

**THE EFFECT OF NEW COMMISSION GUIDANCE ON CERTAIN PROVISIONS OF COUNCIL
REGULATION (EEC) NO 3577/92:
AGIP PETROLI SPA v CAPITANERIA DI PORTO DI SIRACUSA AND OTHERS**

Introduction:

The desire for a common transport policy within the European Union has witnessed a rollercoaster of challenges dating back to the original 1957 *Treaty of Rome*.¹ At that time, a compromise was reached to establish a framework that would facilitate the common transport policy agenda. The process appeared to have been frustrated until *Council Regulation 4055/86* was adopted.² This legislation applied the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries.³

However, the scope of *Regulation 4055/86* did not cover maritime cabotage (coastal shipping) services between Member States in the EU.⁴ Rather, the freedom to transport passengers or goods (maritime cabotage) between Member States in the European Union was achieved finally, through *Council Regulation 3577/92*.⁵ The objective of the regulation was to implement this freedom gradually, thus creating an internal market for the provision of maritime cabotage services.

Nevertheless, even within the framework of *Regulation 3577/92*, several compromises were reached which detracts from the idea of total freedom to provide maritime services between Member States. An example of this restriction can be seen in the area of manning

¹ See Article 9 of the Treaty of Rome 1957 where the idea and intention for a common transport policy is first indicated under the guise of a common custom tariff. Article 61(1) of the Treaty is also indicative of the divergent positions of the Member States on the common transport policy agenda. Since the entry into force of the Lisbon Treaty in 2009, the Treaty of Rome has been renamed the Treaty on the Functioning of the European Union. The provisions of the above Articles are now contained in Articles 58 and 90 respectively of the TFEU.

² Council Regulation (EEC) No 4055/86. Freedom to Supply Services, Competition, Unfair Pricing Practices and Free Access to Ocean Trade. OJ L 378. Adopted 22 December 1986. This legislation came into force on the 1st of January 1987.

³ For a sneak preview of the kind of protectionist practices that were applied before Council Regulation (EEC) No 4055/86 came into force, see: Case C- 49/89 *Corsica Ferries France v Direction générale des douanes françaises*. ECR I-14441. Judgment of the Court (Second Chamber) of 13 December 1989.

⁴ A second specific regulation was proposed by the Commission in its 1989 second package of maritime measures. However, this move was aborted as it failed to secure the agreement of all Member States.

⁵ OJ L 364 - 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).

where some protectionist measures are permitted in island regions for the benefit of the host State. Furthermore, there are safeguard measures which allow Member States to suspend the application of Council Regulation No 3577/92 in the event of a serious disturbance of the internal transport market.⁶ It is suggested that the existence of such safeguard measures is proof that the provision of maritime transport services within the European Union is not regulated completely by free market forces. For instance, in order to avoid distorting competition on the most sensitive routes, *Regulation 3577/92* stipulates that the 'host' State may impose their own crewing rules on ships carrying out island cabotage, and to ships smaller than 650gt engaged in other kinds of maritime cabotage services.⁷ However, to avoid negating the essence of the *Regulation* (i.e. the freedom to provide maritime transport services within the EU), it stipulates that the rules of the 'flag' State will apply to cargo ships over 650gt carrying out island cabotage where the voyage concerned follows or precedes a voyage to or from another State (consecutive cabotage).⁸

It was the confusion over whether the host or flag States rules on crewing should apply, pursuant to the provisions of *Article 3(3) of Regulation 3577/92* that was the subject of legal argument in *Agip Petroli SpA v Capitaneria di porto di Siracusa and Others*.⁹ The issues that were highlighted in this case continues to reverberate in current discourses on EU maritime cabotage notwithstanding the fact that it is now a decade since this case was decided. Clearly, Article 3(3) includes complex ambiguities, which exposes the limits of the purported liberal agenda of a regulation, which is referenced often as an example of a successful liberal maritime cabotage framework.

