JUDGMENT OF THE COURT (Grand Chamber)

13 June 2006 *

In Case C-173/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Genova (Italy), made by decision of 20 March 2003, received at the Court on 14 April 2003, in the proceedings

Traghetti del Mediterraneo SpA, in liquidation

v

Repubblica italiana,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), K. Schiemann and J. Makarczyk, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász and U. Lõhmus, Judges,

* Language of the case: Italian.

Advocate General: P. Léger,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 December 2004,

after considering the observations submitted on behalf of:

— Traghetti del Mediterraneo SpA, in liquidation, by V. Roppo, P. Canepa and S. Sardano, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by G. Aiello and G. De Bellis, avvocati dello Stato,

— the Greek Government, by E. Samoni and Z. Chatzipavlou, and by M. Apessos, K. Boskovits and K. Georgiadis, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, and by P. Sreenan SC and P. McGarry BL,

— the Netherlands Government, by S. Terstal, acting as Agent,

— the United Kingdom Government, by R. Caudwell, acting as Agent, and by D. Anderson QC and M. Hoskins, Barrister,

— the Commission of the European Communities, by D. Maidani and V. Di Bucci, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 October 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the principle of and the conditions governing the non-contractual liability of Member States for damage caused to individuals by a breach of Community law where that breach is attributable to a national court.

2 The reference was made in the context of proceedings brought against the Repubblica italiana by Traghetti del Mediterraneo SpA, a maritime transport undertaking currently in liquidation ('TDM'), for compensation for the damage suffered as a result of an incorrect interpretation by the Corte Suprema di Cassazione (Italian Supreme Court of Cassation) of the Community rules on competition and State aid and, in particular, because of that court's refusal to accede to its request that the relevant questions of interpretation of Community law be referred to the Court of Justice.

National legal context

3 Pursuant to Article 1(1) of Law No 117 of 13 April 1988 on compensation for damage caused in the exercise of judicial functions and the civil liability of judges (legge No 117 [sul] risarcimento dei danni cagionati nell' esercizio delle funzioni guidiziarie e responsabilità civile dei magistrati (GURI No 88 of 15 April 1988, p. 3; 'Law No 117/88'), that Law is to apply 'to all members of the ordinary, administrative, financial, military and special judiciary exercising a judicial function of any type, and to other persons participating in the exercise of a judicial function'.

4 Article 2 of Law No 117/88 provides:

'1. Any person who has sustained unjustifiable damage as a result of judicial conduct, acts or measures on the part of a judge who is guilty of intentional fault or serious misconduct in the exercise of his functions, or as a result of denial of justice, may bring proceedings against the State for compensation for pecuniary damage he has suffered or non-pecuniary damage caused to him by being deprived of his personal liberty.

2. In the exercise of judicial functions the interpretation of provisions of law or the assessment of facts and evidence shall not give rise to liability.

3. The following constitute serious misconduct:

(a) a serious breach of the law resulting from inexcusable negligence;

(b) the assertion, due to inexcusable negligence, of a fact the existence of which is indisputably refuted by the case-file;

(c) the denial, due to inexcusable negligence, of a fact the existence of which is indisputably established by documents in the case-file;

(d) the adoption of a decision concerning personal liberty in a case other than those provided for by law or without due reason.'

5 Under the first sentence of Article 3(1) of Law No 117/88, furthermore, 'any refusal, omission or delay by a judge in regard to the taking of measures for which he is responsible where, after expiry of the statutory time-limit for taking the measure in question, a party has submitted a request for such a measure and, without valid reason, no measure has been taken within 30 days following the date on which the application was lodged with the court registry' constitutes a denial of justice.

6 The subsequent articles of Law No 117/88 lay down the conditions and detailed rules under which an action for compensation may be brought pursuant to Article 2 or 3 of that Law, and actions which may be brought, subsequently, against a judge guilty of intentional fault, serious misconduct in the exercise of his functions or a denial of justice.

Background to the dispute in the main proceedings and the questions referred for a preliminary ruling

7 TDM and Tirrenia di Navigazione ('Tirrenia') are two maritime transport undertakings which, in the 1970s, ran regular ferry services between mainland Italy and the islands of Sardinia and Sicily. In 1981, when it had entered into an arrangement with its creditors, TDM brought proceedings against Tirrenia before the Tribunale di Napoli (Naples District Court) seeking compensation for the damage that it claimed to have suffered during the preceding years as a result of the low-fare policy operated by Tirrenia.

