OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 10 November 2005 [1]

1. This is an action brought by the Commission of the European Communities against the Kingdom of Spain for alleged failure to fulfil its obligations under Articles 1, 4, 7 and 9 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (hereinafter 'Regulation No 3577/92' or simply 'the Regulation'). [2]

I — Legislative background

Community legislation

2. With a view to 'the abolition of restrictions on the provision of maritime transport services within Member States' (third recital), the Council approved Regulation No 3577/92, Article 1(1) of which is in the following terms:

'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 ...'.

3. Article 2 then specifies that:

'For the purposes of this Regulation:

1. "maritime transport services within a Member State (maritime cabotage)" shall mean services normally provided

1 — Original language: Italian.
2 — OJ 1992 L 364, p. 7.

for remuneration and shall in particular include:

(a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands;

...

(c) island cabotage: the carriage of passengers or goods by sea between:

— ports situated on the mainland and on one or more of the islands of one and the same Member State,

— ports situated on the islands of one and the same Member State;

...

3. "a public service contract" shall mean a contract concluded between the competent authorities of a Member State and a Community shipowner in order to provide the public with adequate transport services.

...

4. "public service obligations" shall mean 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;

...'.

4. As far as concerns us here, 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.

...'.

5. Article 7 is worded as follows:

'Article 62 of the Treaty shall apply to the matters covered by this Regulation.'[3]

3 — Article 62 of the Treaty, repealed as of 11 May 1999 with the entry into force of the Treaty of Amsterdam, provided that '[s]ave as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of the Treaty'.

6. Article 9, finally, provides that:

'Before adopting laws, regulations or administrative provisions in implementation of this Regulation, Member States shall consult the Commission. They shall inform the latter of any measures thus adopted.'

National legislation

7. In the Spanish region of Galicia, there is a deep inlet known as the 'ria de Vigo' (Vigo estuary). On its south bank is situated the city of Vigo and on its north bank the towns of Cangas and Moaña. Just in front of the mouth of the estuary lie two islands known as the Cíes Isles.

8. The provision of maritime transport services in the Vigo estuary was formerly governed by a decision of the Autonomous Community of Galicia of 11 June 1984. As far as concerns us here, that decision required operators of regular maritime passenger and freight services between Vigo and Cangas and between Vigo and Moaña to be in possession of a 10-year renewable licence issued by the Directorate-General of the Merchant Navy.

9. As of now, following a number of legislative changes, the services in question are regulated by Law 4/1999 of the Autonomous Community of Galicia of 9 April 1999 (hereinafter 'Law 4/1999'),[4] according to which maritime passenger transport in the Vigo estuary constitutes a public service belonging to the regional government of Galicia.

10. Specifically, Article 1 of that law provides that:

'1. Maritime passenger transport in the Vigo estuary is hereby declared a public service belonging to the regional government of Galicia.

2. The public service comprises both the regular service across the banks of the estuary and seasonal tourist transport between the Cíes Isles and any point on the Vigo estuary.'[5]

11. Article 2(2) and (3) of the law provide for the regional government of Galicia to grant one operator a sole concession to provide the maritime transport service in the Vigo estuary for a period of 20 years, renewable for a maximum of 10 years.

12. Article 3 specifies that the concession is to be awarded by public tender and that the selection criteria are to include the tenderer's experience in operating transport services in the Vigo estuary.

II — Facts and procedure

13. Having received a number of complaints from private parties that the Spanish legislation governing cabotage services in the Vigo estuary was contrary to Regulation No 3577/92, on 19 July 2000 the Commission sent the Kingdom of Spain a statement of objections, which was followed, on 7 May 2001, by a reasoned opinion.

14. Not satisfied with the replies received from the Spanish Government on this matter, on 22 July 2003 the Commission

4 — BOE No 118 of 18 May 1999, p. 18552.

5 — Unofficial translation.

brought the present action in which it seeks a declaration that:

'by maintaining in force legislation which:

— allows a concession for maritime transport services in the Vigo estuary to be granted to a single operator for a period of 20 years and which includes as a criterion for the award of the concession experience in transport in the Vigo estuary which favours the incumbent operator;

— allows the imposition of public service obligations on seasonal transport services with the islands and regular transport services between mainland ports;

— allows the introduction of a more restrictive system than that in effect as of the date on which the Regulation entered into force (January 1993), that is to say, the decision of 11 June 1984;

— was not the subject of any consultation with the Commission prior to being approved,

the Kingdom of Spain has infringed Articles 1, 4, 7 and 9 of Regulation No 3577/92 and has failed to fulfil its obligations under that regulation and under the EC Treaty.'