For emphasis, the issues in question that were brought before the court revolves around the interpretation of Article 3(3) of Council Regulation 3577/92. Suffice to argue that on the one hand, Article 3(3) shines the light on the complicated ambiguities contained in

⁶ Other compromises include for instance that maritime services such as towage is excluded from the scope of Regulation 3577/92. See Case C-251/04 *Commission of European Communities v Hellenic Republic* [2007] ECR I-67. Furthermore, in many insular regions within the European Union, the use of Public Service Contracts (PSC) and Public Service Obligations (PSO) is generally regarded as protectionist measures within the liberal system. In addition, the provision of maritime services in island regions is largely subjected to the laws of the host State, which often reserves such services to indigenous persons. See Article 3(2) of Council Regulation 3577/92.

⁷ See: *Articles 3(1) and 3(2) of Council Regulation (EEC) NO 3577/92*.

⁸ See: *Article 3(3) of Council Regulation (EEC) NO 3577/92*.

⁹ Case C-456/04 *Agip Petroli SpA v Capitaneria di porto di Siracusa and Others* [2006] ECR I-03395.

Regulation 3577/92. On the other hand, it exposes the limit of the liberal agenda of Council Regulation 3577/92 which is often cited as a reference point for a liberal maritime cabotage advocacy.¹⁰

Facts:

Agip Petroli, an Italian company, chartered the Greek registered tanker *Theodoros IV* to transport a cargo of crude oil from the peninsula of Magnisi to the city of Gela. As both the port of origin and the destination port are located on the island of Sicily, this charter was a classic island cabotage transport service.

The Italian company, Agip Petroli chartered the Greek registered tanker *Theodoros IV* which was over 650gt to transport a cargo of crude oil from the peninsula of Magnisi to the city of Gela, both of which are located on the island of Sicily. Hence, this was a classic Island cabotage maritime transport service.¹¹

Agip Petroli made an application for permission to perform the island cabotage service. The company informed the Sicily Harbour Office that the vessel had subsequently to make a voyage directly to a foreign State, albeit without cargo on board (i.e. voyage in ballast). Accordingly, Agip Petroli submitted that the flag State (Greece) rules on manning applied in this circumstance, pursuant to Article 3(3) of Council Regulation 3577/92.

The Sicily Harbour Office refused to grant permission to Agip Petroli because to do so would be contrary Article 318 of the Italian Shipping Code.¹² This was because the Greek vessel was over 650gt and her crew included non EU nationals from the Philippines. This decision was based on the harbour office's interpretation of Article 3(3) of Council Regulation No 3577/92.

¹⁰ For instance, a Member State reserves the right to require the crews of ships carrying out island cabotage (and ships smaller than 650gt) to be composed entirely of European Union nationals. See: European Commission. 2014. Communication from the Commission: on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). P. 9 COM (2014) 232 final. Brussels, 22 April, 2014.

¹¹ Article 2(1) (c) of Council Regulation (EEC) NO. 3577/92.

¹² Article 318 of the Italian Shipping Code states that the crew of the armed national vessels in the ports of the Republic should be composed entirely of Italian citizens. However, there is provision to employ foreign crew below the rank of commander in the event of unavailability of Italian nationals.

Furthermore, the Harbour Office referred to *Circular No TMA3/CA/0230 of 2010 of the Ministero dei Trasporti et della Navigazione* and submitted that for *Article 3(3) of Council Regulation 3577/92* to apply, the voyage that follows or precedes the island cabotage leg ought to be functionally and commercially autonomous. This would have required the *Theodoros IV* to be loaded with commercial cargo destined for or coming from a foreign port.¹³ According to the Harbour Office, this was the only condition upon which the flag State (Greece) rules on manning could apply.

In their argument therefore, *Article 3(3) of Regulation 3577/92* could not be invoked in circumstances where the vessel was performing a voyage in ballast. Neither could it apply where she was carrying cargo which in terms of quantity and quality would not confer an autonomous status on the voyage. Hence, the Harbour Office contended that in this circumstance, the host State (Italy) rules on manning should apply pursuant to *Article 3(2) of Council Regulation 3577/92*.

Agip Petroli disagreed and brought an action before the *Tribunale Amministrativo Regionale per la Sicilia (Regional Administrative Court of Sicily)*. The court took the view that *Article 3(3) of the Regulation* was open to two different interpretations. On the one hand, the need to prevent circumventing the cabotage regulation through practices such as consecutive sham cabotage voyages demands a restrictive interpretation of *Article 3(3)*. On the other hand however, the court opined that there is nothing in the provisions of the *Regulation* to suggest that the scope of *Article 3(3)* is limited to voyages with cargo on board, thus excluding ballast voyages.

