastructure, several amendments have been made to the Revised State Ports and Merchant Navy Law (RSPMNL), aimed at promoting competitiveness in the port sector and increasing private investment in port infrastructure. Among the main new measures, the term for port concessions has been lengthened to up to 50 years, a new scenario has been added for an extraordinary extension associated with the contribution for funding port connectivity infrastructure and improvement of the goods transportation networks, a Financial Fund for Land Access Capacity to the Port has been created and the ban has been lifted on the use for hotels, for hostels or hospitality (especially lighthouses) of certain items of disused port infrastructure located on port public property.

1.3 Drones regulated for the first time

Royal Decree-Law 8/2014 also sets out for the first time the legal regime applicable to the conditions for the operation, authorization of use and mandatory insurance for drones, remotely piloted aircraft (RPAs) or unmanned aerial vehicles (UAVs), which are nevertheless subject to implementing regulations.

1.4 Approval of the Ports Law of the Valencian autonomous community

Law 2/2014, of June 13, 2014, on ports of the Valencia autonomous community was published on July 8, 2014, setting out the organization of ports of the Valencia autonomous community government and controlling the planning, construction, management, operation and disciplinary matters concerning ports falling within the powers of the autonomous community government (one of the most important being the port of Denia). This law, like most of its

predecessor autonomous community laws in this area, mirrors the central government legislation (Revised State Ports and Merchant Navy Law) established for ports 'of general interest' or significant ports.

1.5 Definition of customs representative changed

On May 14, 2014 the Official State Gazette published Royal Decree 285/2014, of April 25, 2014 amending Royal Decree 335/2010, of March 19, 2010 on the right to make customs declarations and the definition of customs representative, a change stemming from a number of supreme court judgments determining that the fact of being a legal entity cannot be a barrier to entering this activity.

As an aftereffect of those judgments, the new royal decree has done away with the condition that the customs representative must be an individual, with the result that any legal entity that had been authorized to file declarations on behalf of third parties before the entry into force of the new legislation is considered to meet the eligibility condition to file customs declarations.

Lastly, some technical amendments have been added, including further specification of the minimum training that must be evidenced to be a candidate for customs representative, the replacement of the registration procedure by the authorities on the Register of Customs Representatives with an application procedure, and the requirement to provide guarantees in cases of direct representation in customs procedures.

1.6 Enabling instruments determined for the provision of passenger rail transport services

On July 4, 2014, the Official State Gazette published the Decision of June 27, 2014, of the Secretary of State for Infrastructure, Transport and Housing, publishing the Resolution of the Cabinet of Ministers of June 13, 2014, determining the number and term of enabling instruments for the provision of passenger rail transport services concurrently on certain lines and stretches of the public rail network.

In the Cabinet Resolution reflecting that Decision, the Cabinet will determine the number of enabling instruments to be granted for each line or group of lines on which the service will be provided concurrently, together with the valid term for those enabling instruments.

Specifically, an additional enabling instrument will be granted which will allow a new operator to provide, concurrently with Renfe-Operadora, passenger rail transport services not subject to public service obligations on the lines and stretches of the public rail network that are specified in the annex to the Decision. This enabling instrument granted to operate the services contemplated in this Resolution will be for a seven-year term, running from its award date.

2. Recent case law

2.1 The Constitutional Court confirms no limitation on period for appealing against rejection decisions by administrative silence

In its Judgment 52/2014, of April 10, 2014, the Constitutional Court dismissed the doubts over constitutionality raised by the High Court of Justice of Castilla-La Mancha in relation to art. 46.1 of Law 29/1998, of July 13, 1998 on the judicial review jurisdiction. This article establishes the time limits for appealing, in a judicial review proceeding, any public authority

decisions taking place by administrative silence and specifically lays down a six-month time limit for appealing against public authority decisions that take place by administrative silence (namely, decisions on which there is no express ruling). The article adds that the six months will start to run 'for the applicant and other potential interested parties, from the day following the date on which, under its specific legislation, the presumed decision takes place'.

The origin of the request for a ruling on unconstitutionality made by the High Court of Castilla-La Mancha is the fine that the Department of Agriculture and Environment in the Castilla-La Mancha autonomous community government imposed on a private party for pruning holm oak trees without the required permit. The private party appealed against the penalty in the administrative jurisdiction, but obtained no reply to the appeal. Faced with silence from the authorities, the private party lodged an appeal for judicial review with the High Court of Castilla-La Mancha. In their pleadings, the authorities asked the court to reject the appeal because it had been filed late, namely after the six month time limit established in article 46.1 of the Law on the Judicial Review Jurisdiction.

The Court's judgment, which had one dissenting vote, held that where, as in the present case, administrative silence is interpreted with a negative meaning (namely, to reject the petition of a private party) the appeal is not subject to any time limit whatsoever, and therefore the article at issue does not apply to those scenarios. As a result, all suspicions as to its constitutionality also disappear, because the right to an effective remedy before a court is not impaired. This judgment has an impact, among others, on penalties and administrative law on ports.

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