III — Legal analysis

The applicability of Regulation No 3577/92

15. As well as denying the Commission's claims on the merits, the Spanish Government also disputes, as a preliminary matter, the applicability of Regulation No 3577/92 to transport in the Vigo estuary. It argues that the Regulation establishes the freedom to provide 'maritime cabotage' services, which are defined — under Article 2 — as the carriage of goods and passengers 'by sea' and 'between ports'. But the transport services at issue were neither 'by sea' nor 'between ports'.

16. Those services could not be described as transport 'by sea', since by that expression the Regulation was referring only to services operated in the 'territorial sea', in other words in the belt of sea extending 12 miles out from the so-called baseline. The Regulation did not concern services operated in sea areas such as bays, fjords and estuaries

(including the Vigo estuary), which lie inside the baseline and which, under the Montego Bay Convention,[6] form part of 'internal waters'. Moreover, the Spanish Government goes on, it made every sense for the Regulation not to have sought to liberalise transport in such waters since the areas concerned were very small and could not support the intense sea traffic that the opening-up of markets would entail.

17. Moreover, in the view of the Spanish Government, transport services in the Vigo estuary could not be regarded as being 'between ports'. That description could certainly not be applied to services operated between the urban centres situated on the banks of the estuary (Vigo, Cangas and Moaña), which, under Spanish law,[7] constitute a single port area under the management of the Vigo port authority (the 'Vigo port services zone'). But neither could it be applied to services to and from the Cíes Isles, which did not have a proper 'port' as such, in the sense of a seafront structure equipped with machinery, premises and facilities of sufficient scale, but only a small landing area for disembarking passengers, with limited berthing capacity, which was likewise, what is more, under the management of the Vigo port authority.

18. In my opinion, those arguments cannot be accepted.

19. First of all, the Regulation establishes the 'freedom to provide maritime transport services within a Member State' ('maritime cabotage', in other words), which includes, inter alia, 'mainland cabotage' and 'island cabotage' (Article 1).

20. According to Article 2, 'mainland cabotage' means 'the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State ...' (subparagraph a), while 'island cabotage' means 'the carriage of passengers or goods by sea between ... ports situated on the mainland and on one or more of the islands ...' or between 'ports situated on the islands of one and the same Member State' (subparagraph c).

21. In that light, I can say right away that I agree with the Commission that the transport services operated in the Vigo estuary are 'maritime cabotage' services, that is, transport services carried out 'by sea'. There is no doubt that the waters of the Vigo estuary are sea waters and that is sufficient, according to the letter of the provisions referred to above, for transport through them to be considered transport 'by sea'.

6 — Here the Spanish Government cites Article 8(1) of the United Nations Convention on the Law of the Sea (Montego Bay Convention) of 10 December 1982, ratified on 20 December 1996 (BOE No 39 of 14 February 1997, p. 4966).

7 — Ministerial Decree of 23 December 1966 (BOE of 23 January 1967).

22. It is irrelevant for these purposes that in terms of international law those waters are deemed to be 'internal waters' rather than 'territorial sea'. The fact that under the Montego Bay Convention States are allowed to draw the internal boundary of their territorial sea (the baseline) across the natural entrance points of bays, with the waters thereby enclosed being considered as internal waters, [8] is relevant only for the purposes of determining the coastal State's powers, which are obviously greater in internal waters than in territorial waters. [9] That fact (and the associated distinction between territorial sea and internal waters) has no significance, however, in the scheme of the Regulation, which, as noted above, pursues the entirely different objective of ensuring 'freedom to provide maritime transport services' (Article 1), and there is therefore no reason to take any account of that distinction.