As a result of the impasse between the parties, the *Regional Administrative Court of Sicily* referred the following question to the *European Court of Justice (ECJ)*¹⁴ for a preliminary ruling: Does a voyage which follows or precedes the cabotage voyage to and from another State as provided for in *Article 3(3) of Council Regulation 3577/92* mean only a voyage which is functionally and commercially autonomous, (i.e. with cargo on board destined for or

¹³ It should be noted that in the context of both Council Regulation 3577/92 and this particular case, a foreign port refers to a port in another Member State of the European Union or a third country outside the European Union, provided that the vessel and the operators in question satisfy all the requirements for carrying maritime cabotage services within the European Union pursuant to Council Regulation 3577/92.

¹⁴ This is now known as the Court of Justice of the European Union (CJEU) following the entry into force of the Treaty of Lisbon in 2009.

coming from a foreign port), or does it also include a voyage without cargo on board (i.e. a voyage in ballast)?

Decision:

The ECJ took cognisance of the liberalization agenda of *Council Regulation 3577/92*.¹⁵ It also observed that a voyage in ballast is not unusual in the business of maritime transport.¹⁶ Therefore, the ECJ held that *Article 3(3) of Council Regulation 3577/92* should in principle be interpreted as contemplating situations where vessels performing island maritime cabotage would sometimes have to undertake a ballast voyage to another State.¹⁷

Nevertheless, the ECJ warned that this decision was not and should not be seen as the legal platform which permits operators to set up artificial (sham) voyages to or from another State with the overall objective of circumventing the host State manning rules as contemplated in *Article 3(2) of Council Regulation 3577/92*.¹⁸

The Relevant Provisions of the Legal Instrument:

For the purpose of this discourse, the relevant provisions of *Council Regulation 3577/92* are paraphrased as follows;

Article 1(1):

Freedom to provide maritime cabotage services within a Member State shall apply to Community ship owners 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.

¹⁵ See the first, third, fourth, fifth, and eighth recitals of the preamble of Council Regulation (EEC) NO. 3577/92.

¹⁶ See paragraph 17 of the Judgement.

¹⁷ Para 15 of the judgement. However, it is important to note that this decision disagrees with the position expressed by the Commission in its Interpretative Communication (COM (2003) 595 final). Nevertheless, it is important to note that the Commission has since reversed its position on this issue in its 2014 Communication on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). COM (2014) 232 final. Brussels, 22 April, 2014. The 2014 Communication from the Commission, replaces the 2003 Interpretative Communication (COM (2003) 595 final), and reflects the decision of the Court in this case. In brief, the Court considered that the flag State rules applies to both laden and ballast voyages.

¹⁸ See paras 18 and 25 of the European Court of Justice Judgement. See also: Case 125/76 *Cremer* [1977] ECR 1593, paragraph 21; and Case C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21.

Article 2(1) (c):

Maritime cabotage within a Member State shall mean services normally provided for remuneration and shall in particular include:

Island cabotage: the carriage of passengers or goods by sea between:

- Ports situated on the mainland and on one or more of the islands of one and the same Member State.
- Ports situated on the islands of one and the same Member State (Ceuta and Melilla shall be treated in the same way as island ports).

Article 3(2):

For vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the (host) State in which the vessel is performing a maritime transport service.

Article 3(3):

For cargo vessels over 650gt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State).

The European Commission provides periodic updates on the impact of Council Regulation 3577/92. Hence, it is useful to provide a conceptual discourse on how this legislative framework has developed vis-a-vis the somewhat contentious decisions of the Court of Justice of the European Union (CJEU). For the purpose of understanding the nuanced arguments on the logic of the ballast voyage phenomenon from both the commercial and regulatory perspectives, it is pertinent to review the above Commission's guidance.¹⁹ It is observed that in the past, the European Commission has taken different positions on issues concerning manning within the scope of Regulation 3577/92. The latest Commission's guidance of 2014 updates the previous Commission's guidance of 2003 and aligns it to recent EU law and case-law of the Court of Justice. It attempts to embrace further transparency and legal certainty by explaining Council Regulation 3577/92 to all stakeholders concerned with its use.

