OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 1 July 2010[1]

1. The Commission asks the Court to declare that, by signing an exclusive public service contract with Gozo Channel Company Ltd ('GCCL') on 16 April 2004, without having undertaken a prior call for tenders, the Republic of Malta has failed to fulfil its obligations under Council Regulation (EEC) No 3577/92, [2] in particular Articles 1 and 4 thereof.

2. Malta's principal defence is that, on the date in question, the Regulation was not applicable to it. Malta acceded to the European Union only on 1 May 2004, although the Accession Treaty [3] had been signed on 16 April 2003.

3. Prompted by the Court, the Commission has stressed the duty of a State to observe the terms of a treaty in good faith and, pending its entry into force, to refrain from acts which would defeat its object and purpose – principles of international law expressed in Articles 18 and 26 of the Vienna Convention on the Law of Treaties. [4]

1 — Original language: English.

2 — Of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7; hereinafter 'the Regulation').

3 — Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17; hereinafter 'the Accession Treaty').

4 — Concluded at Vienna on 23 May 1969; entered into force on 27 January 1980 (*United Nations Treaty Series*, vol. 1155, p. 331; 'the Vienna Convention').

Legal context

Vienna Convention

4. The Vienna Convention to a large extent consolidates the international law of treaties. It applies, under Article 1, to treaties between States (thus including the Accession Treaty) and, under Article 5, to any treaty which is the constituent instrument of an international organisation (thus including the various European Community and Union Treaties). [5] A number of its provisions reflect rules of customary international law which, as such, form part of the Community legal order. [6] Article 18 (which embodies the so-called 'interim obligation') and Article 26 (which spells out the requirement of good faith) are generally considered to be among those provisions. [7] Although they are not, as such, binding on Malta, [8] it is useful to set them out as a formulation of what Malta accepts are the rules of customary international law applicable to it.

5. Article 18, entitled 'Obligation not to defeat the object and purpose of a treaty prior to its entry into force', provides:

'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.'

5 — However, of the current Member States, France, Malta and Romania are not signatories of the Vienna Convention and, although all the others have now ratified it, or acceded or succeeded to it, Luxembourg and Portugal did so only between the signature and the entry into force of the Accession Treaty, and Ireland only after the latter date (see the United Nations Treaty Collection website at http://treaties.un.org).

6 — See, most recently, Case C-386/08 *Brita* [2010] ECR I-1289, paragraphs 40 to 42 and the case-law cited there.

7 — Not all authorities, however, agree on the extent to which Article 18 constitutes simply a codification, rather than a development, of customary international law: see, for example, Sinclair, I., *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1973, p. 22; for an account of some of the formulations of the customary rule, differing from that in the Vienna Convention, see also Klabbers, J., 'How to defeat a treaty's object and purpose pending entry into force: toward manifest intent', 34 *Vanderbilt Journal of Transnational Law*, p. 283, March 2001.

8 — See footnote 5 above.

6. Article 26, entitled '*Pacta sunt servanda*', states:

'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

EC Treaty

7. Article 226 EC (now Article 258 TFEU) provides:

'If the Commission considers that a Member State has failed to fulfil an obligation under [this Treaty/the Treaties], it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice [of the European Union].'

8. In the words of the second paragraph of Article 249 EC (now Article 288 TFEU):

'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'

9. Under Article 254(1) and (2) EC (now, after amendment, Article 297 TFEU), regulations enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication in the *Official Journal of the European Union*.

Accession Treaty and Act of Accession

10. Under Article 1(1) of the Accession Treaty, 10 new States, including Malta, became 'members of the European Union and Parties to the Treaties on which the Union is founded as amended or supplemented'. Article 1(2) specified:

'The conditions of admission and the adjustments to the Treaties on which the Union is founded, entailed by such admission, are set out in the Act annexed to this Treaty. [[9]] The provisions of that Act shall form an integral part of this Treaty.'

9 — Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33; 'the Act of Accession').

11. Pursuant to Article 2(2), the Accession Treaty, which was signed in Athens on 16 April 2003, entered into force on 1 May 2004.

12. Article 2 of the Act of Accession provided:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.'

13. No conditions were laid down as regards the application of the Regulation to Malta.

14. Malta deposited its instrument of ratification of the Accession Treaty with the Italian Government on 30 July 2003.

Regulation No 3577/92

15. The Regulation was adopted by the Council on 7 December 1992 and published in the *Official Journal of the European Communities* on 12 December 1992.