23. The Spanish Government's position on this point has thus no textual basis. Moreover, it also appears to be contrary to the Regulation's aforementioned purpose. For if the sea waters of fjords, estuaries and inlets were as a general rule to fall outside the scope of the Regulation, that would potentially mean excluding from the liberalisation process sea areas such as the Vigo estuary, in which sea traffic is particularly heavy and where the need is therefore all the greater to avoid unjustified restrictions that tilt the level playing field. [10]

24. I likewise can see no merit in the Spanish Government's contention that the transport services operated in the Vigo estuary are not 'between ports', on the basis that the various landing points in the estuary constitute a single port area under national law and that the landing area on the Cíes Isles has limited facilities which greatly reduce its berthing capacity.

25. In that regard, I would note that Regulation No 3577/92 does not define the term 'port'. By virtue of the fact that it is used in the Regulation, however, it remains none the less a term of Community law. As such, and in the absence of any express reference in the Regulation to the laws of the Member States, it cannot be defined on the basis of provisions of national legislation. On the contrary, in accordance with settled case-

8 — See Article 10, paragraphs 4 and 5, of the Montego Bay Convention.

9 — Foreign ships enjoy the so-called right of innocent passage through the territorial sea but not through internal waters (Article 17 et seq. of the convention). In addition, it is only in the territorial sea that the coastal State cannot exercise criminal jurisdiction in respect of matters which are purely internal to the foreign ship (Article 27 of the convention).

10 — In its observations, the Spanish Government repeatedly made the point that the port of Vigo is the largest in Galicia in terms of both traffic and turnover and that the ferry service in the Vigo estuary carries over 1 300 000 passengers each year (see paragraphs 7 and 56c of the defence).

law, it must be given 'an autonomous and uniform interpretation', which must take into account the 'context' and the 'purpose' of the legislation in which it is used. [11]

26. It seems to me that having regard accordingly to the context and to the objectives of Regulation No 3577/92, 'port' for the purposes of that regulation means any structure, irrespective of the scale of its facilities, at which goods may be loaded and unloaded and passengers embarked and disembarked for conveyance by sea. The term 'port' is used in the Regulation in the context of the definition of cabotage ('mainland' and 'island' cabotage), which is defined as a service consisting of 'the carriage of passengers or goods by sea' carried out 'between ports' (Article 2(1)(a) and (b)).

27. Contrary therefore to what the Spanish Government contends, it is not so much the scale of the structure that is key to the 'port' concept but rather its function, in other words whether it serves the purposes of sea transport by enabling goods to be loaded and unloaded or passengers embarked and disembarked.

11 — See Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; Case C-201/02 *Wells* [2004] ECR I-723, paragraph 37; Case C-55/02 *Commission* v *Portugal* [2004] ECR I-9387, paragraph 45; and Case C-188/03 *Junk* [2005] ECR I-885, paragraph 29.

28. Such structures exist, albeit of varying size, both in the urban centres situated on the banks of the estuary (Vigo, Cangas and Moaña) and on the Cíes Isles. The carriage of goods and passengers between the landing areas of those towns, and between them and the islands, must therefore be regarded as cabotage services (mainland and island cabotage respectively) to which Regulation No 3577/92 applies.

29. Having thus concluded that the Regulation applies to the facts of this case, I now turn to analyse, in a changed order for the sake of clarity of exposition, the individual grounds relied upon by the Commission against the Spanish Government.

Articles 1 and 4

30. The principal complaints concern the breach of Articles 1 and 4 of the Regulation, which, respectively, apply the principle of 'freedom to provide services ... to maritime transport within Member States' and lay down the conditions under which that principle may be qualified by 'the introduction of public services' necessary in order to ensure 'the adequacy of ... transport services' for users (see fourth and ninth recitals).

31. According to the Commission, Spain infringed those articles by maintaining in force legislation (Law 4/1999) under which:

(i) public service obligations can be imposed for mainland-mainland services and seasonal mainland-island services, which are not among the services contemplated by Article 4(1) of the Regulation (second complaint);

(ii) a discriminatory criterion was used in the award of the exclusive public service concession (second part of the first complaint);

(iii) the exclusive concession was awarded for an excessively long duration (first part of the first complaint).