8 In that regard, TDM also submitted that its competitor had failed to comply with Article 2598(3) of the Italian Civil Code relating to acts of unfair competition and had infringed Articles 85, 86, 90 and 92 of the EEC Treaty (subsequently Articles 85, 86, 90 and 92 of the EC Treaty and now Articles 81 EC, 82 EC, 86 EC and, after amendment, 87 EC respectively) since, in its view, Tirrenia had infringed the basic rules of that Treaty and, in particular, abused its dominant position on the market in question by operating with fares well below cost owing to its having obtained public subsidies, the legality of which was doubtful under Community law.

9 By decision of 26 May 1993, upheld on appeal by the Corte d'appello di Napoli (Naples Court of Appeal) of 13 December 1996, registered on 7 January 1997, the action for compensation was, however, dismissed by the Italian courts on the ground that the subsidies granted by the authorities of that State were legal, since they reflected public interest objectives in connection, in particular, with the development of the Mezzogiorno and, in any event, did not adversely affect the operation of sea links other than and competing with those objected to by TDM. Thus it could not be held that Tirrenia was responsible for acts of unfair competition.

10 Taking the view, for his part, that those two decisions were vitiated by errors of law since, inter alia, they were based on an incorrect interpretation of the Treaty rules on State aid, the administrator of TDM lodged an appeal against the judgment of the Corte d'appello, requesting the Corte Suprema di Cassazione to submit the relevant questions of interpretation of Community law to the Court of Justice pursuant to the third paragraph of Article 117 of the EC Treaty (now the third paragraph of Article 234 EC).

11 By its judgment No 5087 of 19 April 2000 ('the judgment of 19 April 2000'), however, the Corte Suprema di Cassazione refused to accede to that request on the ground that the approach adopted by the court ruling on the substance followed the letter of the relevant provisions of the Treaty and was, moreover, perfectly consistent with the Court's case-law, in particular its judgment in Case 13/83 *Parliament* v *Council* [1985] ECR 1513.

12 In reaching that conclusion, the Corte Suprema di Cassazione noted, firstly, with regard to the alleged breach of Articles 90 and 92 of the Treaty, that those articles allow, on certain conditions, an exception to the general prohibition of State aid, in order to promote the economic development of underprivileged regions or to meet demands for goods or services which cannot be fully satisfied by the operation of free competition. According to that court, those conditions were met exactly in the present case since, during the period under consideration (between 1976 and 1980), bulk transport between mainland Italy and its main islands could not be operated by sea owing to the costs involved, so that it was necessary to meet the ever more pressing demand for that type of service by entrusting the running of such transport to a public concessionary applying a set schedule of charges.

13 According to that court, the distortion of competition ensuing from the existence of that concession did not, however, imply that the aid granted was automatically unlawful. The grant of such a public service concession always, by implication, had the effect of distorting competition and TDM had not succeeded in demonstrating

that Tirrenia had taken advantage of the aid granted by the State to make profits from activities other than those for which the subsidies were actually granted.

14 With regard, secondly, to the plea alleging infringement of Articles 85 and 86 of the Treaty, this was dismissed by the Corte Suprema di Cassazione as unfounded, on the ground that the activity of maritime cabotage had not been liberalised at the material time and that the restricted nature and geographical extent of that activity did not allow for clear identification of the relevant market for the purposes of Article 86 of the Treaty. In that context that court held, however, that although it was difficult to identify the market, there could none the less be real competition in the sector in question since the aid granted in this case affected only one activity amongst the numerous activities traditionally carried out by a maritime transport undertaking and that, furthermore, it was confined to a single Member State.

15 Consequently, in those circumstances, the Corte Suprema di Cassazione dismissed the appeal before it, having also rejected the complaints raised by TDM alleging infringement of the national provisions on acts of unfair competition and complaining that the Corte d'appello had failed to rule on TDM's request that the relevant questions be referred to the Court of Justice. The proceedings before the referring court arise from that decision to dismiss the appeal.

