

## A Precarious Judicial Interpretation of the Scope of EU Maritime Cabotage Law

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The Court of Justice of the European Union (CJEU) has thrown another curveball at the already highly vexed subject of maritime cabotage with its decision in *Alpina and Nicko Tours v Chioggia Port Authority*.<sup>1</sup> The effect of this decision is that the carriage by sea occurring even within a 'single port system' will trigger the application of the EU Regulation on maritime cabotage.

### The facts

Alpina and Nicko Tours had scheduled a cruise with a tourist vessel flying the Swiss flag to depart from Venice (Italy), cross the Venetian lagoon to Chioggia (Italy), cross the territorial sea between Chioggia and Porto Levante (Italy), travel for approximately 60 kilometres up the river Po (Italy) to the town of Polesella (Italy) and return to Venice following the reverse itinerary. The permission to cross the stretch of sea was rejected by the Chioggia port authority, on the basis that, Italian law stipulates that, maritime cabotage is reserved for ships flying the flag of a Member State of the EU. Vessels flying the Swiss flag do not thus meet that requirement.

### The decision

The CJEU ruled that such maritime transport 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 under maritime cabotage<sup>2</sup> within the meaning of *EU Regulation No 3577/92*. This decision was reached notwithstanding that the relevant provisions of the EU cabotage Regulation categorically stipulates that

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<sup>1</sup> Case C 17/13 *Alpina River Cruises GmbH and Nicko Tours GmbH v Ministero delle infrastrutture e dei trasporti — Capitaneria di Porto di Chioggia*. JUDGMENT OF THE COURT (Third Chamber) 27 March 2014

<sup>2</sup> Under Article 1(1) of Regulation No 3577/92: "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 ..."

carriage by sea must occur between ‘two or more ports of the same Member State’.<sup>3</sup>

This comment highlights some difficulties likely to be caused by the court’s decision. First, as to the concept of “port” for the purposes of cabotage - especially the scope of what is properly understood as a single port system as against a multiple port system. The second difficulty is with regards to the meaning of the sea - that is to say, the scope of “sea transport” within the context of the *EU Regulation 3577/92*.

The Regulation does not specifically offer any definition for a ‘port’, although it has been defined as encompassing any infrastructure, (be it temporary or small scale) that serves as a terminal for the loading and discharging of cargo or passengers for carriage by sea.<sup>4</sup> In the context of transport services, *Article 2(1) (a) to (c) of Regulation No 3577/92* explicitly states that the carriage should have a departure port that is distinct from the arrival port.

This is the crux of the issue since the facts of the case clearly indicate that the vessel was scheduled to start and end in the same port with the same passengers. It might be suggested that the decision in the *Alpina case* is a clear contradiction of the express provisions of *Article 2(1) (a) to (c) of Regulation No 3577/92*. A troubling question is whether any sort of navigation of a vessel away from the port of departure (irrespective of the short distance) would satisfy the ‘different port’ proviso of the Regulation? Further, where the vessel carries other types of cargo (and not passengers), it is debatable whether arriving at the same port of departure would qualify as the sort of “carriage by sea” envisaged by the Regulation.

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<sup>3</sup> Article 2 provides: “For the purposes of this Regulation: (1) “maritime transport services within a Member State (maritime cabotage)” shall mean services normally provided for remuneration and shall in particular include: (a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands; ...”

<sup>4</sup> Commission of the European Communities v Kingdom of Spain Case C-323/03 [2006] ECR I-2161; 9<sup>th</sup> March 2006

An *obiter dictum* of the court is the proposition that because the kind of services envisaged in *Article 2(1)* is introduced by the term ‘in particular’, the provisions of that Article must thus not be interpreted as exhaustive; with the effect of excluding from the scope of that Regulation, transport services, possessing all the essential characteristics of maritime cabotage.

This line of argument by the Court is questionable because even if it could be argued that the list is not exhaustive, the concept needs to be consistent with the general understanding of maritime cabotage internationally. The CJEU’s refusal to be constrained by the wording of the Regulation goes against the common understanding that there should be transportation of goods or passengers between two ports of the same Member State for maritime cabotage to apply.<sup>5</sup> That understanding is bolstered by the express words in *Article 2(1) EU Regulation 3577/92*.

It is submitted that the intention of the parties should be of some importance to the Court when attempting to characterise maritime cabotage. The question to be asked is whether the parties had intended to perform their contract of carriage by sea between more than one port in the same Member State - which would ordinarily constitute maritime cabotage; or whether in fact, the intention of the parties was at all material times always and simply to navigate the waters (whether internal or territorial) of a Member State before returning to its departure point with the same passengers.