32. I now turn to consider those complaints.

(i) The imposition of public service obligations in cases not covered by Article 4(1) (second complaint)

33. The Commission firstly alleges that Spain is in breach of Article 4(1), under which a Member State may impose public service obligations only on '*regular* [maritime transport] services to, from and between *islands*'.[12] Instead, the Commission charges, Law 4/1999 imposes such obligations on all passenger transport in the Vigo estuary, by providing for a sole operator to be granted the concession both for regular transport services between the towns on the estuary, which are mainland rather than island routes, and for seasonal tourist transport services to and from the Cíes Isles, which are indeed island routes but are not regular services.

34. For its part, the Spanish Government accepts that the services between Vigo, Cangas and Moaña are mainland routes and that those to and from the Cíes Isles are not regular, being operated only during the tourist season. It thus acknowledges that the imposition of public service obligations on the routes between the estuary towns and on the island routes is contrary to the letter of Article 4(1), but it maintains that the impugned legislation is none the less compatible with the Regulation.

35. (a) The Spanish Government argues, in relation to the imposition of public service obligations, that Article 4 of the Regulation allows towns situated on the banks of estuaries to be treated as islands, on the

12 — Emphasis added

basis that routes between such towns, like those to and from islands, are likewise links between 'isolated areas', with which overland communications are either non-existent or very difficult. It was quite proper therefore for the Spanish legislation to impose a public service obligation on transport services between the Vigo estuary towns, since the road links, while they did exist, were more expensive and considerably more time-consuming than the sea route.

36. In any case, the Regulation allowed the imposition of public service obligations where there were overriding public interest considerations at stake. It was on the basis of just such considerations that Spain had imposed a public service obligation on all maritime passenger transport in the Vigo estuary. This was needed in order to ensure the viability of cabotage services and to preserve the environmental balance of protected areas.

37. (b) In relation to the first consideration, a report commissioned by the regional government of Galicia [13] had found that sea passenger transport between the estuary towns was unprofitable and that such services would therefore — like those to the Cíes Isles, which, by contrast, did offer an acceptable rate of return — have to be operated on the basis of a sole concession.

13 — 'Report on the economic viability of the operation of transport services in the Vigo estuary and to the Cíes Isles' prepared by KPMG Auditores SL (see Annex 6 to the Commission's application, p. 137 et seq.).

38. (c) As well as that economic consideration, there was also the environmental concern. In order to preserve the natural habitat of the Cíes Isles, Spanish law had placed a cap on tourist numbers. According to the Spanish Government, the only effective means of enforcing that cap was to introduce a public service for the whole estuary and to have it run by a sole operator who would be in charge of policing it.

39. For my part, I can say at once that I agree with the Commission's objections to those arguments of the Spanish Government: (a) that the Vigo estuary towns cannot be treated as islands for the purposes of the imposition of public service obligations; (b) that in the instant case no economic considerations have been adduced such as would justify the imposition of such obligations in circumstances quite beyond anything contemplated by the Regulation; (c) that the environmental considerations relied upon do not necessitate the imposition of such obligations.

40. (a) As far as treating the estuary towns as islands is concerned, I agree in principle with the Spanish Government's argument that the possibility of imposing public service obligations (which is restricted by Article 4(1) to the case of 'regular services to, from and between islands') can be extended to services

to, from and between towns situated on the banks of long fjords or estuaries with which there are no direct road links. [14]

41. It seems to me that such towns are in an analogous situation to that of islands. Like islands, they can be reached only by sea. There is therefore the same need, where they are concerned, of ensuring 'the adequacy of [maritime] transport services' to otherwise inaccessible places, the only consideration which, in terms of the Regulation, justifies 'the introduction of public services' (see ninth recital).

42. I do not agree, however, that the facts of this case fit the above description of a situation to which the application of Article 4(1) may be extended by analogy.

43. The documents attached to the file show that, as well as their sea connections, the towns of Vigo, Cangas and Moaña are directly linked by a road and motorway network that affords ready access both by car and by bus. It is true, as the Spanish Government argues, that the quickest and cheapest way to cross the estuary is still by ferry. [15] The issue, however, is not whether it is more or less convenient to go by sea than by road, but rather whether or not the towns in question are in a situation analogous to that of islands and should accordingly be given the same special treatment as islands.

44. As I have said, it seems to me that the towns on the Vigo estuary are in a decidedly different situation, since they can be easily reached both by sea, travelling by ship, and by land, using the existing direct road connections.