16 Taking the view that the judgment of 19 April 2000 was based on an incorrect interpretation of the Treaty rules on competition and State aid and on the erroneous premiss that there was settled case-law of the Court of Justice on the matter, the administrator of TDM, which had in the meantime been put into liquidation, instituted proceedings against the Repubblica italiana before the Tribunale di Genova (Genoa District Court) for compensation for the damage suffered by that undertaking as a result of the errors of interpretation committed by the Corte Suprema di Cassazione and of the breach of its obligation to make a reference for a preliminary ruling pursuant to the third paragraph of Article 234 EC.

17 Relying, in particular, in that respect, on Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ 2001 L 318, p. 9) — a decision relating, it is true, to subsidies granted after the period at issue in the main proceedings, but adopted following a procedure instituted by the Commission of the European Communities before the hearing before the Corte Suprema di Cassazione in the case which gave rise to the judgment of 19 April 2000 — TDM submits that, had that court made a reference to the Court of Justice, the outcome of the appeal would have been entirely different. Like the Commission in the abovementioned decision, the Court would have laid emphasis on the Community dimension of the maritime cabotage and the difficulties inherent in assessing the compatibility of public subsidies with the rules of the Treaty on State aid, which would have led the Corte Suprema di Cassazione to declare that the aid granted to Tirrenia was unlawful.

18 The Repubblica italiana disputes even the admissibility of that action for damages, basing its arguments on the provisions of Law No 117/88 and, in particular, on Article 2(2) thereof, pursuant to which the interpretation of provisions of law in the context of the exercise of judicial functions cannot give rise to State liability. If, however, the action should be held admissible by the referring court, it submits, in the alternative, that the action must in any event be dismissed since the conditions governing references for a preliminary ruling are not met and the judgment of 19 April 2000, being *res judicata*, may no longer be challenged.

19 In reply to those arguments, TDM raises the question of the compatibility of Law No 117/88 in the light of the requirements of Community law. In particular, it submits that the conditions governing the admissibility of actions laid down by that Law and the practice of the national courts (including the Corte Suprema di Cassazione) in that connection are so restrictive that they make it excessively difficult, indeed virtually impossible, to obtain compensation from the State for damage caused by judicial decisions. Consequently, that legislation disregards the principles laid down by the Court, inter alia, in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357 and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

20 In those circumstances, since it was unsure how to decide the dispute before it and whether it was possible to extend to the judiciary the principles laid down by the Court in the judgments, cited in the preceding paragraph, concerning infringements of Community law committed in the exercise of legislative activity, the Tribunale di Genova decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a Member State liable on the basis of non-contractual liability to individual citizens for errors by its own courts in the application of Community law or the failure to apply it correctly and in particular the failure by a court of last instance to discharge the obligation to make a reference to the Court of Justice under the third paragraph of Article 234 EC?

(2) Where a Member State is deemed liable for the errors by its own courts in the application of Community law and in particular for failure by a court of last instance to make a reference to the Court of Justice under the third paragraph of Article 234 EC, is affirmation of that liability impeded in a manner incompatible with the principles of Community law by national legislation on State liability for judicial errors which:

— precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions,

— limits State liability solely to cases of intentional fault and serious misconduct on the part of the court?'

21 Following delivery of the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239, the Registrar of the Court sent a copy of that judgment to the referring court asking it whether, in the light of the content thereof, it considered it necessary to continue its reference for a preliminary ruling.

22 By letter of 13 January 2004, received by the Court Registry on 29 January 2004, the Tribunale di Genova, having heard the parties to the main proceedings, took the view that the *Köbler* judgment gave a comprehensive answer to the first of the two questions which it had referred, so that it was no longer necessary for the Court to give a ruling on that question.

23 However, it considered it necessary to continue with its second question, in order that the Court give a ruling 'also in the light of the principles set out ... in the *Köbler* judgment' on the question whether 'national legislation on State liability for judicial errors impedes affirmation of that liability where it precludes liability in relation to the interpretation of provisions of law and assessment of facts and of the evidence adduced in the course of the exercise of judicial functions and limits State liability solely to cases of intentional fault and serious misconduct on the part of the court'.