16. Article 1(1) provides:

'As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of, a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State, including ships registered in Euros, once that Register is approved by the Council.'

17. Under Article 2(1), 'maritime transport services within a Member State (maritime cabotage)' means 'services normally provided for remuneration', including in particular, under (c), second indent, 'island cabotage: the carriage of passengers or goods by sea between … ports situated on the islands of one and the same Member State'.

18. Article 2(4) defines 'public service obligations' as 'obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions'.

19. Article 4 provides:

'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.

Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.

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.

Where applicable, any compensation for public service obligations must be available to all Community shipowners.

3. Existing public service contracts may remain in force up to the expiry date of the relevant contract.'

20. In accordance with Article 11, the Regulation entered into force on 1 January 1993. However, pursuant to Article 6, various cabotage services – within the Mediterranean, along the coasts of Spain, Portugal and France and with regard to certain Spanish, Portuguese and French coastal islands and islands and territories outwith Europe – were exempted from implementation of the Regulation until various dates, between 1 January 1995 and 1 January 2004.

Factual and procedural context

21. During the negotiations preceding the conclusion of the Accession Treaty, the question of Malta's progressive achievement of conformity with the *acquis* in the field, inter alia, of maritime transport was raised and discussed on a number of occasions.

22. In that context, a common position of 26 October 2001 [10] stated: '… the EU notes that Malta intends to conclude explicit public service obligation contracts both with Sea Malta Co. Ltd and [with GCCL] of 5 years duration each by 30 June 2002 and that upon termination of these contracts tendering procedures will apply in line with the relevant

10 — Conference on accession to the European Union – Malta – doc. 20766/01 CONF-M 80/01.

acquis'. In the common position, the EU further noted that 'at this stage, this chapter does not require further negotiation' but pointed out that, in the light of monitoring of the *acquis*, it might 'return to this chapter at an appropriate moment'.

23. In the event, the contract with GCCL, [11] for the provision of a regular high-speed ferry service between the islands of Malta and Gozo, was not signed until 16 April 2004 (a year after the signature of the Accession Treaty and some two weeks before its entry into force), and was concluded for a non-renewable period of six years, not five.

24. It is not disputed that the contract was awarded without any opportunity being given for Community shipowners to tender.

25. Following an administrative procedure in conformity with Article 226 EC, the Commission now asks the Court to declare that, by signing an exclusive public service contract with GCCL on 16 April 2004, without having undertaken a prior call for tenders, the Republic of Malta has failed to fulfil its obligations under the Regulation, in particular Articles 1 and 4, and to order the Republic of Malta to pay the costs.

26. Malta asks the Court to declare that the Regulation was not and is not applicable to the disputed contract, to dismiss the application as unfounded, and to order the Commission to bear the costs.

Assessment

27. Malta's defence is, principally, that the Regulation did not apply to it at the relevant time. In the alternative, it submits that the award of the disputed contract was, in essence, authorised during the course of the accession negotiations (although delayed for justifiable reasons), and/or was in any event justified by a real need, and was proportionate to the objectives pursued.

28. In this Opinion, I shall address only the principal argument, which provides, in my view, a sufficient basis on which to dismiss the Commission's application, without there being any need to discuss in detail Malta's other submissions in defence.

11 — It appears from the pleadings that a contract was also concluded with Sea Malta Co. Ltd, but that the company was subsequently wound up.

29. The major obstacle to the Commission's application is simple. A declaration of the type sought can concern only a failure to fulfil an obligation under the Treaties, which includes the obligation to comply with a regulation adopted by virtue of the Treaties. Such an obligation can arise only when the Member State in question is bound by the Treaties, and thus by any regulation adopted by virtue thereof. However, the declaration sought in the present case is that Malta failed to comply with the Regulation by taking a certain step at a time before it became bound by the EC Treaty.

30. The Commission has not, in my view, surmounted that obstacle.

31. There are, however, two possible objections to that view, which must be addressed. Can the declaration sought be construed as relating not to the actual award of the contract on 16 April 2004 but to its maintenance in effect after 1 May 2004? And can Malta be regarded as having been bound to comply with the Regulation before the latter date?

