

JUDGMENT OF THE COURT (Sixth Chamber)

7 March 1996^{*}

In Case C-334/94,

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, and Xavier Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by Edwige Belliard, Assistant Director in the Legal Directorate of the Ministry for Foreign Affairs, and Hubert Renié, Foreign Affairs Secretary in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

defendant,

APPLICATION for a declaration that

— by retaining in force laws, regulations and administrative provisions restricting the right to register a vessel in the national register and to fly the national flag to vessels more than half the shares in which are owned by natural persons of French nationality or which are owned by legal persons having a seat in France or legal persons a certain proportion of whose directors, administrators or

^{*} Language of the case: French.

managers must be French nationals or, in the case of a private limited company, limited partnership, or general commercial or non-commercial partnership, more than half of whose capital must be held by French citizens or all of whose capital must be held by French persons who fulfil certain conditions, the French Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the EC Treaty, Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402) and Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10), and

— by not taking the appropriate measures to comply with the judgment of 4 April 1974 in Case 167/73 *Commission v France* [1974] ECR 359, the French Republic has failed to fulfil its obligations under Article 171 of the EC Treaty,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, G. F. Mancini, F. A. Schockweiler, J. L. Murray and H. Ragnemalm, Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 November 1995,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 22 December 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that
 - by retaining in force laws, regulations and administrative provisions restricting the right to register a vessel in the national register and to fly the national flag to vessels more than half the shares in which are owned by natural persons of French nationality or which are owned by legal persons having a seat in France or legal persons a certain proportion of whose directors, administrators or managers must be French nationals or, in the case of a private limited company, limited partnership, or general commercial or non-commercial partnership, more than half of whose capital must be held by French citizens or all of whose capital must be held by French persons who fulfil certain conditions, the French Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the EC Treaty, Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402) and Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1975 L 14, p. 10), and
 - by not taking the appropriate measures to comply with the judgment of 4 April 1974 in Case 167/73 *Commission v France* [1974] ECR 359, the French Republic has failed to fulfil its obligations under Article 171 of the EC Treaty.

The first branch of the application

2 Article 217 of the French Customs Code provides:

‘Registration as a French vessel confers on the vessel the right to fly the flag of the French Republic with the advantages appertaining thereto. It is an administrative operation, attested by a certificate of registration as a French vessel.’

3 Article 219 of that code, whose provisions are identical to those of Articles 3 and 3.1 of Law No 67-5 of 3 January 1967 on the status of seagoing vessels, as amended by Law No 75-300 of 29 April 1975, provides:

‘I. For registration as a French vessel, the following conditions must be fulfilled:

1. ...

2. A. At least half the shares in the vessel must be owned by French citizens who, if resident in the territory of the French Republic for less than six months a year, must designate an address there for all administrative or judicial purposes relating to the ownership and condition of the vessel.

B. Or all the shares in the vessel must be owned by companies or firms having their seats in the territory of the French Republic.

However, the seat may be situated in another State where, pursuant to an agreement between France and such State, a company or firm constituted under French law may lawfully carry on its activity in the territory of the other State and have its seat there and where it designates an address in France for all administrative or judicial purposes relating to the ownership and condition of the vessel.

In addition, regardless of where the seat is situated, the following must be French citizens:

- (a) In public limited companies: the chairman of the board of directors, the general managers and a majority of the directors; or the members of the management board and a majority of the members of the supervisory board, as the case may be;
- (b) In partnerships limited by shares: the managers and a majority of the members of the supervisory board;
- (c) In ordinary limited partnerships, private limited companies, and general commercial and non-commercial partnerships: the managers and the partners holding at least half of the capital.

C. Or all the shares in the vessel must be owned by French citizens meeting the conditions under A above and by companies or firms meeting the conditions under B, without any further requirement as to the distribution of the shares between them.

D. Or the vessel must be intended, after the exercise of an option to acquire ownership under a leasing arrangement, for ownership

- (a) in respect of at least half the shares, regardless of the identity of the remaining owners, by French citizens meeting the conditions under A above;
- (b) or in respect of all the shares by companies or firms meeting the conditions under B above;
- (c) or in respect of all the shares by French citizens meeting the conditions under A and by companies or firms meeting the conditions under B, without any further requirement as to the distribution of the shares between them.

3. In addition to the cases provided for under paragraph 2 above, special authorization to register a vessel as French may be granted by the minister for the merchant marine and the minister for the budget in the following two cases:

(1) When, in one of the situations provided for in paragraph 2(B), (C) and (D)(b) or (c), the interest in the vessel of the natural or legal persons meeting the conditions laid down therein as regards nationality, residence or seat extends not to all but to at least half of the shares in the vessel, provided also that the vessel is

operated either by those persons themselves or by other persons meeting the conditions under paragraph 2(A) or (B) above;

(2) When the vessel has been chartered under a demise charter by a French operator who has control over the vessel, its equipment and its commercial and nautical management, if the law of the State in which it is registered allows a change of registration in such circumstances.