¹⁹ The European Commission's Communication on the Interpretation of Council Regulation (EEC) No 3577/92 Applying the Principle of Freedom to Provide Services to Maritime Transport within Member States (Maritime Cabotage). COM (2014) 232 final. Brussels, 22 April, 2014.

Traditionally, issues concerning manning are the responsibility of the flag [State], although it is noted that the rules on manning vary from one ship's register to another.

It is noted that the rules on manning vary from one ship register to another. However, issues concerning manning have traditionally been the responsibility of the flag States. This is demonstrated by the fact that some Member States in the European Union impose protectionist nationality conditions which require all crew members to be EU nationals for vessels carrying out activities in island and non-island regions.²⁰ In what may be considered as less protectionist measures, other Member States choose only to reserve the positions of ship Master, Chief Engineer, and Chief Officer to EU nationals.²¹ The disparity in the manning requirements among Member States may be attributed to the fact that prior to *Council Regulation 3577/92* coming into force, Member States implemented different approaches to maritime cabotage. Some States (Greece, France, Spain, and Italy) applied protectionist maritime cabotage regulations, and thus had to amend their legislation to comply with the new European Union regulation. However, other States (United Kingdom, Netherlands and Norway) had traditionally operated an open coast policy and did not need to make any changes to their legislations.²²

²⁰ In **France**: Decree No 99195 of 16/03/1999 stipulates for the following: 100% EU/EEA crew nationality requirement. In addition, there is the application of the SOLAS Convention, and Knowledge of French required for captain and first mate. In **Greece**: Law 2932/2001 stipulates for 100% EU/EEA crew nationality requirement for merchant ships carrying out island cabotage. However, waivers are possible where EU/EEA seamen are not available. Furthermore, Decree 38/2011 stipulates that the Captain shall be EEA national and have adequate knowledge of Greek and Greek maritime legislation. There is also obligation for the non-Greek crew in charge of duties relating to safety and emergencies to hold a certificate verifying their knowledge of Greek. In Italy: Decree No 529 of 25/11/1999 stipulates for 100% EU/EEA crew nationality requirement. There are provisions for waivers for less qualified crew members. Furthermore, Circular of 25/11/1999 documents that Law 88/2001 changed the requirement that the crew be Italian citizens and allowed for crew outside the EEA to board Italian vessels subject to trade union agreements. In addition, Law 88 of 16/03/2001 stipulates that Knowledge of Italian language for crew in charge of safety is a requirement. In Spain: Order of 22/07/1999 stipulates that the Captain, First Officer and at least 50% of the crew must be from EU/EEA. It also applies the SOLAS Convention. In Portugal: Decree Law 7/2006 stipulates that the Captain and 50% of the crew must be from EU/ EEA or from countries with Portuguese as its official language. However, there are possibilities for waivers. For further detail, see Commission Staff Working Document SWD(2014) 143 final: Accompanying the document on Report from the Commission to the Council on the Fifth report on the implementation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime cabotage (2001-2010) {COM(2014) 231 final}

²¹ It should be noted however that Article 9 of Council Regulation 3577/92 stipulates expressly that a Member State wishing to avail itself of the possibility to apply its own regulations or administrative provisions in implementing this Regulation to matters relating to manning shall consult the Commission of any measures thus adopted.

²² See appendix 1 of *Council Regulation (EEC) No. 3577/92* for EU Member States adaptation of their national laws to comply with EU maritime cabotage law.

Following the Commission's 2014 guidance, it is clear that to avoid distorting competition on the most sensitive routes, Regulation 3577/92 stipulates that host States may impose their manning rules on ships carrying out island cabotage, and to ships smaller than 650gt engaged in other kinds of maritime cabotage services.²³ However, to avoid negating the essence of *Council Regulation 3577/92* the *Regulation* provides that flag State rules applies to cargo ships over 650gt carrying out island cabotage where the voyage concerned follows or precedes a voyage to or from another State (consecutive cabotage).²⁴

These provisions raise two issues of primary concern with regards to the extent of the host State's competence. The first issue relates to the leverage possessed by the host State in determining manning requirements, where the applicable law is that of the host State.²⁵ The second issue is concerned with the competent authority between the flag State and the host State with respect to consecutive cabotage. With respect to the first issue, where the applicable law is that of the host State, the *Regulation* does not specifically identify what responsibilities fall to the host State on matters relating to manning. There are suggestions alluding to the possibility that the host State has unlimited competence. This suggestion is based on the express wordings of the Regulation, which refers to 'all matters relating to manning'.²⁶ However, the European Commission adopts a more conservative approach on the issue.