45. I therefore take the view that the Article 4 rules cannot be extended to routes between those towns because that is both contrary to

14 — That view is also taken by the Commission in its communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (COM(2003) 595). In that communication, having noted that '[a]ccording to the wording of Article 4(1) of the Regulation, public service links have to serve routes to, from and between islands', the Commission submits that '[l]ong estuaries or fjords which lead to a detour of about 100 km by road may be treated as islands for the purposes of this section as they may cause a similar problem by isolating conurbations from each other'.

15 — The documents filed by the parties and the report, cited in footnote 13, produced by the Spanish Government in the course of the pre-litigation procedure, disclose that Vigo can be reached from Cangas and Moaña: (i) by sea, involving a journey of around 6 km by ship, which takes an average of 20 minutes and costs EUR 1.75; (ii) by motorway, involving a distance of 20-25 km, which takes 32 minutes and costs EUR 6 (by car) or 60 minutes and EUR 2.30 (by bus); (iii) by road, involving a distance of approximately 59 km.

the letter of the article and incapable of being justified on the basis of the special need the article seeks to address.

46. As we have seen, however, the Spanish Government puts forward further considerations of an economic and environmental nature which, in its view, permit the introduction of a public service, such as that introduced in the Vigo estuary, even outside the circumstances contemplated by the Regulation.

47. It seems to me that such considerations do not constitute grounds for broadening the application of a rule which Article 4 restricts to well-defined circumstances. Apart from the fact that it has no textual basis in the Regulation, the proposed extension would have the effect of upsetting the balance, as between the principle of freedom to provide services and the need to ensure adequate maritime transport services, in pursuit of which the Community legislature allowed the imposition of public service obligations but only in those special circumstances (islands and comparable situations) in which that was absolutely necessary.

48. Moreover, I do not find the further considerations put forward by the Spanish Government convincing.

49. (b) In particular, as far as the economic considerations are concerned, it seems to me that the defendant government has failed to show that passenger transport services across the estuary are not viable and must therefore be made a public concession with a sole operator. The Spanish Government itself has acknowledged that the report which so found (see point 37 above) was based on incomplete information. [16] Moreover, in its written pleadings it repeatedly states that traffic on the routes concerned is particularly heavy, which if anything would suggest that those routes can be operated profitably. [17]

50. (c) In relation to the environmental concerns, finally, Spain argues that the introduction of a public service in the Vigo estuary was justified by the need to ensure compliance with the cap on visitor numbers imposed by Spanish legislation in order to preserve the natural habitat of the Cíes Isles. I agree with the Commission, however, that of all the options available for policing compliance, that chosen by Spain (a 20-year exclusive concession to a sole operator for all passenger traffic in the estuary) is quite the most restrictive and that the same result could easily be achieved, even with several

16 — See paragraphs 20 and 70 of the Spanish Government's defence and page 4 of the report (p. 143 of the annexes to the Commission's application).

17 — Annual passenger volume is 1 300 000.

operators involved, by other means, such as, for example, by setting up a system of advance booking and sale of the available places.

51. For all the reasons set out above, I therefore take the view that the Commission's second complaint should be sustained.

(ii) The use of a discriminatory criterion in the award of the exclusive public service concession (second part of the first complaint)

52. The Commission alleges that Spain is also in breach of Articles 1 and 4 of the Regulation by reason of the fact that Law 4/1999 makes experience in passenger transport in the Vigo estuary a criterion for the award of the public service concession in that estuary, which clearly discriminates against operators from elsewhere in the Community and in favour of the incumbent.

53. In its defence, the Spanish Government argued that the requirement in question was not pivotal to the selection of the current operator, who would have been awarded the concession anyway on the basis of the other criteria set out by the legislation. In its rejoinder, moreover, the Spanish Government indicated that the disputed criterion had been abolished by Law 9/2003 of 23 December 2003.

54. In relation to that last point, I will observe only that, according to settled case-law, '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'. [18] For the purposes of the present proceedings, therefore, the law in question is of no relevance, since it was only after that deadline that it abolished the provision alleged to be unlawful by the Commission.

55. On the merits, then, I note that according to the second subparagraph of Article 4 (1) of Regulation No 3577/92 '[w]henever 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'.