II. A foreign vessel may also be registered as French when, following a shipwreck on the coast of the territory in which it is to be registered as French, it has become entirely French property and is manned by French citizens, following repairs amounting to at least four times the purchase price.'

- 4 In its objections to those provisions, the Commission distinguishes between cases where the vessel is an instrument of economic activity and those where it is not.

- 5 In the first case, the Commission submits that, by restricting the right to register a vessel in the French register and to fly the French flag to vessels more than half of the shares in which are owned by natural persons of French nationality, the French Republic is maintaining in force legislative provisions which discriminate on grounds of nationality, contrary to Article 6, and constitute a restriction on freedom of establishment, contrary to Article 52, of the Treaty. It refers to Case C-221/89 *The Queen v Secretary of State for Transport ex parte Factortame and Others* [1991] ECR I-3905, paragraph 30, to Case C-246/89 *Commission v United Kingdom* [1991] ECR I-4585, and to Case C-93/89 *Commission v Ireland* [1991] ECR I-4569.

- 6 It further submits that the requirement that legal persons owning vessels must have their seat in French territory and that a certain proportion of their capital must be controlled by French nationals is contrary to Article 52 of the Treaty (see *Factor-tame and Others*, paragraphs 33 and 35). It is also contrary to Article 52 for the law to require the actual control or management to be in the hands of French nationals.
- 7 Furthermore, the obligation for legal persons to have their seats in France is a restriction, contrary to Article 58 of the EC Treaty, on the right to set up and operate a company or firm having as its object the management of a vessel by an agency, branch or subsidiary.
- 8 Finally, the restriction on the participation by nationals of other Member States in the capital of the companies or firms referred to in the French legislation is contrary to Article 221 of the EC Treaty, under which Member States must accord such nationals the same treatment as their own nationals as regards participation in the capital of companies or firms (*Factortame and Others*, paragraph 31).
- 9 In cases where the vessels are not an instrument of economic activity, the Commission considers that the restrictions imposed by the national provisions in issue are contrary to Articles 6, 48 and 52 of the Treaty. They are also contrary to Article 7 of Regulation No 1251/70 and Article 7 of Directive 75/34, each of which, in its respective field, confirms the right of nationals of a Member State to the same treatment as that applied to nationals of the host Member State.
- 10 In the Commission's view, even though the registration of a vessel for leisure purposes does not concern the exercise of an economic activity in the strict sense, the availability of leisure activities in the Member States is a corollary to freedom of movement. The Commission refers to Case 186/87 *Cowan v Trésor Public* [1989] ECR 195, paragraph 20, and Case C-45/93 *Commission v Spain* [1994] ECR I-911).

- 11 The French Government does not contest the failure to fulfil its obligations with which it is charged by the Commission.
- 12 The first aspect to be considered is that of vessels used in the course of an economic activity.
- 13 The Court has held that the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the EEC Treaty has been implemented by Article 52 of that Treaty in the specific domain which it governs and that, consequently, any rules incompatible with the latter provision are also incompatible with Article 7 of the Treaty (*Commission v United Kingdom*, paragraph 18). Article 7 of the EEC Treaty has become Article 6 of the EC Treaty.
- 14 In *Factortame and Others* the Court noted that, in exercising its powers for the purpose of defining the conditions for the grant of its 'nationality' to a ship, each Member State must comply with the prohibition of discrimination against nationals of Member States on grounds of their nationality (paragraph 29) and that a condition which stipulates that where a vessel is owned or chartered by natural persons they must be of a particular nationality and where it is owned by a company the shareholders and directors must be of that nationality is contrary to Article 52 of the Treaty (paragraph 30).
- 15 The Court further stated that such a condition is also contrary to Article 221 of the Treaty, under which Member States must accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 58 (paragraph 31).
- 16 Finally, the Court held that a requirement for the registration of a vessel to the effect that it must be managed and its operations directed and controlled from

within the Member State in which it is to be registered essentially coincides with the actual concept of establishment within the meaning of Article 52 et seq. of the Treaty, which implies a fixed establishment (paragraph 34). It pointed out, however, that such a requirement would not be compatible with those provisions if it had to be interpreted as precluding registration in the event that a secondary establishment or the centre for directing the operations of the vessel in the Member State in which the vessel was to be registered acted on instructions from a decision-taking centre located in the Member State of the principal establishment (paragraph 35).

- 17 It follows that the French legislation restricting the right to register a vessel in the French register and to fly the French flag to vessels more than half the shares in which are owned by natural persons of French nationality is contrary to Articles 6 and 52 of the EC Treaty. The same applies to the requirement that a certain proportion of the capital of certain legal persons owning vessels must be controlled by French nationals and to the requirement that the actual control or management must be in the hands of French nationals.
- 18 Furthermore, the condition relating to the control of the capital of certain legal persons owning vessels is also contrary to Article 221 of the Treaty since it restricts participation by nationals of other Member States in the capital of such legal persons.
- 19 Finally, in so far as the French legislation requires legal persons owning vessels to have their seats in French territory and thus precludes the registration or management of a ship in the case of a secondary establishment such as an agency, branch or subsidiary, it is contrary to Articles 52 and 58 of the Treaty.
- 20 Next, the case of vessels which are not used in the context of an economic activity must be considered.

