

Important judgement on the relationship between EU and International Law: *MSC Orchestra* and sulphur emissions

Introduction

An issue of key concern to the shipping community is whether EU law prevails over international treaty law (in particular, treaties in the maritime sector).

The issue arose very clearly in the context of the *Manzi and Another v Capitaneria di Porto di Genova* (The “*MSC Orchestra*”) case (Case C-537/11, ECLI:EU:C:2014:19).

On 23 January 2014, the CJEU gave a preliminary ruling in *Manzi and Another v Capitaneria di Porto di Genova* (The “*MSC Orchestra*”) on the interpretation of Articles 2(3g) and 4a(4) of Council Directive 1999/32/EC on the reduction of sulphur content of certain liquid fuels and amending Directive 93/12/EEC, as amended by Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 (“Directive 1999/32”).

The case has wider implications than the subject matter would suggest at first. The case addresses, in part, the issue of what happens in the EU when the emissions regulation legislation of the EU diverges from the legislation of the International Maritime Organization (“IMO”). As this divergence is likely to grow (with the EU likely to have the tougher regime than the wider international community) then the case is interesting in that regard at the very least. While it relates to sulphur levels, it could well have a wider significance for the way in which maritime matters generally are addressed by the EU (and its courts) when there is a divergence between the EU and the international legal regime.

Factual Background

The factual background was straightforward. The Genoa Port Authority (i.e., the Capitaneria di Porto di Genova) (the “Port Authority”) found that the Panamanian-flagged cruise ship *MSC Orchestra* (the “Vessel”) consumed within the Port of Genoa marine fuels with a sulphur content in excess of the level of 1.5% by mass enshrined in EU law. The Port Authority thus issued an administrative penalty order against the captain, Mr Manzi (the “Master”) and the vessel owner, Compagnia Naviera Orchestra (“Shipowner”) as being jointly and severally liable. The Master and Shipowner instituted proceedings against the Port Authority and appealed the penalty order to the Tribunale di Genova.

The appellants argued: (a) there was a discrepancy between the EU’s Directive 1999/32 and the IMO’s Annex VI, Rule 14(1) to the International Convention for the Prevention of Pollution from Ships (the “Marpol Convention”) on the maximum amount of sulphur contained in marine fuels; (b) the Vessel flew the flag of a State Party to the Marpol Convention and was thus authorised to use a fuel with a sulphur content of less than 4.5% by mass where it is in the port of another State Party to the same protocol; and (c) Art. 4a(4) of Directive 1999/32/EC and Legislative Decree 152/2006 transposing that provision apply only to ships which operate “regular services” and this was not a category to which cruise ships belonged.

It is clear therefore that the Vessel owner wanted to abide by the higher IMO level of sulphur content at 4.5% in contrast to the lower EU 1.5% level and the net issue was which should prevail. The Vessel owner emphasised the fact that the Vessel flew a non-EU flag and, moreover, flew the flag of a State which had agreed to the higher IMO level.

Legal Background

Introduction

It is best to see the legal background as divided into three: (a) the international; (b) the EU; and (c) the Italian. Nothing turned on the Italian legal dimension because there was no issue about whether the Directive had been implemented properly; the issues turned therefore on the international and EU law aspects of the case.

International Law

The Marpol Convention - the International Convention for the Prevention of Pollution from Ships - was signed in 1973 and supplemented by a 1978 Protocol to establish rules to combat pollution of the marine environment. There was a further 1997 Protocol which added Annex VI to the convention. This Annex was entitled “Prevention of Air Pollution from Ships” (“Annex VI”). At the time of the case, among the Contracting Parties to the 1997 Protocol were 25 of the EU Member States (the Czech Republic, Hungary and Austria were not parties to it) and at that time, Rule 14(1) of Annex VI provided that, outside the emission control areas for sulphur oxide (SO_x), the content of sulphur oxide in marine fuels must not exceed 4.5% by mass.

European Union Law

The Directive at issue was Directive 1999/32. Recitals 1, 3 and 8 to the preamble to the Directive stated:

1. Whereas the objectives and principles of the Community’s environmental policy aim in particular to ensure the effective protection of all people from the recognised risks from sulphur dioxide emissions and to protect the environment by preventing sulphur deposition exceeding critical loads and levels...
3. Whereas emissions of sulphur dioxide contribute significantly to the problem of acidification in the Community; whereas sulphur dioxide also has a direct effect on human health and on the environment...
8. Whereas sulphur which is naturally present in small quantities in oil and coal has for decades been recognised as the dominant source of sulphur dioxide emissions which are one of the main causes of “acid rain” and one of the major causes of the air pollution experienced in many urban and industrial areas.”

