JUDGMENT OF THE COURT (Second Chamber)

19 May 2011 *

In Case C-376/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 22 September 2009,

European Commission, represented by A. Alcover San Pedro and E. Depasquale, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Malta, represented by S. Camilleri and A. Buhagiar, acting as Agents,

defendant,

* Language of the case: English.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Rosas, U. Lõhmus (Rapporteur), A. Ó Caoimh and P. Lindh, Judges,

Advocate General: J. Mazák,
Registrar: A. Calot Escobar,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2010,

gives the following

Judgment

1 By its action, the Commission of the European Communities seeks a declaration from the Court that, by failing to decommission fire protection systems and fire 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 (OJ 2000 L 244, p. 1), as amended by Commission Decision 2004/232/EC of 3 March 2004 (OJ 2004 L 71, p. 28) ('Regulation No 2037/2000').

Legal context

Regulation No 2037/2000

2 The purpose of Regulation No 2037/2000 is to implement international commitments under the Vienna Convention for the Protection of the Ozone Layer, signed on 22 March 1985, and the Montreal Protocol on substances that deplete the ozone layer, adopted on 16 September 1987, which were approved by the European Economic Community by Council Decision 88/540/EEC of 14 October 1988 (OJ 1988 L 297, p. 8).

3 In accordance with Article 1 thereof, Regulation No 2037/2000 applies, inter alia, to the use of halons.

4 Article 4(1)(c) of the regulation provides that '[s]ubject to paragraphs 4 and 5, the placing on the market and the use of [halons] shall be prohibited.'

5 Article 4(4)(v) of Regulation No 2037/2000 is worded as follows:

'Except 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 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.'

7 Article 20(3) of Regulation No 2037/2000 provides that '[t]he competent authorities of the Member States shall carry out the investigations which the Commission considers necessary under this Regulation. Member States shall also conduct random checks on imports of controlled substances, and communicate the schedules and results of those checks to the Commission.'

8 Annex VII to Regulation No 2037/2000, concerning critical uses of halons, 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:

…

— 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,

…’

9 As regards the temporal application of Regulation No 2037/2000, no transitional measure was provided for in relation to the Republic of Malta in 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 (OJ 2003 L 236, p. 33) ('the Act of Accession').

10 Article 2 of the Act of Accession provides as follows:

'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.'

Pre-litigation procedure

11 By letter of 11 November 2005, the Commission reminded the Maltese authorities of the need to decommission fire protection systems and fire extinguishers containing halons not intended for critical uses and pointed out that the only authorised uses of those substances on board existing cargo ships, under Annex VII to Regulation No 2037/2000, were the making inert of oil tanks and the machinery used in connection with the automatic pumping of flour in or out of a ship's hold. It also requested

the Maltese authorities to complete and return by no later than 31 January 2006 a form relating to the critical use of halons on board ships flying the Maltese flag.

12 Since it did not receive any reply to that letter, the Commission deduced that the Maltese Government admitted non-critical use of halons on board ships flying the Maltese flag. Thus, taking the view that the Republic of Malta had failed to fulfil its obligations under Articles 4(4)(v), 16 and 20(3) of Regulation No 2037/2000 in conjunction with Article 10 EC, by letter of 15 December 2006 the Commission gave that Member State formal notice to submit its observations.

13 In their reply of 14 May 2007 to the letter of formal notice, the Maltese authorities stated that 89 ships flying the Maltese flag were still equipped with fire protection systems and fire extinguishers containing halons. However, disputing the Commission's interpretation of Annex VII to Regulation No 2037/2000, which they regarded as restrictive, those authorities submitted that the uses at issue were 'critical uses' within the meaning of that annex.

14 Since it was not convinced by that reply, the Commission issued a reasoned opinion on 17 October 2008 in which it called on that Member State to take the measures required to comply with the opinion within two months of the date of receipt.

15 The Maltese authorities replied by letter of 16 July 2009, stating that 41 ships flying the Maltese flag still used halons as fire-extinguishing agents. Whilst they disputed the interpretation advocated by the Commission of the concept of 'critical uses of halon' in Annex VII to Regulation No 2037/2000, the Republic of Malta stated that it

was instructing all ship owners with ships flying the Maltese flag that were equipped with fire protection systems containing halons to decommission those ships by no later than 30 June 2010.