32. Before examining either of those questions, it seems helpful to recall certain aspects of the Court's case-law regarding infringement proceedings.

Case-law regarding infringement proceedings

33. First, as the Court has made clear, the purpose of the pre-litigation procedure in infringement proceedings is both to give the Member State an opportunity to comply with its obligations under EU law and to allow it to defend itself against the charges formulated by the Commission. Consequently, (a) the subject-matter of the proceedings is delimited by the pre-litigation procedure and (b) both the reasoned opinion and the application to the Court must set out the Commission's complaints precisely, unambiguously and in detail, so that the Member State and the Court may appreciate exactly in what way the former is claimed to have failed to fulfil one of its Treaty obligations, and so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint. [12]

34. Second, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion. [13]

12 — See, among many other examples, Case C-340/02 *Commission* v *France* [2004] ECR I-9845, paragraphs 25 to 27, Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraph 48, and Case C-457/07 *Commission* v *Portugal* [2010] ECR I-8091, paragraphs 67 and 68, together with the case-law cited in those judgments.

13 — See, for example, Case C-235/04 *Commission* v *Spain*, cited in footnote 12 above, paragraph 52.

35. Finally, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to enable it to determine that point. The Commission may not merely claim in its application that, by taking certain action, a Member State has failed to fulfil its obligations under a provision in a regulation, thereby inferring from that provision legal consequences which may not necessarily flow from it. In order to establish its claim, it must prove that the conditions for applying that provision are in fact fulfilled in the case in question. [14]

Award of the contract or maintenance in effect?

36. The declaration which the Commission seeks is, unambiguously, that Malta failed to fulfil its obligations under the Regulation by concluding a particular contract on 16 April 2004.

37. In its reasoned opinion of 12 December 2006, the Commission used practically identical wording in relation to the allegation of failure to fulfil obligations. In that document, however, it also called upon Malta to take the measures necessary to comply with the reasoned opinion within two months from the date of receiving it.

38. Clearly, Malta could not be expected to travel backwards in time in order *not* to conclude the contested contract on 16 April 2004. The measures necessary to comply with the reasoned opinion could only be those which would have led to termination of the contract, or to a new award following a non-discriminatory tendering procedure.

39. Such a situation is not uncommon in infringement proceedings concerning, for example, the award of specific public contracts contrary to the EU procurement rules. In the light of Article 258 TFEU and the Court's case-law, where the Commission considers that such a contract has been awarded unlawfully, it must, after giving the Member State concerned the opportunity to submit its observations, first call upon that Member State to remedy the illegality (by whatever means are at that stage available) by a certain date and may then, if the Member State has not done so, bring proceedings before the Court, which will give its judgment having regard to whether the unlawful situation still prevailed on the date set by the Commission.

14 — See Case C-347/98 *Commission* v *Belgium* [2001] ECR I-3327, paragraphs 38 and 39.

40. That scenario thus implies that the Court will either find that the Member State failed to fulfil its obligations if the illegality had not been remedied by that date or dismiss the Commission's action if it had been remedied. [15] In the former case, however, the Court's declaration will still be linked to the original unlawfulness of the award, and not to the failure to remedy it. [16]

41. Consequently, even if the present infringement proceedings as a whole seek to bring about an end to the situation alleged to be unlawful in the light of the Regulation, or to have Malta censured for not having brought about that end within the period accorded for that purpose, their success is necessarily dependent on a finding that the award of the contract was unlawful on the date of its conclusion, or at least became unlawful on some subsequent date.

42. The declaration sought here alleges a failure to fulfil obligations under the Regulation, and not under any other instrument. Consequently, for the action to be successful, the award of the contract must have been prohibited by the Regulation – either on 16 April 2004, when it was concluded (first hypothesis), or on 1 May 2004, when the Regulation became binding on Malta pursuant to Article 2(2) of the Accession Treaty and Article 2 of the Act of Accession (second hypothesis).

43. The second hypothesis may be dismissed fairly briefly.

44. The contested contract was already in existence before 1 May 2004, and Article 4(3) of the Regulation explicitly allows existing public service contracts to remain in force up to their expiry dates. [17]

45. I cannot accept the Commission's suggestion, made at the hearing, that Article 4(3) concerns only contracts existing on 1 January 1993, even in relation to Member States acceding to the Union more than a decade later. The provision refers to 'existing contracts', not to "contracts existing on 1 January 1993". In order to meet the requirements of legal

15 — An example of the latter type (albeit in relation to the adoption and maintenance in force of an ordinance of broader applicability, rather than to the award of a specific contract) may be found in Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, paragraph 16.