The Commission argues that the powers of the host State should be limited to protect the objective of *Regulation 3577/92*, which is the freedom to provide maritime transport services within the European Union.²⁷ The author suggests that when put in context, the principle that allows host States to impose their manning requirements on maritime cabotage services derogates from the objective of the Regulation.²⁸

²³ See: Articles 3(1) and 3(2) of Council Regulation (EEC) NO 3577/92.

²⁴ See: Articles 3(1) of Council Regulation (EEC) NO 3577/92.

²⁵ See: Articles 3(1), 3(2), and 3(3) of Council Regulation (EEC) NO 3577/92.

²⁶ Ibid

²⁷ It is observed that the lack of easy access by the shipowners to the legislation of the host State on manning requirements often impedes the further development of island cabotage. In order to remedy this problem, the Commission encourages Member States that apply *Article 3(2) of the Regulation* to appoint a designated authority to supply interested shipowners with all relevant information on the applicable host State rules relating to manning.

²⁸ See *Article 9 of Council Regulation (EEC) NO 3577/92*, which stipulates that any Member State wishing to avail itself of the possibility to apply its own rules to matters relating to manning should consult the

The Commission suggests that the powers of the host States should be limited to the right firstly, to assert the required proportion of EU nationals on board ships carrying out island cabotage, and secondly to regulate the activities of vessels smaller than 650gt. In that regard therefore, a Member State may:

- (a) Require the crews of such vessels to be composed entirely of EU nationals.
- (b) Require the seafarers on board to have social insurance cover in the European Union.
- (c) With regards to working conditions, impose the minimum wage rules in force in the country.
- (d) With regards to rules on safety and training (including the languages spoken on board), Member States may only require compliance with EU or international rules in force (STCW and SOLAS Conventions), without disproportionately restricting the freedom to provide services.²⁹

In the context of this discourse, there is another development worthy of consideration which is also highlighted in the latest 2014 Commission's communication. This is concerned with the adoption of *Council Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road* which appear to cause some agitation.³⁰ In particular, *Article 1(2) of the Regulation* provides that it shall apply to the national and international operation of public passenger transport services by road, rail, and other track-based modes of transport. However, what is concerning is that Member States may apply *Article 1(2) of 1370/2007* to public passenger transport by inland waterways with the possibility of prejudicing *Regulation 3577/92*. This means that where *Regulation 1370/2007* is applied, it opens the door to the possibility of using crew that contradict, confuse and conflict with the already ambiguous manning requirements as stipulated by *Council Regulation 3577/92*. It re-emphasises the contradiction that a ballast

Commission. Furthermore, the Article states that the scope and content of envisaged measures will be subject to a case-by-case analysis in the light of the principles of necessity and proportionality.

²⁹ See: European Commission. 2014. Communication from the Commission: on the interpretation of *Council Regulation (EEC) No 3577/92* applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). COM (2014) 232 final. Brussels, 22nd April, 2014.

³⁰ Council Regulation 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road, which repeals Council Regulation (EEC) No 1191/69 and Council Regulation (EEC) No 1107/70, was adopted on the 23rd of October 2007. See: OJ L 315. 3rd December 2007, p. 1.

voyage can be used to circumvent the manning requirements under Council Regulations 3577/92 and 1370/2007 frameworks.³¹