16 Taking the view that that response was unsatisfactory, the Commission decided to bring the present action.

The action

Arguments of the parties

17 In support of its action, the Commission submits, first, that the concept of 'critical uses' of halons in Annex VII to Regulation No 2037/2000 must be given a restrictive interpretation since such uses are exceptions to the requirement laid down in Article 4(4)(v) of that regulation to decommission fire protection systems and fire extinguishers containing halons.

18 The Commission states that in accordance with the wording of Annex VII, in particular the third indents of the provisions relating to critical uses of halon 1301 and halon 2402 respectively, the only authorised critical uses of those halons in existing cargo ships are those envisaged 'for the making inert of occupied spaces where flammable liquid and/or gas release could occur'. In practice, those provisions relate to only two particular cases, namely making inert oil tankers and the machinery used in connection with the automatic pumping of flour in or out of a ship's hold.

19 Next, the Commission claims that a distinction must be made between systems for making inert and fire extinguishing systems, the halon-based systems installed on most cargo ships falling into the latter category. The phrase 'making inert' 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'.

20 Thus, as regards existing cargo ships, the only use of halons which can be regarded as critical within the meaning of Annex VII to Regulation No 2037/2000 is the use of halons 1301 and 2402 as part of a fire protection system that is designed to make inert occupied spaces where flammable liquid and/or gas release could occur, namely their use as part of a system designed to discharge halon before combustion or an explosion occurs in an atmosphere that is flammable or explosive in order to prevent such combustion or explosion. Consequently, the interpretation advocated by the Republic of Malta of the concept of critical uses is contrary to the wording of that annex.

21 The Commission adds that the Maltese authorities themselves admitted, during the pre-litigation procedure, that the ships in question use halon to extinguish fires. In any event, the Republic of Malta has failed to provide any information concerning the purpose of the use of halon on those ships. It therefore follows that, since halon is not usually installed on cargo ships for the purpose of making inert, such vessels are not covered by the exceptions for cargo ships set out in Annex VII to Regulation No 2037/2000.

22 Lastly, in rebuttal of the Republic of Malta's argument concerning the principle of the protection of legitimate expectations on which the ship owners in question should be able to rely, the Commission submits that there has been no breach of that principle in the present case as the Commission has not only never given any assurance to the effect claimed by the Republic of Malta in its arguments but has also consistently maintained its position on the interpretation to be given to that annex with regard to critical uses of halons in cargo ships. Moreover, as regards the financial burden

borne by the owners and charterers of the cargo ships in question, the Commission submits that the decommissioning of installations containing halon on those ships should have taken place before 1 May 2004 and that practical difficulties which appear at the stage when a European Union act is put into effect cannot permit a Member State unilaterally to opt out of fulfilling its obligations. It refers in that regard to Case 127/78 *Commission* v *United Kingdom* [1979] ECR 419.

23 The Republic of Malta contests, first, the interpretation advocated by the Commission of the concept of 'critical uses of halon' within the meaning of Annex VII to Regulation No 2037/2000. It submits that such use relates to engine rooms 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. In the present case, the use of halon in such 'spaces' on board the ships in question is covered by the concept of 'critical uses' within the meaning of that annex.

24 According to that Member State, the interpretation given by the Commission of that concept is contrary to the precise wording of the provisions in question in the annex, which are formulated in broad terms, referring to 'the making inert of occupied spaces where inflammable liquid and/or gas release could occur … in existing cargo ships' without further qualification.

25 Next, the Republic of Malta submits that, in the context of Regulation No 2037/2000, the distinction drawn by the Commission between the expressions 'extinguishing' and 'making inert' is unfounded and artificial. The process of extinguishing essentially forms part of the process of making inert, especially where the same agent is used. The demarcation line between the process of making inert and that of extinguishing is often questionable, since the use of halons 1301 and 2402 to combat deflagration in a particular area automatically renders the adjacent areas inert to further combustion

and/or possible explosions. Therefore, making inert is the natural outcome of the process of extinguishing where such halons are used. According to the Republic of Malta, halons 1301 and 2402 are renowned, in the fire protection field, for their effectiveness in extinguishing fires and making spaces inert and it is precisely their multi-purpose nature which accounts for their attractiveness and relative irreplaceability as fire protection agents.