Article 1(1) explained the purpose of Directive 1999/32:

“The purpose of this Directive is to reduce the emissions of sulphur

dioxide resulting from the combustion of certain types of liquid fuels and thereby to reduce the harmful effects of such emissions on man and the environment.”

Article 2(3f) of Directive 1999/32 provides a number of definitions for the purpose of that directive:

“ ‘passenger ships’ means ships that carry more than 12 passengers, where a passenger is every person other than:

- i. the master and the members of the crew or other person employed or engaged in any capacity on board a ship on the business of that ship, and
- ii. a child under one year of age”.

Critically important in the context of a cruise liner, Article 2(3g) of the Directive states that, for the purpose of that directive:

“ ‘regular services’ means a series of passenger ship crossings operated so as to serve traffic between the same two or more ports, or a series of voyages from and to the same port without intermediate calls, either:

- i. according to a published timetable, or
- ii. with crossings so regular or frequent that they constitute a recognisable schedule.”

Article 4a(4) of the Directive provided the relevant time line for the case:

“From [11 August 2006], Member States shall take all necessary measures to ensure that marine fuels are not used in their territorial seas, exclusive economic zones and pollution control zones by passenger ships operating on regular services to or from any Community port if the sulphur content of those fuels exceeds 1.5% by mass. Member States shall be responsible for the enforcement of this requirement at least in respect of vessels flying their flag and vessels of all flags while in their ports.”

Italian law

The provisions of Directive 1999/32 were transposed into Italian law by way what may be termed the “Italian Legislative Decree” so there was no issue in that regard.

Appellants’ Arguments in the Tribunale di Genova

The Master and the Shipowner made three arguments to appeal against the penalty. First, there is a discrepancy between the Directive and Annex VI as regards the maximum amount of sulphur contained in marine fuels. Secondly, the Vessel as a ship flying the flag of a State Party to the Marpol Convention and the 1997 Protocol, was authorised to use a fuel with a sulphur content of less than 4.5% by mass where it is in the port of another State Party to the same Protocol (i.e., in this case, Italy). Thirdly, Article 4a(4) of the Directive, and, therefore, the Italian Legislative Decree transposing that provision apply only to ships which operate ‘regular services’, a category to which cruise ships do not belong.

Questions referred by the Italian Court to the CJEU

During the course of the appeal proceedings, some questions of EU law arose. Those questions were referred to the CJEU under Article 267 of the TFEU.

The three questions referred were:

- “1. Is Article 4a of [Directive 1999/32], which was adopted in the light of the entry into force of [Annex VI], to be interpreted, in

accordance with the international principle of good faith and the principle of cooperation in good faith as between the Community and its Member States, as meaning that the limit, fixed by that provision, of 1.5% m/m of sulphur in marine fuels does not apply to ships flying the flag of a non-European Union State which is party to the Marpol Convention 73/78, where such ships are in the port of a Member State which is itself a party to [Annex VI]?

2. If Article 4a of [Directive 1999/32], is not to be interpreted as having the meaning proposed in Question 1, is that provision – in so far as it limits to 1.5% m/m the sulphur content of fuel for use by passenger ships operating regular services to or from a Community port, including ships flying the flag of a non-European Union State which is party to [Annex VI], pursuant to which, outside [the emission control areas for SO_x] the 4.5% m/m sulphur content limit applies – invalid on the basis that it is contrary to the general principle of international law *pacta sunt servanda* and to the principle of cooperation in good faith as between the Community and its Member States, in that it requires Member States which have agreed to and ratified Annex VI to act in breach of the obligations entered into towards the other States which are party to [Annex VI]?

3. Is the term “regular services” in Article 2(3g) of [Directive 1999/32], to be interpreted as meaning that cruise ships also count as ships operating “regular services”?”

Responses by the CJEU

Introduction

Interestingly, the CJEU decided to deal first with the third question. The CJEU is entitled to do this because it has given itself the power to answer just some of the questions asked by referring tribunals where it believes that this would be sufficient, to re-order the questions and even to reformulate entirely the questions referred. In this case, re-ordering the questions was very logical because the third question was a “threshold” one which if answered in the negative would have disposed of the issues for the CJEU.