16 — An example may be found in Case C-16/98 *Commission* v *France* [2000] ECR I-8315, paragraphs 1, 12 to 22 and 113. One may contrast the situation in procedures concerning State aid under Article 88(2) EC (now Article 108(2) TFEU and previously Article 93(2) of the EC Treaty), where the only issue is the obligation, imposed by the Commission's decision, to remedy the unlawfulness; see, for example, Case 213/85 *Commission* v *Netherlands* [1988] ECR 281, paragraphs 7 and 8.

17 — It may be noted, also, that there is no Treaty provision having, with regard to contracts with natural or legal persons, the same effect as Article 307 EC (now Article 351 TFEU) has with regard to international agreements. That provision requires new Member States to eliminate any incompatibilities between international agreements, concluded before accession, and the Treaties.

certainty, the term 'existing' can there mean only 'in existence on the date of entry into force of the Regulation'.[18] For States which acceded to the Union after 1 January 1993, that date is the date of their accession – a point with which the Commission itself agrees. Indeed, by accepting, in the common position of 26 October 2001, that a contract concluded from June 2002 to June 2007 would be compatible with Malta's future obligations, without any need to lay down any conditions as regards the application of the Regulation to Malta, the EU negotiators implicitly acknowledged that Article 4(3) would apply to such a contract.

46. The Commission's contention, in its reply, that it was as from 1 May 2004 that Malta was not in compliance with its obligations under the Regulation cannot, therefore, be upheld.

47. In any event, a finding to the effect that Malta had failed to fulfil its obligations under the Regulation as from 1 May 2004 would contradict the form of declaration sought by the Commission itself – and it is not open to the Commission to seek to change or reinterpret that form of declaration at a later date, as it seemed to attempt at the hearing.

48. It is therefore to the first hypothesis that I now turn. That hypothesis involves the existence of an obligation on Malta not to conclude the contract pending accession.

Obligation prior to accession?

49. Nothing in the Accession Treaty or the Act of Accession – which Malta had signed on 16 April 2003, depositing its instrument of ratification on 30 July 2003 – explicitly rendered the Regulation binding on Malta before that Treaty entered into force. On the contrary, it seems an inescapable conclusion from Article 2 of the Act of Accession that the Regulation became binding on Malta only on that date – 1 May 2004.

50. However, it appears that during the negotiation phase Malta stated that it intended to conclude a five-year contract with GCCL by 30 June 2002, and that such a contract was acceptable to the EU side as compatible with accession; but that in fact Malta concluded the disputed contract for six years on 16 April 2004, an eventuality which had been neither accepted by nor even presented to the EU negotiators.

18 — See further point 58 et seq. below.

51. A first point to note is that the Commission did not, at any point in its application to the Court, or in its reply to Malta's defence explicitly raising the question of the applicability of the Regulation to Malta at the material time, contend that its case was based in any way or in any degree on any obligation which might have been incumbent on Malta prior to the entry into force of the Accession Treaty. On the contrary, it clearly stated in its reply that 'it was precisely from that date, namely the date of accession, that the Republic of Malta was not in compliance with its obligations under Council Regulation (EEC) No 3577/1992'.

52. In those circumstances, the Commission would clearly be failing in its obligation, as applicant to the Court, to set out all the elements necessary to establish its case if it were subsequently to rely on the existence of an earlier obligation. Indeed, such a situation would be contrary to the first subparagraph of Article 42(2) of the Court's Rules of Procedure, which provides: 'No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'. [19]

19 — See Case C-279/89 *Commission* v *United Kingdom* [1992] ECR I-5785, paragraphs 14 to 17.

53. However, the Court itself has asked the parties to comment, having regard to the applicability *ratione temporis* of the Regulation in the circumstances of this case, on the importance to be given to the obligation of acting in good faith during the period preceding the entry into force of a treaty.

54. It might be wondered whether, were the Court to decide that an infringement arose as a result of an obligation not relied upon by the Commission in its application or reply, that would not represent the raising of a plea by the Court of its own motion.