As regards the wording in *Article 2(1)*, two issues might be examined. First, the word ‘between’ as used in *Article 2(1)* cannot be grammatically and logically given any other meaning except that, there should always be two or more ports in the same Member State. Secondly, an analogy might be drawn from the carriage of commercial goods. The sailing of a commercial vessel from a port and returning to the same port with the same cargo would not make any commercial, maritime or logical sense for such endeavours to be classed as carriage of goods by sea. It is clear that the commercial objective of the carriage in question is quite different

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<sup>5</sup> See: Case C-251/04 - Commission v Greece EU: C: 2007:5, paragraphs 28 - 32.

to that which is often covered by maritime cabotage. The CJEU had clearly seen it fit to extend the concept.

The other difficulty arising from the decision in this case is: Alpina and Nicko Tours claimed that, with the exception of the short passage through the territorial sea between Chioggia and Porto Levante, the cruise at issue was scheduled to occur in internal waters and hence had a mainly non-maritime nature, thereby taking it outside the scope of *EU Regulation 3577/92*.

The Regulation does not provide an exclusive definition of the 'sea'. The definition of "sea" has been accorded by the CJEU an expanded scope under the Regulation<sup>6</sup>, a meaning quite distinct from the usual definition ascribed to it in public international law.<sup>7</sup> Hence, under the Regulation; the 'sea' extends beyond the limit of the territorial seas to include internal maritime waters. This expanded definition of the sea as upheld in this case is significant. Barring such an expanded definition, a smaller vessel would be able to perform the schedule without triggering the debate on whether the law of maritime cabotage applied or not - bearing in mind that crossing the stretch of the Italian territorial sea between the ports of Chioggia and Porto Levante was only necessitated due to the large size of the vessel. For smaller vessels, the organisers would have had the option of navigating the canal which connects Chioggia with the River Po.<sup>8</sup> This therefore begs the question which the court sidestepped, which is: what distance of

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<sup>6</sup> *Commission of the European Communities v Kingdom of Spain* Case C-323/03 [2006] ECR I-2161; EU: C: 2006:159, paragraphs 25 to 27. 9<sup>th</sup> March 2006. Hence; under the EU Regulation 3577/92; The Sea extends beyond the territorial seas to cover the internal maritime waters which are on the landward side of the baseline of the territorial sea.

<sup>7</sup> See; Article 3 of UNCLOS 1982 (The Montego Bay Convention), signed on the 10<sup>th</sup> of December 1982; in force, 16<sup>th</sup> November 1994. Approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1). Also: Article 8 of UNCLOS 1982, specifically defines 'Internal Waters' (bays, estuaries, fjords and inlets) thereby distinguishing it from the territorial sea.

<sup>8</sup> It is important to note that it was the failed application for authorisation to cross that stretch of sea which triggered this dispute. Alpina and Nicko Tours had submitted to the Ministero delle infrastrutture e dei trasporti — Capitaneria di Porto di Chioggia an application for authorisation to cross the stretch of Italian territorial sea between the ports of Chioggia and Porto Levante. By decision of 12 March 2012, that authority rejected the application on the ground that maritime cabotage was reserved for ships flying the flag of a Member State of the European Union. This refusal led to a series of appeals by Alpina and Nicko Tours which ended up in the Court of Justice of the European Union.

transportation in the territorial sea should be covered in order to confer a maritime nature on an adventure?<sup>9</sup>

In summary, what is concerning, is the ambivalent and uncertain direction in which the CJEU is moving with regards to interpreting the provisions of *Regulation 3577/92* as to whether it is inclined to adopt the narrow view<sup>10</sup> or the broad view.<sup>11</sup> The CJEU, like many, is in a quandary as to the precise construction of the concept of maritime cabotage in law.

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<sup>9</sup> Article 1(1) of Regulation No 3577/92 categorically stipulates that the regulation relates only to transport services within a Member State (cabotage) which are of a maritime nature. Consequently, inland waterway transport services provided within a Member State and not of a maritime nature are beyond the scope of that regulation. Rather, such services are covered by Council Regulation (EEC) No 3921/91 of 16 December 1991, which regulates how non-resident carriers may transport goods or passengers by inland waterway within a Member State (OJ 1991 L 373, p. 1).

<sup>10</sup> Case C-251/04 - Commission v Greece EU: C: 2007:5

<sup>11</sup> Case C 17/13: Alpina River Cruises GmbH and Nicko Tours GmbH v Ministero delle infrastrutture e dei trasporti — Capitaneria di Porto di Chioggia