The Third Question: Does a Cruise Ship fall within the Definition of “Regular Services”?

The third question asked whether a cruise ship fell within the scope of Article 4a(4) of the Directive with regard to the criterion of ‘regular services’ as laid down in Article 2(3g) in the Directive.

The CJEU ruled that a cruise ship falls within the definition of “regular services”, if it operates cruises finishing in the port of departure or another port, provided those cruises are organised at a particular frequency, on specific dates, and with interested persons being able to choose between the various cruises offered. So, the phrase “regular services” is not confined to scheduled ferry services. The CJEU was not determining whether the particular activities of the Vessel in this case amounted to “regular services” – that is a matter for the referring court, not the CJEU, to ascertain – but it laid the groundwork from which the referring court could hold that cruise liner services are regular services.

It is useful to study the CJEU’s reasoning in rejecting the appellants’ arguments:

- “18 in order to be covered by the system established by Article 4a(4) of [the] Directive, cruise ships must satisfy the criterion relating to ‘regular services’ laid down by Article 2(3g) thereof applicable to passenger ships. It is common ground that cruise ships fall within the latter category of ships.

- 19 According to the first condition of that provision, a passenger ship operates regular services if it makes ‘a series of crossings operated so as to serve traffic between the same two or more ports’ or ‘a series of voyages from and to the same port without intermediate calls’.
 - 20 A cruise ship therefore satisfies the first condition if it operates cruises which end at the port of departure without making intermediate calls.
 - 21 In order to determine whether a cruise ship may also satisfy the first condition in other situations, it must be ascertained whether such a ship may be regarded as operating crossings so as to ‘serve traffic between the same two or more ports’.
 - 22 The applicants in the main proceedings claim, first, that a cruise ship, such as that at issue in the main proceedings does not ‘serve traffic’. Cruise passengers do not purchase a package to be transported from one place to another; they do so with the broader purpose of tourism, the service provided being also the entertainment of those persons.
 - 23 However, such an interpretation of the concept of ‘traffic’, laid down in Article 2(3)(g) of [the] Directive, cannot be accepted.
 - 24 It must be observed that cruise ships transport passengers from one port to another in order for them to visit those ports and various places nearby. Since the European Union legislature has not specified the aims for which transport is carried out, it follows that such aims are irrelevant for the purpose of Article 2(3g) of [the] Directive. Thus, a series of crossings for the purpose of tourism must be regarded as traffic within the meaning of that provision.
 - 25 In so far as that directive intends to contribute to the protection of human health and the environment by reducing sulphur dioxide emissions, including those produced on sea voyages, that finding cannot be invalidated by the fact that those passengers enjoy additional services during the crossings, such as accommodation, catering services and entertainment.
 - 26 Second, the applicants in the main proceedings submit that a ship such as that at issue in the dispute before the referring court, does not operate crossings ‘between the same two or more ports’, since the port of departure is the same as the port of arrival and since it often happens that the intermediate calls planned in the itinerary are not made, whereas calls which have not been planned in the itinerary may be made when passengers so request in the interests of tourism.”
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- 28 In order to satisfy the criterion relating to ‘traffic between the same two or more ports’, which is specific to cases involving transport with intermediate calls, it is necessary that the traffic operated by a cruise ship be between ‘the same two or more ports’. A cruise between two or more ports must be regarded as a transport operation between ‘the same two or more ports’.
 - 29 The list of ports contained in the itinerary for a normal cruise will necessarily consist of at least two ports which cannot be avoided, that is the port of departure and the port of arrival. The transport is thus made between ‘the same two or more ports’, even where the transport ends at the port of departure.
 - 30 Furthermore, it must be observed that that interpretation is supported by the objective underlying [the] Directive, as set out in paragraph 25 of the present judgment. Whether or not cruise ships return to the port of departure is not such as to alter the rate of sulphur dioxide emissions.
 - 31 Consequently, if there are intermediate calls, the issue as to whether or not certain intermediate calls planned when the package is bought

are made, while other unscheduled calls may be made in their place, is irrelevant with regard to the concept of ‘traffic’ within the meaning of Article 2(2g) of [the] Directive...