55. It is settled case-law that pleas involving matters of public policy may, and even must, be raised by the Court of its own motion when they are not raised by the parties. However, on the one hand, it does not seem that the Court has ever previously done so in order to extend the scope of the Commission's allegations in the context of infringement proceedings against a Member State and, on the other hand, the 'matters of public policy' raised by the EU judicature on that basis relate to essential procedural requirements rather than to substantive legal arguments. [20] It would, in any event, appear to be a novel departure

20 — Thus, for example, failure to observe a proper pre-litigation procedure (which is an 'essential guarantee' required by the Treaty – see Case C-442/06 *Commission* v *Italy* [2008] ECR I-2413, paragraph 22 and the case-law cited there) might be raised by the Court of its own motion, even if the Member State itself did not explicitly do so. For the distinction drawn in the context of an appeal, see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67.

for the Court to supplement the Commission's arguments against a Member State in infringement proceedings. In my view, such a course of action would not be consistent with the accusatorial, quasi-penal nature of such proceedings.

56. Be that as it may, in response to the Court's question, the Commission has expressed its view (a) that, as a future Member State, Malta was obliged to act in good faith as from the date of the common position of 26 October 2001; and (b) that it was undoubtedly obliged to refrain from acting in breach of EU law as from the date of its signing the Accession Treaty on 16 April 2003. None the less, the Commission pursues, Malta did conclude the contested contract, in circumstances which indicate bad faith. In that regard, it considers the requirement of good faith, and its expression in Articles 18 and 26 of the Vienna Convention, to be of primordial importance.

57. In order to make the declaration sought, however, the Court must in my view find not only that Malta's obligation not to conclude the disputed contract on 16 April 2004 stemmed from its status as a future Member State which had signed and ratified the Accession Treaty but also – and as a prior matter – that the Regulation itself could place obligations on Member States before its entry into force.

58. The period before a regulation which forms part of the *acquis* enters into force in a Member State on accession is comparable to the period between its adoption or publication and its entry into force in respect of an existing Member State. Whatever obligations may lie on a future Member State during the pre-accession period, they cannot be greater than those which lie on an existing Member State during the comparable period before ordinary entry into force. Consequently, it is only if one of the then 12 Member States would have been in breach of its obligations under the Regulation by concluding an equivalent contract between the adoption or publication of the Regulation, on 7 or 12 December 1992 respectively, and its entry into force, on 1 January 1993, that it can be considered whether Malta was in breach of its obligations during the period immediately prior to becoming a Member State.

59. In that regard, it is clear that a regulation is binding in its entirety (and on all, be they Member States, institutions or individuals) from the date of its entry into force, but not before – unless, in exceptional circumstances, its provisions have explicit retroactive

effect. [21] The rule in Article 254(1) and (2) EC (Article 297 TFEU), which ensures that each regulation has a clearly ascertainable date of entry into force, is an essential expression of the principle of legal certainty. If regulations were to produce their effects before their date of entry into force, that date would be meaningless.

60. In the present case, the Regulation contains no explicitly retroactive provision. On the contrary, not only does Article 11 specify the date of entry into force is 1 January 1993, but Article 1(1) explicitly states that freedom to provide maritime transport services is to apply as from 1 January 1993, and Article 4(3) explicitly states that *existing* public service contracts may remain in force up to their expiry date. In that context (regarding the then 12 Member States [22]), existing contracts can mean only those existing either on 1 January 1993 or (possibly, with regard to the services temporarily exempted from the implementation of the Regulation pursuant to Article 6), on the date on which the relevant temporary exemption came to an end. [23]

61. I therefore consider that a Member State which, in late December 1992, might have concluded a public service contract without an appropriate Community invitation to tender could not have been censured for failing to fulfil its obligations *under Articles 1 and 4 of the Regulation*.

62. It is true that Member States are also under a more general duty of sincere cooperation, expressed now in Article 4(3) TEU (previously Article 10 EC and earlier Article 5 of the EC Treaty), which implies taking all appropriate measures to ensure fulfilment of obligations arising out of the Treaties or out of action taken by the institutions, facilitating the achievement of the Community's (or Union's) tasks and refraining (or abstaining) from any measure which could jeopardise the attainment of the objectives of the Treaties.

63. It was on that last-mentioned obligation that the Court based its ruling in

21 — See, for an example of such exceptional circumstances, Case C-337/88 *SAFA* [1990] ECR I-1.