The question referred for a preliminary ruling

24 A preliminary point to note is that the aim of the proceedings pending before the referring court is to have the State held liable in respect of a decision of a supreme court that is not subject to appeal. The question which the referring court wished to maintain must therefore be understood as concerning, in essence, the question whether Community law and, in particular, the principles laid down by the Court in

the *Köbler* judgment preclude national legislation such as that at issue in the main proceedings which, firstly, excludes all State liability for damage caused to individuals by an infringement of Community law committed by a national court adjudicating at last instance, where that infringement is the result of an interpretation of provisions of law or of an assessment of the facts and evidence carried out by that court, and, secondly, also limits such liability solely to cases of intentional fault and serious misconduct on the part of the court.

25 In the view of TDM and the Commission, that question calls clearly for an affirmative answer. Since assessment of facts and evidence and interpretation of provisions of law are inherent in the judicial function, the exclusion, in such cases, of State liability for damage caused to individuals by reason of the exercise of that function amounts, in practice, to exonerating the State from all liability for infringements of Community law attributable to the judiciary.

26 Furthermore, with regard to the limitation of that liability solely to cases of intentional fault or serious misconduct on the part of the court, that is also likely to lead to de facto exclusion of all State liability since, firstly, the court called upon to rule on an action for compensation for damage caused by a judicial decision is not left free to construe the actual concept of 'serious misconduct' itself but is bound by the strict definition laid down by the national legislature which sets out in advance — and exhaustively — what constitutes serious misconduct.

27 According to TDM, it follows, secondly, from experience gained in Italy in the implementation of Law No 117/88, that that State's courts and, in particular, the Corte Suprema di Cassazione adopt a very narrow reading of that law and of the concepts of 'serious misconduct' and 'inexcusable negligence'. Those concepts are

interpreted by that court as 'manifest, gross and large-scale infringement of the law' or as containing a construction of the law 'in terms contrary to all logical criteria', which leads in practice to the virtually systematic dismissal of complaints brought against the Italian State.

28 However, according to the Italian Government, supported on this point by Ireland and the United Kingdom Government, national legislation such as that at issue in the main proceedings is perfectly compatible with the very principles of Community law since it creates a fair balance between the need to preserve the independence of the judiciary and the essential requirements of legal certainty, on the one hand, and the provision of effective judicial protection of individuals in the most flagrant cases of infringement of Community law attributable to the judiciary, on the other.

29 On that view, if it were to be accepted, Member States' liability for damage resulting from such infringements ought therefore to be restricted solely to those cases in which there is a sufficiently serious infringement of Community law. However, liability could not be incurred where a national court has ruled on a dispute on the basis of an interpretation of articles of the Treaty which is adequately reflected in the reasons given by that court.

30 In that regard, it should be noted that, in the *Köbler* judgment, delivered after the date on which the national court made the reference to the Court, the Court held that the principle that a Member State is obliged to make good damage caused to individuals as a result of breaches of Community law for which it is responsible applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (see paragraph 31 of that judgment).

31 Basing its reasoning in that respect, inter alia, on the essential role played by the judiciary in the protection of the rights derived by individuals from Community rules and on the fact that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law, the Court infers that the protection of those rights would be weakened — and the full effectiveness of the Community rules conferring such rights would be brought into question — if individuals were precluded from being able, under certain conditions, to obtain reparation when their rights are affected by an infringement of Community law attributable to a decision of a court of a Member State adjudicating at last instance (see *Köbler*, paragraphs 33 to 36).

32 It is true that, having regard to the specific nature of the judicial function and to the legitimate requirements of legal certainty, State liability in such a case is not unlimited. As the Court has held, State liability can be incurred only in the exceptional case where the national court adjudicating at last instance has manifestly infringed the applicable law. In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it, which include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC (*Köbler*, paragraphs 53 to 55).

33 Analogous considerations linked to the need to guarantee effective judicial protection to individuals of the rights conferred on them by Community law similarly preclude State liability not being incurred solely because an infringement of Community law attributable to a national court adjudicating at last instance arises from the interpretation of provisions of law made by that court.

34 On the one hand, interpretation of provisions of law forms part of the very essence of judicial activity since, whatever the sphere of activity considered, a court faced with divergent or conflicting arguments must normally interpret the relevant legal rules — of national and/or Community law — in order to resolve the dispute brought before it.