- 32 It follows that a cruise ship which operates crossings with intermediate calls between two separate ports or finishing in the port of departure serves traffic between the same two or more ports within the meaning of that provision.
- 33 According to the second condition laid down in Article 2(3g) of [the] Directive, which is cumulative with the first, a passenger ship must operate a series of crossings or voyages in accordance with a published timetable or with crossings so regular or frequent that they constitute a recognisable schedule.
- 34 That condition is satisfied, in particular, where a shipping company proposes to the public a list of sea crossings on a cruise ship of a frequency determined, in particular by the capacity of that company and by public demand, on specific dates and, in principle, with specified times of departure and arrival, interested persons being able to choose freely between the various cruises offered by that company.”

The CJEU therefore responded that a cruise ship, such as the *Vessel*, fell within the scope of Article 4a(4) of Directive 1999/32 with regard to the criterion of ‘regular services’, as laid down in Article 2(3g), “provided that it operates cruises, with or without intermediate calls, finishing in the port of departure or another port, provided that those cruises are organised at a particular frequency, on specific dates and, in principle, at specified departure and arrival times, with interested persons being able to choose freely between the various cruises offered, which is a matter for the referring court to ascertain.”

The Second Question: whether Article 4a(4) of Directive 1999/32 is valid in the light of the general principle of international law *pacta sunt servanda* and the principle of cooperation in good faith

The CJEU then proceeded to answer the other two questions. The second question asked the CJEU whether Article 4a(4) of Directive 1999/32 is valid in the light of the general principle of international law *pacta sunt servanda* and the principle of cooperation in good faith laid down in the first subparagraph of Article 4(3) of the Treaty on European Union (“TEU”), on the ground that that provision of the Directive may lead to an infringement of Annex VI and thereby require Member States party to the 1997 Protocol to infringe their obligations with regard to the other Contracting Parties thereto. The CJEU responded:

- “...37 It must be held at the outset that the validity of Article 4a(4) of Directive 1999/32 cannot be determined in the light of Annex VI since the European Union is not a contracting party to the *Marpol 73/78* Convention, including Annex VI, and is not bound by it (see, by analogy, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraphs 47 and 52).
- 38 Nor can the validity of Article 4a(4) be examined in the light of the general principle of international law *pacta sunt servanda*, since that principle applies only to those subject to international law who are contracting parties to a specific international agreement and which, as a result, are bound by it.
- 39 Furthermore, it does not appear that Annex VI constitutes an expression of the customary rules enshrined by general international law which, are binding upon the institutions of the Union and form part of the legal order of the Union (see, to that effect, Case C-386/08 *Brita* [2010] ECR I-1289, paragraph 42).

- 40 Finally, it must be stated that the principles laid down in paragraphs 47 to 52 of *Intertanko and Others*, according to which the validity of Directive 1999/32 cannot be examined in the light of Annex VI may not be circumvented by relying on the alleged infringement of the principle of cooperation in good faith laid down in the first subparagraph of Article 4(3) TEU.
- 41 In those circumstances, the answer to the second question is that the validity of Article 4a(4) of Directive 1999/32 cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI and thereby oblige the Member States party to the 1997 Protocol to infringe their obligations with respect to the other contracting parties thereto."
- 50 In the present case, the 1997 Protocol is an international agreement to which only certain Member States are contracting parties while others are not.
- 51 Therefore, the Court is not required to interpret Article 4a(4) of Directive 1999/32 in the light of Annex VI and, in particular, Rule 14(1) thereof.
- 52 In those circumstances, the general principle of international law of good faith cannot usefully be relied upon before the Court.
- 53 Even assuming that the Court could interpret Article 4a(4) of Directive 1999/32 in the light of the sulphur content laid down in Annex VI, it suffices to state that, in the light of the objective pursued by that annex and set out in the title thereof, namely to protect the atmosphere by a reduction in harmful emissions produced by marine transport, that provision, in so far as it fixes a maximum limit on the sulphur content of marine fuel lower than that provided for by that annex, does not appear to be incompatible with such an objective.