22 — See also point 45 above.

23 — See point 20 above. The point has not been decided by the Court, but there are suggestions in its recent judgment in Case C-122/09 *Enosi Efopliston Aktoploïas and Others* [2010] ECR I-3667, paragraphs 15 and 17, and in its order of 28 September 2006 in Case C-285/05 *Enosi Efopliston Aktoploïas and Others*, paragraph 19, cited in paragraph 10 of the judgment in Case C-122/09, that a Member State might be under an obligation not to take any steps likely seriously to compromise the application of the Regulation after the end of the period of temporary exemption. See further point 63 et seq. below, especially point 65 and footnote 25.

Inter-Environnement Wallonie [24] that Member States to which a directive is addressed must refrain, during the period laid down for its implementation, from adopting measures liable seriously to compromise the result prescribed.

64. However, I do not consider that that now settled case-law can be simply transposed from directives to regulations. A directive typically specifies a date on which it enters into force and a date by which Member States must have implemented it. It is during the period between those dates that the Court's case-law requires Member States to refrain from adopting measures liable seriously to compromise the result prescribed. The Court has never ruled that such an obligation exists also during the earlier period between the adoption and/or publication of a directive and the date of its entry into force. To do so would, in my view, be again to render meaningless the date of entry into force.

65. Where regulations are concerned, there is no transitional period of implementation, only a period between adoption and/or publication and entry into force, whereupon the regulation becomes binding in its entirety. The period to which the *Inter-Environnement Wallonie* case-law relates therefore does not exist in the case of regulations. [25]

66. I would not go so far as to suggest that there can never be circumstances in which a Member State may be guilty of a failure to comply with its duty of sincere cooperation as a result of action taken at a time when a directive or regulation was in existence but had not yet entered into force. However, it seems to me that in such a case, the criterion of action 'liable seriously to compromise' the useful effect of the measure in question would have to be interpreted particularly strictly. Possibly only action which could not be reversed before the deadline for transposition of a directive, or which would in some way prevent the regulation from being applied in such a way as to achieve its purpose, would constitute a failure to comply with the duty of sincere cooperation in such circumstances. [26]

67. Whilst it is true that there is no *de minimis* rule in relation to Treaty infringement

24 — Case C-129/96 [1997] ECR I-7411, paragraph 45 of the judgment and point 2 of the operative part. See also the Opinion of Advocate General Jacobs, in particular, point 33 and point 39 et seq.

25 — I accept the – as yet unconfirmed – possibility that a temporary derogation or exemption from the application of a regulation (and, in particular, the present Regulation) may entail an obligation equivalent to that in the *Inter-Environnement Wallonie* case-law (see point 60 and footnote 23 above), but the present case is concerned with a situation in which no such derogation or exemption existed when the Regulation entered into force in the Member State in question.

26 — See also the Opinion of Advocate General Jacobs in *Inter-Environnement Wallonie*, cited in footnote 24 above, point 42 et seq.

proceedings [27] – the Court will find a failure to fulfil obligations no matter how minor or isolated the breach – it seems to me that a different standard would be appropriate in cases where the infringement was alleged to have occurred through action taken before the measure in question entered into force.

68. As regards the Regulation in issue in the present case, it might have been necessary for the Commission to establish that, for example, the action in question precluded any possibility of compliance with its provisions for some appreciable period after its entry into force, or comprised a series of steps which cumulatively and systematically undermined its application, or was taken with the deliberate and/or overt intention of flouting its provisions.

69. By contrast, the conclusion of a single contract, however clearly it would have been prohibited by the Regulation once the latter had entered into force, should not in my view have been regarded as sufficient – on its own, in the absence of further aggravating circumstances – to justify finding that a Member State had failed to fulfil its duty of sincere cooperation, *if the contract had been concluded before the Regulation entered into force*. To take any other view would amount to denying not only the significance of the date of entry into force but also the express provision in Article 4(3).

70. In addition, the Commission should in my view in such a case have sought, first and foremost, a declaration confirming a breach of the duty of sincere cooperation, rather than a breach of Articles 1 and 4 of the Regulation, which were not in force when the contract was concluded. It is true that the Court has occasionally ruled that a Member State has failed to fulfil that general duty when no such declaration appears to have been sought [28] but not, to my knowledge, as an alternative to finding a breach of a more specific provision which had been alleged but not established, or in a case where such a provision was not already in force at the time of the act giving rise to the breach.