- 21 Under Community law, every national of a Member State is assured of freedom both to enter another Member State in order to pursue an employed or self-employed activity and to reside there after having pursued such an activity. Access to leisure activities available in that Member State is a corollary to that freedom of movement.
- 22 The registration by such a national of a leisure craft in the host Member State falls within the scope of the Community provisions relating to freedom of movement.
- 23 French legislation under which only French nationals may register in France leisure craft of which they own more than half the shares is therefore contrary to Articles 6, 48 and 52 of the Treaty, Article 7 of Regulation No 1251/70 and Article 7 of Directive 75/34.
- 24 With regard to the first branch of the application, therefore, it must be held that by retaining in force laws, regulations and administrative provisions restricting the right to register a vessel in the national register and to fly the national flag to vessels more than half the shares in which are owned by natural persons of French nationality or which are owned by legal persons having a seat in France or legal persons a certain proportion of whose directors, administrators or managers must be French nationals or, in the case of a private limited company, limited partnership, or general commercial or non-commercial partnership, more than half of whose capital must be held by French citizens or all of whose capital must be held by French persons who fulfil certain conditions, the French Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the Treaty, Article 7 of Regulation No 1251/70 and Article 7 of Council Directive 75/34.

The second branch of the application

- 25 This branch concerns the failure by the French Republic to comply with the judgment of 4 April 1974 in Case 167/73 *Commission v France* [1974] ECR 359.
- 26 In that judgment, the Court held that by maintaining unamended the provisions of Article 3(2) of the Maritime Labour Code as regards nationals of other Member States, the French Republic had failed to fulfil its obligations under Article 48 of the EEC Treaty and Article 4 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).
- 27 Under the second paragraph of Article 3 of the French Maritime Labour Code, a certain proportion of the crew of a ship, to be defined by order of the minister for the merchant marine, must be of French nationality.
- 28 The Commission states that an administrative circular issued after the above judgment was delivered contains instructions for disapplying the national law in issue. However, the Court has held that ministerial circulars are not adequate measures for compliance with obligations arising under Community law. The fact that the national legislation has not yet been amended to comply with the judgment of 4 April 1974 in Case 167/73 therefore constitutes a failure to fulfil the obligation under Article 171 of the Treaty to take the necessary measures to comply with a judgment.
- 29 The French Government, whilst not denying that failure, points out that, since the abovementioned circular was issued, the nationality requirement for persons working as mariners is no longer applied to Community nationals. It further

indicates that a draft law amending those rules to comply with the Court's judgment is currently being drawn up and should shortly be enacted.

- 30 It has consistently been held that the incompatibility of national legislation with provisions of the Treaty, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty (Case 168/85 *Commission v Italy* [1986] ECR 2945, paragraph 13).
- 31 Furthermore, even though Article 171 does not specify the period within which a judgment must be complied with, the importance of immediate and uniform application of Community law requires that the process of compliance must be initiated at once and must be completed as soon as possible (Case 169/87 *Commission v France* [1988] ECR 4093, paragraph 14). In the present case, the French Republic has failed to comply with a judgment delivered by the Court more than 20 years ago.
- 32 As regards the second branch of the application, therefore, it must be held that by not taking the appropriate measures to comply with the judgment of 4 April 1974 in Case 167/73, the French Republic has failed to fulfil its obligations under Article 171 of the EC Treaty.

Costs

- 33 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by retaining in force laws, regulations and administrative provisions restricting the right to register a vessel in the national register and to fly the national flag to vessels more than half the shares in which are owned by natural persons of French nationality or which are owned by legal persons having a seat in France or legal persons a certain proportion of whose directors, administrators or managers must be French nationals or, in the case of a private limited company, limited partnership, or general commercial or non-commercial partnership, more than half of whose capital must be held by French citizens or all of whose capital must be held by French persons who fulfil certain conditions, the French Republic has failed to fulfil its obligations under Articles 6, 48, 52, 58 and 221 of the EC Treaty, Article 7 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State and Article 7 of Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity;

2. Declares that, by not taking the appropriate measures to comply with the judgment of 4 April 1974 in Case 167/73 *Commission v France* [1974] ECR 359, the French Republic has failed to fulfil its obligations under Article 171 of the EC Treaty;

3. Orders the French Republic to pay the costs.

Kakouris

Mancini

Schockweiler

Murray

Ragnemalm

Delivered in open court in Luxembourg on 7 March 1996.

R. Grass

C. N. Kakouris

Registrar

President of the Sixth Chamber