The problem stems from the fact that the term '*national sea waters*' is not defined expressly in any of the EU or international legal instruments. Thus, the application of *Regulation 1370/2007* to maritime cabotage within the European Union raises concerns that it conflicts with *Regulation 3577/92*, which is the authority on EU maritime cabotage. This concern has been addressed somewhat through a three-stage guidance. Hence, in order to guide Member States who may wish to alternate the application of both legislations, the following steps must be observed. Firstly, *Regulation (EC) No 1370/2007* does not apply automatically to public passenger transport by national seawaters, except where a Member State makes it expressly applicable.³² Secondly, the Regulation applies only to public transport of passengers by road or rail. However, the bulk of the maritime cabotage transport services covered under Council Regulation (EEC) NO 3577/92 are a combination of freight and passengers. Thus, *Regulation 1370/2007* cannot apply to a maritime transport service carrying only freight or a combination of passenger and freight. Thirdly, the Regulation may only be applied by Member States to the transportation of passengers by national seawaters provided that it does not conflict with or prejudice the implementation of *Council Regulation (EEC) NO 3577/92*. In the event of any conflict between the two legislations, *Regulation 3577/92* take precedence, with *Regulation 1370/2007* serving in a supplementary capacity.³³

³¹ Article 3(1) and 2(f) of Regulation (EC) No 1370/2007 stipulate that Member States may grant an operator an exclusive right in return for the discharge of public service obligations. This opens the possibility for shipowners and operators to circumvent manning requirements legislations in exchange for performing Public Service Obligation (PSO).

³² It has already been established that inland waterways transport services within the EU that is not of a maritime nature does not fall within the scope of *Council Regulation (EE) NO 3577/92*. Instead, such transport services fall under *Council Regulation (EEC) NO 3921/91*.

³³ For a broader discussion on how Regulation (EC) NO 1370/2007 conflicts with Council Regulation (EEC) NO 3577/92 on maritime cabotage, see: European Commission. 2014. Communication from the Commission: on the interpretation of *Council Regulation (EEC) No 3577/92* applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). COM (2014) 232 final. Brussels, 22nd April, 2014.

The Issues and Legal Analysis of the Court's Decision:

The thrust of this case rests on the interpretation of *Article 3(3) of Regulation 3577/92*. It should be parenthetically noted that *Article 3(3)* is only concerned with cargo vessels above 650gt, and not passenger vessels.³⁴ In substance therefore, the question before the ECJ was only focused on the necessity or otherwise of transporting commercial and functional goods on the international leg prior to or after performing island cabotage in a Member State.

It is observed that the term 'voyage' is not expressly defined in the Regulation. Also, the Regulation does not provide any guidance on whether it is mandatory for the vessel to be laden on the voyage which follows or precedes the cabotage voyage to and from another State. Furthermore, there is no suggestion in the Regulation that such cargo must be one that conveys a functional and commercially autonomous status on the international voyage.

Nevertheless, it is imperative to pivot back to the overall objective of *Council Regulation 3577/92*, which is to provide for the carriage of goods and passengers between Member States with minimum restriction.³⁵ The third recital in the preamble of the Regulation and *Article 2(1) (a), (b), (c)* consistently refer to the carriage of passengers or goods. Thus, it is suggested that the term voyage should naturally be interpreted as the carrying of goods or passengers from one point to another for commercial benefit.

This suggestion is bolstered by the decision of the ECJ in *Commission v Hellenic Republic*³⁶, where the court accepted without reservation that within the context of *Council Regulation 3577/92*, the essential characteristic of maritime cabotage is to transport passengers or goods by sea between two places.³⁷ Moreover, in that case, *Advocate General MS Sharpston* contended that *Article 2(1)* should not be interpreted as encompassing any service which is in some way incidental or ancillary to the provision of maritime transport services. This is regardless of whether that service shares the essential characteristics of the services

³⁴ This is due to a variety of reasons which include for instance the fact that the very nature of passenger vessel services mean that the domestic passengers services market has very little or no influence from the international market. A detailed discourse on this issue is outside the scope of this work.

³⁵ Case C -49/89 *Corsica Ferries France v Direction Générale Des Douanes*. (Second Chamber) 13 December 1989

³⁶ *Commission v Hellenic Republic* Case C-251/04 [2007] ECR I – 67 (Second Chamber). Dated 11th January 2007.

³⁷ See paragraphs 29 – 30 of the judgement in *Commission v Hellenic Republic*. See also Article 1(4) of Council Regulation 4055/86. OJ 1986 L378/1

expressly defined in *Article 2(1)*.³⁸ It is suggested that a ballast voyage fits in with such incidental or ancillary services.

