

Introduction

Directive 2012/33/EU of the European Parliament and of the Council of 21 November 2012 amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels, imposes certain specific fuel quality requirements on *passenger ships operating on regular services to or from Union ports*.

This provision has sparked a debate on the exact meaning of the term "regular service". Obviously there is no doubt that regular passenger ferry services are covered. However, could cruise services, if operating according to a published schedule, also be caught by the notion of regular service?

On the 23rd of January 2014 the ECJ (Fourth Chamber) issued a Judgment in response to a request for a preliminary ruling under Article 267 TFEU from the Tribunale di Genova. The preliminary ruling states that under certain conditions cruise services can be considered 'regular services'.

However, there is still a margin of uncertainty regarding the required 'regularity'. Also, turning the question around, if passenger ferries and cruise ships and other tourist boats operating in accordance with a published schedule are performing 'regular services', then what are the passenger ships not performing regular services?

In order to see more clearly, a horizontal analysis has been made of the body of relevant EU maritime legislation adopted since the 1990s in which the notion of "regular services" has been used.

Other relevant legal instruments

In addition to the Sulphur Directive mentioned above, three legal instruments were identified that use the same term in their legal provisions, namely:

- a. Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on board passenger ships operating to or from ports of the EU Member States;
- b. Council Directive 1999/35/EC of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services;
- c. 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).

The first legal instrument (98/41) on passenger registration applies to all types of passenger ships, with the exception of: ships of war, troop ships and pleasure yachts carrying less than 12 passengers. Hence, passenger operations by ferries, or cruise ships, or party boats, etc. fall equally within the scope of this Directive.

The Directive does contain in Article 2, a definition of "regular service", as follows:

"regular service" shall mean a series of ship crossings operated so as to serve traffic between the same two or more ports, either

- a. according to a published timetable, or*

b. with crossings so regular or frequent that they constitute a recognisable systematic series.

In this definition, three elements are to be noted as particularly relevant for our case.

First, there is the notion of "ship crossings" which seems to refer to ferry operations. The routes followed by ferries are commonly referred to as "crossings", as in crossing the Channel, crossing the Strait of Messina, crossing the North Sea, etc. Cruise ships typically make round trips. Typically they embark their passengers at Port X, make a round trip of several days to visit a series of tourism- oriented places and finally return to Port X to disembark. The tourist itinerary may partly follow the coast line and may include (a) crossing(s) to visit (an) island(s), but the operation as a whole cannot be described as "a series of crossings between two or more ports".

Secondly, there is the expression "ship crossings so as to serve traffic between the same two (or more) ports". Again this form of words seems to refer to ferry operations. Ferries do serve traffic between two ports. That is indeed the essence and the purpose of their operation. Cruise ships do not "serve traffic". They transport passengers by sea against remuneration to a port for tourism purposes and leave that port after a period of time with the same group of passengers. They serve their passengers, but they do not "serve traffic" and certainly not "between the same two ports" because the cruise ship will move on to its next destination as listed in its scheduled itinerary.

Thirdly, there is the requirement of "regularity", either in the form of a published timetable, or with crossings so regular that no timetable is needed. This type of wording adequately describes common practice in ferry operations. If crossings are very short, sailings will be very frequent and no timetable is needed, since passengers can go to the ferry ramp and wait a moment for the ferry to arrive. On the other hand, ferries operating long distance crossings will sail according to a published timetable to accommodate the traffic between the ports they are serving. Cruise ships will also have their itinerary and sailing schedule published for sales purposes and logistics planning. As a matter of fact any passenger ship of substance will have to inform its (potential) passengers of its sailing schedule. However, it is hard to see how this type of wording ("published timetable, or regular frequent crossings") could have been intended to be applicable to cruise operations.

The second legal instrument (Directive 1999/35/EC) defines "regular service" in Article 2f in respect of ro-ro ferries and high-speed passenger craft. The wording used is the same as cited above ("a series of crossings", "so as to serve traffic" and "regularity").

It is to be noted that the scope of this Directive is exclusively limited to operations by ro-ro ferries and high-speed passenger craft. Operations with cruise ships are outside the scope.