56. But, as the Commission observes, discriminatory is precisely what the requirement of experience in the Vigo estuary

18 — See, in particular, Case C-147/00 *Commission* v *France* [2001] ECR I-2387, paragraph 26; Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7; and Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9.

appears to be, since it can be satisfied only by shipowners who have already operated in that estuary and not by other Community shipowners.

57. Nor is it relevant that the criterion was not pivotal to the award of the particular concession concerned and did not cause prejudice to other operators. Since 'the finding of a Member State's failure to fulfil its obligations is not bound up with a finding as to the damage flowing therefrom', the offending State cannot rely — as Spain seeks to do — on the argument that the breach has not had adverse consequences on private parties or on other Member States. [19]

58. For the reasons set out above, I take the view that the second part of the first complaint should be sustained.

(iii) The excessively long duration of the exclusive concession of the public service

59. The Commission alleges, finally, that Spain is in breach of Articles 1 and 4 of the Regulation because of the excessively long duration (20 years, renewable for a further 10) of the exclusive concession for sea passenger transport services in the Vigo estuary, paralysing the freedom to provide cabotage services in that estuary for the whole of that period.

60. The Spanish Government rejects the allegation, arguing that the length of the concession was justified by the concession operator's need to amortise the substantial investments it would have to make in order to provide the service required, in particular on purchasing the ships to be deployed in the estuary.

61. I do not find that argument convincing, however.

62. It is true that the Regulation does not prescribe any maximum duration for a public cabotage service concession. That does not mean, however, that Member States enjoy absolute discretion in the matter and can accordingly fix the duration of such concessions at will. On the contrary, there are limits to their discretion inherent in the scheme of Articles 1 and 4 of the Regulation.

63. As the Court held in *Analir and Others*, [20] the imposition of public service obligations restricts the general principle of

19 — See, to that effect, Case C-263/96 *Commission* v *Belgium* [1997] ECR I-7453, paragraph 30, and Case C-175/97 *Commission* v *France* [1998] ECR I-963, paragraph 14.

20 — Case C-205/99 [2001] ECR I-1271.

freedom to provide services established, in the maritime cabotage sector, by Article 1. It follows that State regulation of that sector, as well as having to be justified by the objective of ensuring adequate maritime transport services to areas not otherwise accessible, must also observe the principle of proportionality, and must therefore not go beyond what 'is necessary and proportionate' to the attainment of that objective. [21]

64. It seems to me that Law 4/1999 has overstepped that limit.

65. Even accepting that the provision of an adequate transport service in the Vigo estuary requires exceptional investments (in particular for the purchase of suitably designed ships) which require a long amortisation period, it is my view that the availability of such a service could still be ensured by less restrictive measures than a concession (an exclusive one at that) of 20 years' duration, such as, for example, by requiring the successful bidder for the service to purchase or lease the ships already in use from the previous operator. [22]

21 — *Analir and Others*, paragraph 25. To that effect, see also Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 15; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; and Case C-272/94 *Guiot* [1996] ECR I-1905, paragraphs 11 and 13.

22 — See paragraph 5.3.2.1 of the Commission communication cited in footnote 14.

66. On that ground, I propose that the first part of the first Commission complaint should also be sustained.

67. So to draw together the conclusions so far reached, it is my view that Spain is in breach of Articles 1 and 4 of the Regulation and that accordingly the Commission's first and second complaints should both be sustained.

The breach of Article 7

68. By its third complaint, the Commission alleges that Spain is in breach of Article 7 by having enacted, with Law 4/1999, rules which, contrary to that article, are more restrictive than those applying prior to the entry into force of the Regulation (1 January 1993).

69. Before going further, I must point out that, having already proposed that those rules be declared contrary to Articles 1 and 4 of the Regulation, I have no need now to consider this ground, especially since it is not contested by the defendant government. For the sake of completeness, however, I propose to examine it none the less.

70. As just mentioned, Spain accepts that Law 4/1999 regulates the provision of maritime cabotage services in the Vigo estuary in more restrictive terms than the preceding decision of 11 June 1984. It acknowledges that, unlike Law 4/1999, that decision did not provide for an exclusive right to operate the services in question but merely made the provision of such services subject to the issue of a 10-year (and not 20-year) renewable licence.