Suppose that one accepts the invitation to interpret *Article 3(3)* broadly, with the effect that the term voyage is given an expanded scope. This would encompass any kind of voyage including ballast voyage, and voyages with cargo notwithstanding that such cargo fails to confer a functional and commercially autonomous status on the voyage. It is suggested that it would be difficult on that basis, to exclude from the scope of *Regulation 3577/92*, any essential service that is not unusual or uncommon in the business of maritime transport.³⁹

It is argued that broadening the definition of voyage in *Article 3(1)* to include a voyage in ballast reopens the very contentious argument on whether 'incidental' or 'ancillary' services should be included within the scope of maritime transport services pursuant to *Article 2(1) of Council Regulation 3577/92*.⁴⁰ The ECJ acknowledged that the use of sham voyages to circumvent the application of *Article 3(2) of Regulation 3577/92* would not be allowed to succeed. Therefore, it imposed on the host State the evidentiary burden of demonstrating that the voyage in ballast to or from another State is not bona fide.⁴¹ Hence, it is incumbent upon the host State to demonstrate what benefit the ship owner intends to derive from a voyage in ballast, if the law of the flag State is applied, with the effect that it frustrates the provision of *Article 3(2)* of the Regulation.

For clarity, *Article 3(2)* stipulates that the law of the host State applies to all matters relating to manning in the case of island cabotage. It should be noted that the provisions of *Article 3(2)* was an important compromise in finally achieving the common maritime transport

³⁸ See the opinion of Advocate General Sharpston in *Commission v Hellenic Republic* Case C-251/04 [2007], para. 52. Delivered 14 September 2006.

³⁹ See footnote 12. Such essential services would include the operations of the following: hydrographic vessels (provide data for correcting and updating charts), dredgers (for maintain safe draught in the channels), pilot vessels (to navigate vessels into berth safely), light ships (aid navigation by putting navigational marks and buoys in place), and specialised meteorological vessels (provide data for shipping forecasts and other important information). All of these are involved in the provision of services that contribute, in one way or another, to maritime transport.

⁴⁰ In *Commission v Hellenic Republic* Case C-251/04 [2007] ECR I – 67 (Second Chamber), the ECJ had rejected that ancillary services such as towage fell within the scope of *Article 2(1)* of *Council Regulation 3577/92*

⁴¹ This means that the host State has the burden of producing objective evidence to prove that the essential aim of the international voyage in ballast is to avoid the application of *Article 3(2)* of the regulation, in favour of *Article 3(3)*.

agenda sought after since the *Rome Treaty*.⁴² In order to preserve the principles of legal certainty, it is argued that *Article 3(3)* is subservient to *Article 3(2)*, and should be recognised as a supplementary provision. This position is buttressed by the fact that the ECJ specifically confirmed that the Regulation's objective of abolishing restrictions on the provision of maritime transport services within Member States was yet to be fully achieved, particularly in the area of island cabotage.⁴³

It is noted that it is already settled case law that any such sham voyages would be interpreted as relying on Community law for abusive or fraudulent ends.⁴⁴ Nevertheless, it is argued that where a ballast voyage occurs, the shipowner should be held to demonstrate that on the balance of probability, every foreseeable contingency plan was put in place to avoid a ballast voyage. The shipowner must be seen to have made concrete arrangements for the vessel to load a functional and commercially autonomous cargo in the following or preceding voyage, to or from another State.

It is suggested that recognising *Article 3(3)* as a supplementary provision to *Article 3(2)* takes added significance as it would revert to the shipowner the burden of proving that an unavoidable ballast voyage is bona fide. The narrow interpretation of *Article 3(3)* aligns best with the objective of the Regulation, which is to implement freedom to provide maritime transport services between Member States, as decided in the *Analir*.⁴⁵

A useful analogy can be drawn from the judgement of the House of Lords in the *Evia (No. 2)*.⁴⁶ There, it was held that no breach of contract is deemed to occur when a port is prospectively safe at the time that the order to proceed to the port is given, even if it turns out to be unsafe by the time the vessel arrives at the port.

