OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 20 April 1999 *

1. In this action, the Commission asks the Court to declare that the Kingdom of Belgium has failed to fulfil its obligations under Regulation (EEC) No 4055/86 [1] by failing either to adjust the Agreement with the Republic of Zaire in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium or to denounce that Agreement.

Legislative background

2. Regulation No 4055/86 is intended to implement Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences. [2] In particular, it is intended to 'apply the principle of freedom to provide services... to maritime transport between Member States and between Member States and third countries so as progressively to abolish existing restrictions and prevent the introduction of new restrictions'. [3] Article 1(1) of the regulation provides that 'freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

3. The provisions of the regulation which are significant in the present case are those on cargo-sharing arrangements. In this context, a distinction must be made between arrangements contained in existing agreements and those contained in future agreements. With respect to the latter, Article 5(1) of the regulation provides that they 'are *prohibited* other than in those exceptional circumstances where Community liner shipping companies would not otherwise have an effective opportunity to ply for trade to and from the third country concerned. In these circumstances such arrangements *may be*

* Original language: Italian.

1 — Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L 378, p. 1).

2 — OJ 1979 L 121, p. 1.

3 — See 11th recital.

permitted in accordance with the provisions of Article 6'.[4] With respect to existing arrangements, Article 3 provides that these 'shall be phased out or adjusted in accordance with the provisions of Article 4'. Article 4 provides:

'1. Existing cargo-sharing arrangements not phased out in accordance with Article 3 shall be adjusted in accordance with Community legislation and in particular:

(a) where trades governed by the United Nations Code of Conduct for Liner Conferences are concerned, they shall comply with this Code and with the obligations of Member States under Regulation (EEC) No 954/79;

(b) where trades not governed by the United Nations Code of Conduct for Liner Conferences are concerned, agreements shall be adjusted as soon as possible and in any event before 1 January 1993 so as to provide for fair, free and non-discriminatory access by all Community nationals, as defined in Article 1, to the cargo-shares due to the Member States concerned.

2. National action in pursuance of paragraph 1 shall be notified immediately to the Member States and the Commission. The consultation procedure established by Council Decision 77/587/EEC shall apply.

3. Member States shall report to the Commission on progress made on the adjustments referred to in paragraph 1(b), initially every six months and subsequently every year.

4. When difficulties arise in the process of adjusting agreements to bring them into conformity with paragraph 1(b), the Member State concerned shall inform the Council and the Commission. In cases where agreements are incompatible with paragraph 1(b) and where the Member State concerned so asks, the Council shall, acting on a proposal from the Commission, take appropriate action.'

4 — My italics. The procedure provided in Article 6 for authorisation of new arrangements is as follows:
'1. If a Member State's nationals or shipping companies, as defined in Article 1, paragraphs 1 and 2, are experiencing, or are threatened by, a situation where they do not have an effective opportunity to ply for trade to and from a particular third country, the Member State concerned shall inform the other Member States and the Commission as soon as possible.
2. The Council, acting by qualified majority on a proposal of the Commission, shall decide on the necessary action. Such action may include, in the circumstances envisaged in Article 5(1), the negotiation and conclusion of cargo-sharing arrangements.
3. If the Council has not decided on the necessary action within six months of a Member State providing information under paragraph 1, the Member State concerned may take such action as may for the time being be necessary to preserve an effective opportunity to ply for trade in accordance with Article 5(1).
4. Any action taken under paragraph 3 shall be in accordance with Community law and provide for fair, free and non-discriminatory access to the relevant cargo shares by nationals or Community shipping companies, as defined in Article 1(1) and (2).
5. National action in pursuance of paragraph 3 shall be notified immediately to the Member States and the Commission. The consultation procedure established by Council Decision 77/587/EEC shall apply.'

4. On 5 March 1981, the Kingdom of Belgium and the Republic of Zaire entered into an international agreement which included cargo-sharing arrangements. Article 3(3) of the Agreement provides that 'as regards maritime freight traffic of any kind between the two Parties, whatever the port of loading or unloading, the system to be applied by the Contracting Parties to vessels operated by their respective national shipping lines shall be based on the allocation formula 40/40/20 with respect to cargoes of freight and by volume'. [5]

The Agreement was to remain in force for an indefinite period but could 'be denounced at any time in writing by diplomatic channels, on six months' notice'. [6] Under Article 18(1), the Agreement was to enter into force once the Contracting Parties had notified each other that the formalities required by their respective legislations had been completed.

Ratification of the Agreement was notified by the Kingdom of Belgium on 13 June 1983 and by the Republic of Zaire on 13 April 1987. The Agreement therefore took effect on 13 April 1987, that is to say, after Regulation No 4055/86.