The fact that the definition of "regular service by ro-ro ferries/high-speed craft" is the same as the definition of "regular service by passenger ships of all types" is a further indication that the definition is meant to describe ferry operations, not cruise operations.

Council Regulation 3577/92 on freedom to provide services in maritime cabotage uses the notion of "regular services" in relation to island-cabotage. According to our survey, this Regulation of 1992 was the first EU maritime legal instrument containing provisions on "regular services". The Regulation does not contain a definition, possibly because the expression and the context in which it was used were considered sufficiently clear. Coincidentally, the Commission has recently (22 April 2014) adopted a Communication on the interpretation of Council Regulation (EEC) No 3577/ 92, which will be examined in the following in tandem with the Regulation.

The Regulation does apply (see Article 2) to "maritime transport services within a Member State

(maritime cabotage) normally provided for remuneration". Operations by "cruise liners" are specifically referred to in Article 3.1 and fall within the scope. The Commission in its abovementioned Communication elaborates on this point (see paragraphs 3.1 and 3.3):

"Similarly, the remunerated carriage of passengers by boat by sea for touristic purposes starting and ending in the same port with the same passengers is covered by the Regulation, since such service is provided for remuneration and serves the purpose of transporting passengers by sea in the territory of a single Member State." Paragraph 3.3 of the Communication is dedicated to cruise services. It is stated in the opening phrase that "cruise services do fall within the scope of Regulation 3577/92".

However, can cruise services also be covered by the notion of "regular services" as used in the Regulation? The term "regular services" is used in Article 4, as follows:

*1. A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating **in regular services** to, from and between islands.*

2. 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.

In Recital 9 it is clarified that the above measures limiting the freedom to provide services can be justified *"in order to ensure the adequacy of regular transport services to, from and between islands"*. In its communication of 22 April 2014, Chapter 5, the Commission explains the thinking behind Article 4 in some more detail. In the opening phrase of Chapter 5 it is stated: *"The maritime transport of passengers and goods is **vital** for the inhabitants of Europe's islands"*. The idea that the regular services of Article 4 serve as a "life line" for isolated populations is further elaborated by the Commission in paragraph 5.1: *"The Commission considers that the application of Article 4 should be limited to those islands that can be reached only by sea or air and which have no permanent land links with the European mainland."* The idea of ensuring vital transport links for isolated communities is further strengthened by the quote *"In line with the opinion of Advocate General Tizzano, the possibility of applying Article 4(1) can be extended to services provided between places in an analogous situation to that of islands (e.g. banks of long fjords or estuaries with which there are no direct road links) where there is the same need of ensuring the adequacy of maritime transport services"*.

From the above, it is abundantly clear that the "regular services" as mentioned in Article 4 refer to ferry services. Ferries form the bridge between an island community and the European mainland. They bring the doctor to the island, or the patient from the island to the hospital on the mainland. They bring spare parts, medicine, energy and other essentials from the mainland to the island, etc. Cruise ships do not do any of that. Cruise ships, as stated before, transport a group of passengers living aboard to an island for sightseeing purposes and will leave after a period of time (typically, a number of hours) with that same group of passengers. Hence, cruise services – although falling within the scope of the Regulation – are not covered by the notion of "regular services" as used in the Regulation. The EU legislator has used the expression "regular services" to identify what in more colloquial language could be described as ferry services.

Conclusion

The EU legislator has consistently used the expression "regular services" when referring to ferry services. This happened for the first time in 1992 in the cabotage Regulation. The same expression was used – and defined – in Directive 98/41/EC on registration of passengers (OJ, 2

July 1998). Again the expression was used – with the same definition – in Directive 99/35/EC on mandatory surveys for ro-ro ferries (OJ, 1 June 1999). At roughly the same time the expression was used, with the same definition, in the initial Sulphur Directive 99/32/EC published in the OJ on 11 May 1999. It has to be concluded that the meaning of "regular services" has been the same in all four legal instruments and that cruise services were not meant to be covered by this notion.

If it were upheld that cruise services are to be considered as regular services, the consequences may not be limited to the Sulphur Directive (99/32/EC). It could be argued, for example, that Article 4 of the cabotage Regulation would also apply to cruise ships when engaged in services to, from and between islands. This may lead to unintended consequences.