OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 28 October 2010[1]

1. In this case,[2] brought under Article 226 EC (now Article 258 TFEU), the Commission of the European Communities has sought a declaration from the Court that, by failing to decommission fire protection systems and extinguishers containing halons for non-critical uses on board ships and to recover such halons, the Republic of Malta has failed to fulfil its obligations under Article 4(4)(v) and Article 16 of Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer.[3]

2. Relying on a different interpretation of the relevant provisions of Regulation No 2037/2000, in particular of the phrase 'critical uses of halon for the making inert of occupied spaces where flammable liquid and/or gas release could occur in existing cargo ships' in Annex VII to the regulation, the Republic of Malta arrived at the conclusion that the Commission's action is unfounded and should be dismissed.

Legal background

3. Regulation No 2037/2000 forms part of a series of regulations[4] by which the Community has met its obligations under the Vienna Convention for the protection of the ozone layer[5] and the Montreal Protocol on substances that deplete the ozone layer,[6] of which it is a signatory.[7] In spite of the fact that that regulation is no longer in force, since

1 — Original language: French.

2 — As regards the pre-litigation procedure, it is sufficient to point out that, in the present case, it proceeded in accordance with Article 226 EC. No argument questioning the lawfulness of that stage of the procedure has been raised before the Court.

3 — OJ 2000 L 244, p. 1.

4 — Regulation No 2037/2000 was preceded by Council Regulation (EEC) No 3322/88 of 14 October 1988 on certain chlorofluorocarbons and halons which deplete the ozone layer (OJ 1988 L 297, p. 1), Council Regulation (EEC) No 594/91 of 4 March 1991 on substances that deplete the ozone layer (OJ 1991 L 67, p. 1) and Council Regulation (EC) No 3093/94 of 15 December 1994 on substances that deplete the ozone layer (OJ 1994 L 333, p. 1).

5 — OJ 1988 L 297, p. 10.

6 — OJ 1988 L 297, p. 21.

7 — Council Decision of 14 October 1988 concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer (OJ 1988 L 297, p. 8).

it was repealed and replaced as from 1 January 2010 by Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer, [8] it remains the regulation applicable at the material time for the purposes of the present case.

4. Article 4 of Regulation No 2037/2000, entitled 'Control of the placing on the market and use of controlled substances', lays down, in paragraph 1 thereof, a general prohibition on the placing on the market and use of various controlled substances, including halons.

5. Article 4(4) and (5) of Regulation No 2037/2000 provide for exceptions to the prohibition in question. As regards fire protection systems and extinguishers containing halons, which are involved in the present case, a temporary exception is provided for in Article 4(4)(v). That provision is worded as follows:

'[e]xcept for uses listed in Annex VII, fire protection systems and fire extinguishers containing halons shall be decommissioned before 31 December 2003, and halons shall be recovered in accordance with Article 16.'

6. Annex VII to Regulation No 2037/2000, concerning critical uses of halon, which derogates from the principle that exceptions to the general prohibition on the placing on the market and use of halons in the case of fire protection systems and extinguishers are of a temporary nature, is worded as follows:

'Use of halon 1301:

…

— for the making inert of occupied spaces where flammable liquid and/or gas release could occur in the military and oil, gas and petrochemical sector, and in existing cargo ships,

…

Use of halon 2402 only in Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia:

…

8 — OJ 2009 L 286, p. 1.

— for the making inert of occupied spaces where flammable liquid and/or gas release could occur in the military and oil, gas and petrochemical sectors, and in existing cargo ships,

…'

7. Article 16(1) of Regulation No 2037/2000 provides as follows:

'Controlled substances contained in:

…

— fire protection systems and fire extinguishers,

shall be recovered for destruction by technologies approved by the Parties or by any other environmentally acceptable destruction technology, or for recycling or reclamation during the servicing and maintenance of equipment or before the dismantling or disposal of equipment.'

8. Article 2 of the Act concerning the conditions of accession to the European Union 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 [9] provides that '[f]rom 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.'

9. Given that that act of accession did not provide for any transitional measure concerning the application of Regulation No 2037/2000 to the Republic of Malta, that State's obligations under the regulation, which also include the obligation to decommission fire protection systems and extinguishers containing halons and to recover halons, took effect on 1 May 2004.

Assessment

10. Although the present case is not the first action brought by the Commission that is

9 — OJ 2003 L 236, p. 33.

based on Regulation No 2037/2000, [10] it is the first time that the alleged failure to comply with obligations consists in infringement of the general prohibition on the placing on the market and use of halons under Article 4(1) of Regulation No 2037/2000, in particular the obligation to decommission — in the case of the Republic of Malta, before 1 May 2004 — fire protection systems and extinguishers containing halons and to recover halons laid down in Article 4(4)(v) of Regulation No 2037/2000.