35 On the other hand, it is not inconceivable that a manifest infringement of Community law might be committed precisely in the exercise of such work of interpretation if, for example, the court gives a substantive or procedural rule of Community law a manifestly incorrect meaning, particularly in the light of the relevant case-law of the Court on the subject (see, in that regard, *Köbler*, paragraph 56), or where it interprets national law in such a way that in practice it leads to an infringement of the applicable Community law.

36 As the Advocate General observed in point 52 of his Opinion, to exclude all State liability in such circumstances on the ground that the infringement of Community law arises from an interpretation of provisions of law made by a court would be tantamount to rendering meaningless the principle laid down by the Court in the *Köbler* judgment. That remark is even more apposite in the case of courts adjudicating at last instance, which are responsible, at national level, for ensuring that rules of law are given a uniform interpretation.

37 An analogous conclusion must be drawn with regard to legislation which in a general manner excludes all State liability where the infringement attributable to a court of that State arises from its assessment of the facts and evidence.

38 On the one hand, such an assessment constitutes, like the interpretation of provisions of law, another essential aspect of the judicial function since, regardless of the interpretation adopted by the national court seised of a particular case, the application of those provisions to that case will often depend on the assessment which the court has made of the facts and the value and relevance of the evidence adduced for that purpose by the parties to the dispute.

39 On the other hand, such an assessment — which sometimes requires complex analysis — may also lead, in certain cases, to a manifest infringement of the applicable law, whether that assessment is made in the context of the application of specific provisions relating to the burden of proof or the weight or admissibility of the evidence, or in the context of the application of provisions which require a legal characterisation of the facts.

40 To exclude, in such circumstances, any possibility that State liability might be incurred where the infringement allegedly committed by the national court relates to the assessment which it made of facts or evidence would also amount to depriving the principle set out in the *Köbler* judgment of all practical effect with regard to manifest infringements of Community law for which courts adjudicating at last instance were responsible.

41 As the Advocate General observed in points 87 to 89 of his Opinion, that is especially the case in the State aid sector. To exclude, in that sector, all State liability on the ground that an infringement of Community law committed by a national court is the result of an assessment of the facts is likely to lead to a weakening of the procedural guarantees available to individuals, in that the protection of the rights which they derive from the relevant provisions of the Treaty depends, to a great extent, on successive operations of legal classification of the facts. Were State

liability to be wholly excluded by reason of the assessments of facts carried out by a court, those individuals would have no judicial protection if a national court adjudicating at last instance committed a manifest error in its review of the above operations of legal classification of facts.

42 With regard, finally, to the limitation of State liability to cases of intentional fault and serious misconduct on the part of the court, it should be recalled, as was pointed out in paragraph 32 of this judgment, that the Court held, in the *Köbler* judgment, that State liability for damage caused to individuals by reason of an infringement of Community law attributable to a national court adjudicating at last instance could be incurred in the exceptional case where that court manifestly infringed the applicable law.

43 Such manifest infringement is to be assessed, inter alia, in the light of a number of criteria, such as the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, and the non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 234 EC; it is in any event presumed where the decision involved is made in manifest disregard of the case-law of the Court on the subject (*Köbler*, paragraphs 53 to 56). is

44 Accordingly, although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the *Köbler* judgment.

45 A right to obtain redress will therefore arise, if that latter condition is met, where it has been established that the rule of law infringed is intended to confer rights on individuals and there is a direct causal link between the breach of the obligation incumbent on the State and the loss or damage sustained by the injured parties (see inter alia, in that regard, *Francovich and Others*, paragraph 40; *Brasserie du Pêcheur and Factortame*, paragraph 51; and *Köbler*, paragraph 51). As is clear, in particular, from paragraph 57 of the *Köbler* judgment, those three conditions are necessary and sufficient to found a right in favour of individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions pursuant to national law.

46 In the light of the foregoing considerations, the answer to the question referred by the national court for a preliminary ruling, as reformulated in its letter of 13 January 2004, must be that Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court. Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the *Köbler* judgment.

Costs

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Community law precludes national legislation which excludes State liability, in a general manner, for damage caused to individuals by an infringement of Community law attributable to a court adjudicating at last instance by reason of the fact that the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court.

Community law also precludes national legislation which limits such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation were to lead to exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed, as set out in paragraphs 53 to 56 of the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239.

[Signatures]