71. Notwithstanding the above, however, I am not sure that this complaint should be sustained.

72. In support of its position, the Commission relies on Article 7 of the Regulation, which simply states that 'Article 62 of the Treaty shall apply to the matters covered by this Regulation'. That article, in turn, required Member States '[s]ave as otherwise provided in this Treaty ... not [to] introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of the Treaty'.

73. In its communication on the interpretation of Regulation No 3577/92, the Commission noted that the article of the Treaty to which Article 7 refers was repealed by the Treaty of Amsterdam. Nevertheless, in its view, '[t]he standstill clause in Article 7 of the Regulation ... remains valid'.[23] The Commission reaffirmed that position at the hearing.

74. In my view, however, that position is a debatable one, even leaving aside the question of the impact of the repeal of Article 62 of the Treaty. For even to argue that the repeal has no effect and that the principle underlying the article survived its demise, there is, to my mind, another argument to be considered.

75. It seems to me that standstill clauses are meaningful in a context of progressive liberalisation, where Member States are allowed to maintain existing restrictions during a transitional period. That possibility is usually then accompanied by a strict prohibition on the introduction of new restrictions (a standstill).[24]

23 — See paragraph 2.1 of the Commission communication cited in footnote 14.

24 — For example, prior to the Treaty of Amsterdam, Article 59 of the Treaty simply provided that '[w]ithin the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be *progressively* abolished *during the transitional period* in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended' (emphasis added). In that context, Article 62 provided that '[s]ave as otherwise provided in this Treaty, Member States shall not introduce any *new* restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of the Treaty' (emphasis added).

76. But it is a different matter once a particular area has become regulated by a specific body of rules (such as now exists, in the area of freedom to provide services, with the rules laid down by Articles 49 EC to 55 EC and, in the specific field of maritime cabotage, with the rules prescribed by the Regulation), [25] which spell out which restrictions are outlawed and which permitted. In those circumstances, it seems to me that standstill clauses lose their function and thus have no further *raison d'être*, because the lawfulness of legislation enacted in a Member State is no longer measured against what went before but rather against the supervening Community rules.

77. In other words, I am saying that in these proceedings it cannot be held against Spain that it is in breach of Article 7 of the Regulation, which ceased to serve any useful purpose once the cabotage rules came into force. The charge that can be made against it, however, is to have imposed public service obligations which, *regardless of whether they are more or less restrictive than the earlier legislation*, are contrary to the provisions of Articles 1 and 4 of the Regulation.

78. On that basis, and in that specific sense, I take the view that the complaint in question cannot be sustained.

25 — As from 1 January 1999, the rules set out in the Regulation apply to all maritime cabotage services in all Member States, with the sole exception of Greece where full liberalisation did not take effect until 1 January 2004 (see Article 6).

The breach of Article 9

79. By its fourth complaint, the Commission alleges that Spain infringed Article 9 of Regulation No 3577/92 by failing to consult the Commission before enacting Law 4/1999.

80. That article requires Member States to consult the Commission before adopting laws, regulations or administrative provisions in implementation of the Regulation and to inform it subsequently of any measures thus adopted.

81. The only defence offered by the Spanish Government against this charge is that the Regulation, and hence also Article 9, has no application to transport services operated in the Vigo estuary.

82. Since, as discussed above (see point 18 et seq.), I have taken the view that Regulation No 3577/92 is indeed applicable to such services, it follows that Spain was bound to consult the Commission before approving Law 4/1999. By having failed to do so, it is in breach of Article 9 of the Regulation.

83. I therefore take the view that this final complaint must be sustained.

IV — Costs

84. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has been substantially unsuccessful and the Commission has applied for costs, the Kingdom of Spain must be ordered to pay the costs.

V — Conclusion

85. In the light of the foregoing considerations, I propose that the Court should reply in the following terms:

(1) By having maintained in force rules which:

— allow a concession for maritime transport services in the Vigo estuary to be granted to a single operator for a period of 20 years, and specifies experience in transport in the Vigo estuary as one of the selection criteria, which favours the incumbent operator,

— allow the imposition of public service obligations on seasonal transport services with the islands and regular transport services between mainland ports,

— were not the subject of consultations with the Commission prior to being approved,

the Kingdom of Spain has infringed Articles 1, 4 and 9 of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage).

(2) The remainder of the action is dismissed.

(3) The Kingdom of Spain is ordered to pay the costs.