11. As I have already stated in presenting Regulation No 2037/2000, Article 4(4)(v) thereof provides, for fire protection systems and extinguishers containing halons, a temporary exception to the general prohibition on the placing on the market and use of halons. However, that provision itself states that no temporal limitation is to apply to the exception in respect of the uses of halons listed in Annex VII to Regulation No 2037/2000. That means that the use of fire protection systems and extinguishers containing halons is permissible even after the deadline, which, in the case of the Republic of Malta, was 1 May 2004, if halon is used for what may be regarded as a critical use within the meaning of Annex VII to Regulation No 2037/2000.

12. It is settled case-law that, in proceedings for failure to fulfil obligations, it is for the Commission to prove the existence of the alleged infringement and to place before the Court the information necessary for it to determine whether the infringement is made out, and in so doing the Commission may not rely on any presumption. [11] It follows that, in the present case, in order for the Commission's action to be successful, it was necessary for it to establish, first, that vessels flying the Maltese flag were, after 1 May 2004, equipped with fire protection systems and extinguishers containing halons and, second, that any such use did not constitute critical use of halons within the meaning of Annex VII to Regulation No 2037/2000 — in particular within the meaning of the third indent of the provisions relating to halon 1301 and the third indent of the provisions relating to halon 2402 in that annex — intended for the making inert of occupied spaces where flammable liquid and/or gas release could occur in existing cargo ships.

10 — The Commission has brought in total seven actions based on Regulation No 2037/2000. It withdrew two of them (Orders of the President of the Court of 8 August 2006 in Case C-425/05 *Commission* v *Ireland* and of 4 August 2008 in Case C-490/07 *Commission* v *Cyprus*), the remaining five concluding in a judgment of the Court (judgments of 26 October 2004 in Case C-406/03 *Commission* v *Ireland*; of 7 July 2005 in Case C-214/04 *Commission* v *Italy*; of 14 July 2005 in Case C-79/05 *Commission* v *Italy*; of 14 December 2006 in Case C-390/05 *Commission* v *Greece*, and of 3 April 2008 in Case C-522/06 *Commission* v *Belgium*).

11 — See, in particular, Case C-37/09 *Commission* v *Portugal*, paragraph 28 and the case-law cited.

13. As to whether there were vessels flying the Maltese flag equipped with fire protection systems and extinguishers containing halons, the Republic of Malta and the Commission agree that, at the time when the deadline set in the reasoned opinion addressed to the Republic of Malta expired, some vessels flying the Maltese flag were equipped with fire protection systems and extinguishers containing halons.

14. However, the parties disagree over whether the use of halons on board those vessels may be regarded as non-critical, which would mean that the use of fire protection systems and extinguishers on board the vessels did not comply with the requirements of Regulation No 2037/2000, or whether it is, instead, a critical use of halons for the making inert of occupied spaces where flammable liquid and/or gas release could occur within the meaning of Annex VII to Regulation No 2037/2000, which would mean that the use of fire protection systems and extinguishers on board the vessels complied with that regulation.

15. As regards existing cargo ships, the Commission takes the view that, since the entry into force of Regulation No 2037/2000, there are only two situations which can be classified as constituting critical use of halons 'for the making inert of occupied spaces where flammable liquid and/or gas release could occur', namely, first, the making inert of oil tanks and, second, the making inert of the machinery used in connection with the automatic pumping of flour in or out of a ship's hold. According to the Commission, the making inert of occupied spaces is necessary in such situations in order to prevent explosions on board oil tankers transporting crude oil or refined oil products or on board ships transporting flour, where an explosion may occur due to the accumulation of flour dust.

16. The Republic of Malta has accepted that that is not the case with regard to some ships flying the Maltese flag equipped with fire protection systems and extinguishers containing halons. However, it claims that, in the case of the ships in question, halon is nevertheless used 'for the making inert of occupied spaces where flammable liquid and/or gas release could occur'. It has always disagreed with the Commission's interpretation of the formulation 'critical use of halon for the making inert of occupied spaces where flammable liquid and/or gas release could occur in existing cargo ships'.

17. According to the Republic of Malta, the Commission's interpretation amounts to an arbitrary and unjustifiable restriction of the scope of the third indent of the provision relating to halon 1301 and the third indent of the provision relating to halon 2402 in Annex VII to Regulation No 2037/2000. It is of the opinion that the use of halons 1301

and 2402 in machinery spaces containing combustion engines, oil-fired boilers or oil-fuelled units and generators, cargo pump-rooms and other similar spaces on ships built before 1 October 1994 must also be regarded as a critical use within the meaning of the provisions in question in Annex VII to Regulation No 2037/2000. The Republic of Malta claims that the use of halon on all ships flying the Maltese flag equipped with fire protection systems and extinguishers containing halons is consistent with that interpretation.

18. For its part, the Commission refers to the phrase 'for the making inert of' in the formulation at issue in the third indent of the provision relating to halon 1301 and the third indent of the provision relating to halon 2402 in Annex VII to Regulation No 2037/2000.