⁴² It should be remembered that before the coming into force of Council Regulation 3577/92, some Member States including; Italy, Spain, Greece, Portugal, France implemented a protectionist closed sea policy. These countries were reluctant to open up their coastal waters. The other Member States including; the United Kingdom, Norway, and Denmark that already had open coast policy were more receptive of the idea.

⁴³ See; para 13 of the judgement in this case - Case C-456/04 *Agip Petroli SpA v Capitaneria di porto di Siracusa and Others* [2006] ECR I-03395. For the objective to liberalise maritime transport services between Member States, see; the third and fourth recitals in the preamble of Council Regulation (EEC) No 3577/92.

⁴⁴ For a deeper and broader understanding of the issue here discussed and the consequences of engaging in such abusive and fraudulent practices, see the following judicial decisions: Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68)

⁴⁵ Case C-205/99 *Analir and Others* [2001] ECR I-1271; see paragraph 19.

⁴⁶ [1982] 2 Lloyd's Rep. 307

It was held in this case that, no breach of contract is deemed to occur when a port is prospectively safe at the time that the order to proceed to the port is given, even if it turns out unsafe by the time the vessel arrives at the port. Likewise, a shipowner would not be held to be in breach of *Article 3(3)*, where it was proven that there was prospective arrangement for the vessel to load cargo of a functional and commercial nature during the international leg of the island cabotage operations. What is not acceptable is that it cannot in all practicality be a voyage in mere spes of finding cargo to load without any reasonable expectation. It is observed that the European Commission has used its 2014 Interpretative Communication to confirm the court's decision in the *Agip Petrololi* case that shipowners are forbidden from relying on the decision of this case as an excuse to set up fictitious international voyages without cargo on board with the aim of avoiding the application of Article 3(2) in favour of Article 3(3), thus circumventing Regulation 3577/92.

This is in addition to the fact that Member States are at liberty to impose different manning conditions under Public Service Obligations (PSO) and Public Service Contracts (PSC). The imposition of different manning requirements may contradict the host and flag States manning rules as provided for in Article 3(1) and 3(2) of Regulation 3577/92. However, this contradiction is expressly provided for in Article 4(2) of Regulation 3577/92.⁴⁷ Further to this, the European Commission suggests in its 2014 Interpretative Communication that any rules imposed under Public Service Agreements should be limited to what is necessary to achieve public service needs pursuant to Article 4(2) of Regulation 3577/92. The challenge with this position is that with regards to the question on manning, it is not clear what the extent of the flexibility is and how far it can go to contradict both the host and flag States rules on manning. Hence, it is suggested that on the evidence of both the European Commission's Interpretative Communication of 2014 and Article 4(2) of Regulation 3577/92, it appears that there is no limit to how much the manning rules may be adjusted under the cover of Public Service Agreements.

⁴⁷ Article 4 of Council Regulation 3577/92 stipulates as follows: In imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel.

Furthermore, the ECJ tasked the national court of the host State with verifying whether any action constituting abusive practices have taken place in the case before it.⁴⁸ This is instructive, albeit that one questions the wisdom of proceeding in that direction. It is suggested that such proposition puts undesirable pressure on the national court, who it is observed must have a duty to protect domestic interests within the fabric of Community law, without being unfair to the external party.

Perhaps, the fallout from this case is the very pertinent question of whether island cargo cabotage voyages with vessels over 650gt which do not follow or precede a voyage to or from another State (and which are presently subject to the host State manning rules) should continue to be exempted from the normal flag State rule.⁴⁹ It is suggested that applying flag State rules to vessels over 650gt carrying out Island cabotage which do not follow or precede a voyage to or from another State will remove the confusion the surrounds Article 3(2) and 3(3) of Council Regulation 3577/92. It is unfortunate that the latest Interpretative Communication of 2014 by the European Commission is conspicuously silent on this point.

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⁴⁸ Case C-515/03 Eichsfelder Schlachtbetrieb [2005] ECR I-7355

⁴⁹ Commission of the European Communities. 1998. Communication on a Common Policy on Manning of Regular Passenger and Ferry Services Operating in and Between Member States. Paragraph 8, COM (1998) 251 final. Brussels, 29th April, 1998.