5 — Free translation.

6 — Art. 18(2). Free translation.

The pre-litigation procedure

5. On 10 April 1991, on the view that the cargo-sharing arrangements contained in the Agreement were contrary to Regulation No 4055/86, the Commission initiated the pre-litigation procedure, laid down in Article 169, with respect to the Kingdom of Belgium. In the letter of formal notice, the Commission stated that those cargo-sharing arrangements should be classed with 'arrangements in... future agreements' for the purposes of Article 5 of the regulation: they were therefore prohibited failing express authorisation, but this had not been requested.

In its reply of 7 June 1991 the defending Government challenged the classification of the Agreement as a future agreement; in its opinion, the Agreement had been concluded before Regulation No 4055/86 came into force and had been applied *de facto* since 1981. The Agreement could not therefore be regarded as prohibited under Article 5 of Regulation No 4055/86.

6. The Commission was not satisfied with this reply and, on 11 October 1993, sent the Belgian Government a reasoned opinion in which it stated that the Agreement,

in so far as it reserved 40% of maritime traffic to Belgian companies to the exclusion of those of other Member States, was contrary to Regulation No 4055/86. This arrangement was in fact considered discriminatory and contrary, therefore, to Article 1 of the regulation. Since the Agreement post-dated the entry into force of the regulation, it was prohibited by Article 5 thereof. The Belgian Government was therefore called upon to adopt the measures necessary to remedy the position within a period of two months.

7. However, after a more detailed study of the case, the Commission reached the conclusion that the Agreement could be regarded as an 'existing agreement' and therefore governed by Articles 3 and 4 of the regulation. Consequently, on 11 April 1996 a supplementary letter of formal notice was sent to the defendant government; in this the Commission noted that it had not received any communication regarding adjustment of the Agreement.

The Belgian authorities merely replied that they would endeavour to secure the adjustment requested by the Commission.

The Commission thereupon sent the Kingdom of Belgium a supplementary reasoned opinion on 23 June 1997.

Substance

8. In its submissions, the Commission repeats the arguments put forward during the pre-litigation procedure. The Agreement between Belgium and Zaire is described as an 'existing agreement': Article 18(1) thereof provides that the parties are to be bound only after 'the formalities required by their respective legislations have been completed'; those formalities were completed by Belgium upon enactment of the Law of 21 April 1983 approving the Agreement, which was notified to Zaire on 13 June 1983, that is to say, before the entry into force of Regulation No 4055/86.

The Commission goes on to argue that the Agreement is governed by Articles 3 and 4 of the regulation. It should therefore have been adjusted, under Article 4(1)(a), as from the time that Belgium ratified the United Nations Code of Conduct for Liner Conferences, that is to say, with effect from 30 March 1988.

9. Essentially, the Kingdom of Belgium does not deny the failure to fulfil obligations. It does not contend that the application should be rejected and, in its written defence, submits that it has always expressed its willingness for the disputed provisions to be amended in the way

desired by the Commission. This amendment has not yet been completed because of the difficult political situation in the Republic of Zaire, which has now become the Democratic Republic of the Congo.

However, the Belgian Government does not share the Commission's view that the Agreement should have been adjusted as from the time that Belgium ratified the United Nations Code of Conduct for Liner Conferences, that is to say, with effect from 30 March 1988. It contends, furthermore, that to denounce the Agreement would be disproportionate, as it also contains provisions which do not conflict with Regulation No 4055/86.

10. However, I cannot agree with the arguments put forward by the Belgian Government — which in any case do not lead it to contend that the application be rejected. As regards determination of the date from which the Agreement must be adjusted, the Commission properly observes that Article 4(1) makes a distinction between trades which are governed by the Code of Conduct and trades which are not. It is only in respect of the latter that the Regulation allows the Member States until 1 January 1993 to make the adjustment. On the other hand, no period of time is allowed for the other category of maritime transport, that relevant to the present case. And the failure to allow a period for adjustment of that category of trades means that they must be adjusted immediately, as soon as the State concerned has ratified the Code of Conduct. In the case of the Kingdom of Belgium, such ratification took place on 30 March 1988.

Next, as regards the contention that to denounce the Agreement is disproportionate, I accept the Commission's reply that no such denunciation was sought; the Commission merely requested that the Agreement be adjusted to make it compatible with the provisions of the regulation. Denunciation of the Agreement in its entirety would have been necessary only if the other Contracting Party had not accepted the amendments needed.

I therefore consider that the Commission's action is well founded and that Belgium has failed to fulfil its obligations under Regulation No 4055/86.

Conclusion

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

— uphold the action brought by the Commission;

— order the Kingdom of Belgium to pay the costs.