19. Relying on a definition of the phrase 'the making inert of' which corresponds to 'the pre-emptive release of halon in response to a potential fire or explosion into an occupied space in which a flammable, hazardous condition prevails and at a concentration which will render the atmosphere within the enclosure incapable of supporting combustion', the Commission submits that the use of halons 1301 and 2402 in cargo ships can be regarded as a critical use only if those halons are used in a fire protection system that is designed to make inert occupied spaces where flammable liquid and/or gas release could occur, namely if they are used as part of a system designed to discharge halon before combustion or explosion is initiated in an atmosphere that is otherwise flammable or explosive, or in order to prevent such combustion or explosion. Any system designed to discharge halon in response to the detection of a fire is a fire extinguishing system, not a system for making occupied spaces inert, and therefore falls outside the definition of critical uses of halon on cargo ships.

20. The Commission submits that, even though, in its defence, the Republic of Malta stated that the use of halons on board ships flying the Maltese flag relates specifically to the 'making inert of' occupied spaces, it stated in response to the reasoned opinion that halon was used as a means of 'fire extinguishing'.

21. The Republic of Malta states, in response to that point, that the distinction made by the Commission between 'making inert' and extinguishing is artificial and contrived, since the process of extinguishing essentially forms part of the process of making inert, especially

where the same agent is used. Making inert is in effect a natural and inevitable outcome of extinguishing where halons are used.

22. It follows from all the foregoing that the critical question is whether the Commission has established to the requisite legal standard that the critical use of halon for the making inert of occupied spaces where flammable liquid and/or gas release could occur in existing cargo ships within the meaning of the third indent of the provision relating to halon 1301 and the third indent of the provision relating to halon 2042 in Annex VII to Regulation No 2037/2000 concerns only the making inert of oil tankers and the making inert of the machinery used in connection with the automatic pumping of flour in or out of a ship's hold and that, unlike the use of a system for making occupied spaces inert, the use of a fire extinguishing system falls outside the scope of those provisions. If that were the case, it would mean that the Republic of Malta has indeed failed to fulfil its obligations as alleged, given that it accepts that ships flying the Maltese flag equipped with fire protection systems and extinguishers containing halons include cargo ships which are not petrol tankers and do not use halon for the purpose of making inert the machinery used in connection with the automatic pumping of flour in or out of a ship's hold.

23. The approach adopted by the Commission as to the meaning of the formulation 'critical use of halon for the making inert of occupied spaces where flammable liquid and/or gas release could occur in existing cargo ships' has clearly not altered since the entry into force of Regulation No 2037/2000. That does not mean, however, that the Commission's position is correct.

24. In support of its interpretation of the formulation 'critical use of halon for the making inert of occupied spaces where flammable liquid and/or gas release could occur in existing cargo ships', the Commission refers to a practice followed in the cargo shipping sector by which halon is installed on cargo ships for the purpose of making occupied spaces inert only in two special cases, namely the use of halon for making inert oil tankers and the use of halon for making inert machinery used in connection with the automatic pumping of flour in or out of a ship's hold.

25. The fact nevertheless remains that the Commission has failed to produce the slightest evidence, such as, for example, statistical data or expert opinions, capable of demonstrating that that is in fact the case in the cargo shipping sector. It has simply referred solely to the practice followed in the cargo shipping sector, failing to explain how it

examined whether there was such a practice and in which Member States. [12]

26. In order to rule on the merits, first, of the Commission's claim that halon is used, on existing cargo ships, for the making inert of occupied spaces where flammable liquid and/or gas release could occur only on oil tankers and cargo ships equipped with machinery used in connection with the automatic pumping of flour in or out of a ship's hold and, second, of the claim that fire extinguishing systems fall outside the scope of the third indent of the provision relating to halon 1301 and the third indent of the provision relating to halon 2402 in Annex VII to Regulation No 2037/2000, the Court would need technical knowledge which is not available to it. [13]

27. I am of the view that, in the absence of technical evidence provided by the Commission, the Court should not adopt a position on the Commission's claim, all the more so since the defence of the Member State concerned is based on arguments that are more technical than legal in nature.

28. As a consequence, it is not possible on the basis of the content of the file submitted to the Court to determine whether the Commission's action is well founded.

29. That means that, in the present case, the Commission has not met its obligations with regard to proof and has therefore failed to establish that the Republic of Malta has failed to fulfil its obligations.

30. In the light of the foregoing, I am of the view that the Commission's action must be dismissed.

12 — The argument put forward by the Republic of Malta — that, even if the Commission were in fact to provide empirical data which proves that the 'vast majority' of cargo ships use halon solely in the two cases referred to, it does not follow that the phrase at issue in Annex VII relates only to the situations mentioned — must be recognised as having a certain relevance.

13 — I would add that, even if the court in question had the necessary technical knowledge, which cannot be ruled out, it could not make use of it for the purpose of adjudicating in a case, since its role is to try cases using its legal knowledge and not any technical knowledge which it might possess in the field relating to the subject-matter of a dispute.

Conclusion

31. In light of the foregoing considerations, I propose that the Court:

(1) Dismiss the action;

(2) Order the European Commission to pay the costs.