26 Lastly, the Republic of Malta maintains that Annex VII to Regulation No 2037/2000 gave rise to a legitimate expectation on the part of ship owners, which may be affected by the Commission's subjective interpretation of that provision, especially since that interpretation restricts the scope of that provision and is contrary to its wording and spirit. Moreover, that interpretation is also contrary to the principle of legal certainty.

27 In any event, that Member State states that the number of ships flying the Maltese flag that are still equipped with fire protection systems containing halons is diminishing. Most of those vessels are approaching the end of their life, given that a number of them are single hull oil tankers which must be decommissioned by no later than the end of 2010, in accordance with the relevant provisions of the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978, and Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94 (OJ 2002 L 64, p. 1). It would therefore be unduly burdensome and disproportionate to require the owners of those ships to decommission those systems.

Findings of the Court

28 It should be noted, first, that Article 4(1)(c) of Regulation No 2037/2000 provides that, subject to paragraphs 4 and 5 of Article 4, the placing on the market and the use of halons is to be prohibited.

29 Article 4(4)(v) requires fire protection systems and fire extinguishers containing halons to be decommissioned before 31 December 2003, except for uses listed in Annex VII to Regulation No 2037/2000. In the absence of any provision to the contrary in the Act of Accession, that requirement took effect with regard to the Republic of Malta, under Article 2 of that act, upon its accession to the European Union on 1 May 2004.

30 It is clear from a combined reading of those provisions that, since 1 May 2004, the use of such systems and extinguishers is permitted for ships flying the Maltese flag only if it may be regarded as a 'critical use' within the meaning of that annex.

31 That Member State does not dispute that a number of ships flying the Maltese flag have fire extinguishing systems which use halon. However, it submits that such uses of halon are covered by the concept of critical use, disputing the restrictive interpretation of it given by the Commission.

32 In that regard, it is established 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 provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for

that purpose (see, in particular, Case C-287/03 *Commission* v *Belgium* [2005] ECR I-3761, paragraph 27, and the judgment of 10 June 2010 in Case C-37/09 *Commission* v *Portugal*, not published in the ECR, paragraph 28).

33 It is clear that the interpretation advocated by the Commission of the third indents relating to the critical use of halon 1301 and halon 2402 in Annex VII to Regulation No 2037/2000 is based on two claims. First, the halon-based systems installed in the vast majority of cargo ships are fire extinguishing systems, not systems for making inert. Second, those provisions cover only two particular cases in which halon-based systems may be used for the purpose of making inert, namely in oil tankers and for machinery used in connection with the automatic pumping of flour in or out of a ship's hold.

34 However, that interpretation cannot be inferred either from the provisions of that annex or from any other provision in Regulation No 2037/2000. Moreover, there is no reference in the preamble to the regulation to the two situations mentioned by the Commission.

35 On the other hand, the third indents relating to the use of halon 1301 and halon 2402 in Annex VII to Regulation No 2037/2000 are formulated in broad terms, referring to their use 'in the military and oil, gas and petrochemical sector, and in existing cargo ships'.

36 Moreover, the words 'the making inert of occupied spaces' in those provisions indicate that the use of those halons at issue is envisaged in spaces occupied by people, which may encompass types or parts of ships other than those referred to by the Commission.

37 Accordingly, even if, as the Commission maintains, in practice the use of halons on ships is confined to the two situations to which it refers, there is nothing in the wording of Regulation No 2037/2000 from which it can be inferred that the intention of the European Union legislature was to confine the use of halon on ships to those two situations.

38 Accordingly, it must be held that the Commission has not proved the alleged failure of the Republic of Malta to fulfil its obligations.

39 The Commission's action must therefore be dismissed.

Costs

40 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. As the Republic of Malta has applied for costs against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]