71. If I am correct in the view I have thus reached in relation to a hypothetical case of a Member State concluding a comparable contract in late December 1992, what does that imply for the case of a Member State such as Malta, which concluded the disputed contract in the period not only before the

27 — See, for example, Case 166/82 *Commission* v *Italy* [1984] ECR 459, paragraph 24, Case C-348/97 *Commission* v *Germany* [2000] ECR I-4429, paragraph 62, or Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, paragraph 44.

28 — See, for example, Case C-507/04 *Commission* v *Austria* [2007] ECR I-5939.

Regulation became applicable in its territory but also before the Treaties entered into force and it became a Member State of the Union?

72. At the very least, no greater obligation can have lain on Malta in April 2004 than on the hypothetical Member State in December 1992. If anything, it can only be lesser. The interim obligation under international treaty law, although there is no full consensus as to its precise import, cannot require compliance with a treaty before it enters into effect in exactly the same terms as after it enters into effect – or, yet again, the date of entry into effect would be meaningless.

73. Although, as I have noted, the terms of the Vienna Convention are not as such binding on Malta, and although the formulation of the rule has been fluid over the years and has varied from one authority to another, [29] it seems clear that the interim obligation does not prevent a signatory State from taking any action whatever which would have been incompatible with the treaty if it had already been in force, but rather from taking any action which would in some way strike at a core element of the treaty.

74. I would not, in that connection, argue that the interim obligation on a State having signed and ratified a treaty of accession to the European Union is merely to refrain from such action as might defeat the whole object and purpose of the EU Treaties, or of the accession treaty – any action capable of doing so would have to be far-reaching indeed – but I consider that a single instance of conduct not fully compatible with one of the impending obligations of membership of the Union would not normally be such as to lay the State open to subsequent Treaty infringement proceedings.

75. In the present case, it seems to me, without there being any need even to examine the justifications put forward by Malta to explain the discrepancy between the dates mentioned in the common position of 2001 and the starting and ending dates of the contract as finally concluded, [30] that the Court

29 — Klabbers (cited in footnote 7 above) quotes various sources expressing the obligation as being to 'refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult,' 'not to do anything between signature and ratification which would frustrate the purpose of the treaty', not to 'do anything which will hamper any action that may be taken by the other party if and when the treaty enters into force', to 'refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed', or not to take 'action in bad faith deliberately aiming at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration'.

30 — Essentially, Malta states that (i) it was obliged to await completion of a restructuring of GCCL and the delivery of three new vessels before it could correctly evaluate the level of subsidy required for the route and (ii) in setting the duration of the contract it followed the Commission's guidelines (COM(2003) 595 final), which consider a duration to be disproportionate only if it exceeds six years. In that regard, I shall say no more than that such justification, if the point were to be examined, could not in my view be dismissed out of hand.

should not make the declaration sought by the Commission.

76. The case involves a single contract. Malta's intention to conclude that contract, for a period extending some three years or more beyond the date of Malta's accession to the Union, had been made clear during the accession negotiations. The Commission did not at the time object to that intention and must be presumed – since it neither caused any condition to be laid down in the Act of Accession as regards the application of the Regulation to Malta nor returned to the chapter during negotiations – to have accepted that such a contract was reconcilable with the Regulation. What the Commission now objects to is that the period of the contract as actually concluded extended for (rather less than three years) longer than contemplated in the common position of 26 October 2001. What is at issue, therefore, is not an act liable seriously to compromise the overall application of the Regulation in Malta in the long term, but one which removes a particular island cabotage service from its scope for a limited period (albeit a rather longer period than that originally announced and accepted).

77. That, it seems to me, does not constitute conduct which, *given that neither the Regulation nor the Treaties were in force in Malta at the relevant time,* can justify declaring that Malta failed to fulfil its obligations *under the Regulation*, by virtue of any duty it may have had, as a future Member State, not to frustrate the purpose and objects of the Treaties or the future application of the Regulation.

Conclusion

78. For the reasons set out above, I consider that the Court should dismiss the application and, as requested by Malta and pursuant to Article 69(2) of the Court's Rules of Procedure, order the Commission to pay the costs.