The first question: Impact of Annex VI

In its first question, the national court asked the CJEU a question concerning the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32 with respect to the general principle of international law which requires international agreements to be implemented and interpreted in good faith. The CJEU responded:

- "...43 Annex VI was inserted into the Marpol 73/78 Convention by the 1997 Protocol. It contains, in particular, Rule 14(1) which provides that the sulphur content in marine fuels must not exceed 4.5% by mass.
- 44 Directive 1999/32 provides, in Article 4a(4), that the maximum sulphur content in marine fuels must not exceed 1.5% by mass. Neither that article nor any other provision of the Directive makes any reference, as regards the maximum sulphur content, to Annex VI.
- 45 In that connection, the Court has already held that, although the European Union is not bound by an international agreement, the fact that all its Member States are contracting parties to it is liable to have consequences for the interpretation of European Union law, in particular the provisions of secondary law which fall within the field of application of such an agreement. Therefore, it is incumbent upon the Court to interpret those provisions taking account of the latter (see, to that effect, *Intertanko and Others*, paragraphs 49 to 52).
- 46 That case-law cannot therefore be applied as compared with an international agreement to which only some Member States are contracting parties while others are not.
- 47 To interpret the provisions of secondary law in the light of an obligation imposed by an international agreement which does not bind all the Member States would amount to extending the scope of that obligation to those Member States which are not contracting parties to such an agreement. The latter Member States must however be regarded as 'third countries' for the purposes of that agreement. Such an extension would be incompatible with the general international law principle of the relative effect of treaties, according to which treaties must neither harm nor benefit third countries ('*pacta tertiis nec nocent nec prosunt*').
- 48 It is clear from the case-law of the Court that the latter is required to observe that principle since it constitutes a customary rule of international law which, as such, is binding upon the European Union institutions and forms part of its legal order (see, to that effect, *Brita*, paragraphs 42 to 44).
- 49 Furthermore, such an interpretation of secondary law would not be consistent with the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU.

- 54 Having regard to the foregoing, the answer to the first question is that it is not for the Court to rule on the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32."

So, the CEJU declined to rule on the impact of Annex VI on the scope of Article 4a(4) of the Directive.

Summary of the CJEU's Preliminary Ruling

The CJEU summarised its ruling as follows:

- "1. A cruise ship, such as that at issue in the main proceedings, falls within the scope of Article 4a(4) of Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, as amended by Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 with regard to the criterion of 'regular services', as laid down in Article 2(3g) thereof, provided that it operates cruises, with or without intermediate calls, finishing in the port of departure or another port, provided that those cruises are organised at a particular frequency, on specific dates and, in principle, at specified departure and arrival times, with interested persons being able to choose freely between the various cruises offered, which is a matter for the referring court to ascertain.
2. The validity of Article 4a(4) of Directive 1999/32, as amended by Directive 2005/33, cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI to the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 and thereby oblige the Member States party to the Protocol of 1997 amending the International Convention of 1973 for the Prevention of Pollution from Ships, as amended by the Protocol of 1978 relating thereto, signed in London on 26 September 1997, to infringe their obligations with respect to the other contracting parties thereto.
3. It is not for the Court to rule on the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32."

Assessment of the Case

The *Manzi* case has a wider significance than might first appear. First, it answered the question of whether a cruise ship can be engaged in "regular service" and, if so, in what circumstances. Secondly, the CJEU

decided that Article 4a(4) of Directive 1999/32, as amended by Directive 2005/33, cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI. Ultimately, and not surprisingly given that the duty of the CJEU is to uphold and apply EU law, the CJEU's ruling means that owners and operators of vessels flying non-EU must comply with the EU requirements (i.e., Article 4a(4) of Directive 1999/32) rather than the IMO but lesser requirements of Annex VI of MARPOL 73/78. In other words, compliance with international law is no defence, in this context, to a breach of EU law: it goes back to the notion that EU law can be supreme not only Member State law where there is a conflict but also, in some circumstances, international law as well. One might say: when in Rome, live by the Treaty of Rome!

The ruling is available on the [CJEU's website](#).

KEY CONTACTS



Dr. Vincent Power

Partner and Head of
EU, Competition & Procurement
T: +353 1 649 2226
E: vpower@algoodbody.com



Alan McCarthy

Partner
T: +353 1 649 2228
E: amccarthy@algoodbody.com



Anna Marie Curran

Partner
T: +353 1 649 2227
E: amcurran@algoodbody.com



Eileen Roberts

Partner
T: +353 1 649 2439
E: eroberts@algoodbody.com



Catherine Duffy

Partner
T: +353 1 649 2244
E: cduffy@algoodbody.com

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