OPINION OF ADVOCATE GENERAL LÉGER delivered on 25 November 2004 [1]

1. By this action, the Commission of the European Communities asks the Court of Justice to declare that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 10 EC, under Council Regulation (EEC) No 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State [2] and, finally, under Council Regulation (EC) No 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services. [3]

2. The Commission complains that the Grand Duchy of Luxembourg independently negotiated, concluded, ratified, brought into force and refused to terminate bilateral agreements concerning inland navigation with the Czech and Slovak Federative Republic, Romania and Poland.

3. The Luxembourg Government challenges the alleged infringement as to its substance, even though it has made clear its intention to terminate the bilateral agreements at issue.

4. It will be seen that this case carries forward, in the context of inland waterway transport, from the judgments delivered by the Court in the *Open skies* cases, [4] which were concerned with bilateral air transport agreements concluded by a number of Member States with the United States of America.

1 — Original language: French.

2 — OJ 1991 L 373, p. 1.

3 — OJ 1996 L 175, p. 7.

4 — Case C-466/98 *Commission* v *United Kingdom* [2002] ECR I-9427; Case C-467/98 *Commission* v *Denmark* [2002] ECR I-9519; Case C-468/98 *Commission* v *Sweden* [2002] ECR I-9575; Case C-469/98 *Commission* v *Finland* [2002] ECR I-9627; Case C-471/98 *Commission* v *Belgium* [2002] ECR I-9681; Case C-472/98 *Commission* v *Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission* v *Austria* [2002] ECR I-9797; and Case C-476/98 *Commission* v *Germany* [2002] ECR I-9855.

I — Legal framework

A — *Community law*

1. Article 10 EC

5. That article provides:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

2. Community rules on transport by inland waterway

6. Title V of the EC Treaty is devoted to transport. At Article 70 EC it provides that, in that matter, the objectives of the Treaty 'shall ... be pursued by Member States within the framework of a common transport policy'.

7. For the purpose of implementing that common policy, Article 71(1) EC provides that 'the Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) measures to improve transport safety;

(d) any other appropriate provisions'.

8. Article 80(1) EC states that 'the provisions of this Title shall apply to transport by rail, road and inland waterway'.

9. Community policy on inland waterway transport is composed of various parts, such as structural improvements in inland waterway transport, the harmonisation of the conditions for obtaining and for the mutual recognition of national boatmasters' certificates for carriage by inland waterway, inland waterway transport services supplied within a Member State by non-resident carriers and the carriage of goods or passengers by inland waterway between Member States.

10. The last two elements of the Community policy on inland waterway transport have been implemented by Regulations No 3921/91 and No 1356/96 respectively.

11. Regulation No 3921/91 is intended to remove the restrictions imposed on persons providing inland waterway transport services on the grounds of their nationality or the fact that they are established in a Member State other than the one in which the service is to be provided. In accordance with the general principle of equality of treatment, the regulation provides that non-resident carriers should therefore be allowed to carry out the national transport of goods or persons by inland waterway under the same conditions as those imposed by the Member State concerned on its own carriers.

12. That right, conferred, with effect from 1 January 1993, on every carrier of goods or passengers, temporarily to operate national transport services for hire or reward in a Member State in which he is not established, a practice known as 'cabotage', is subject to conditions relating to the carrier and the vessels used by him.

13. As regards the conditions relating to the carrier, the effect of Article 1 of Regulation No 3921/91 is that cabotage in a Member State may be carried out by any carrier who is established in a Member State in accordance with its legislation and, where relevant, who is entitled there to carry out the international transport of goods or persons by inland waterway.

14. As regards the conditions relating to the vessels used by the carrier to carry out cabotage in a Member State, Article 2(1)

provides that they must be vessels whose owner or owners are either natural persons domiciled in a Member State and who are Member State nationals or legal persons which have their registered place of business in a Member State and the majority holding in which or majority of which belongs to Member State nationals.

15. Lastly, Article 6 of Regulation No 3921/91 states that the regulation 'shall not affect the rights existing under the Revised Convention for the Navigation of the Rhine (Convention of Mannheim)'. [5]

16. Regulation No 1356/96, for its part, is intended to establish freedom to provide services in the transport of goods or passengers by inland waterway between Member States. For that purpose, it is designed, like Regulation No 3921/91, to eliminate restrictions on the providers of services on grounds of their nationality or the fact that they are established in a Member State other than that in which the service is to be provided.

17. According to the first recital in the preamble to Regulation No 1356/96, '... the establishment of a common transport policy involves, inter alia, laying down common rules applicable to access to the market in the international transport of goods and passengers by inland waterway within the territory of the Community; ... those rules must be laid down in such a way as to contribute to the completion of the internal transport market'.

18. In addition, the third recital in the preamble to that regulation sets out the background to it and the reasons for its adoption. It states that, following the accession of new Member States, the different arrangements arising from bilateral agreements between Member States and new acceding States have made it necessary to lay down 'common rules to ensure the proper functioning of the internal transport market and, more particularly, to avoid distortions of competition and disturbances in the organisation of the market concerned'.

19. The effect of Articles 1 and 2 of Regulation No 1356/96 is essentially that any carrier of goods or passengers by inland waterway is to be allowed to carry out transport operations between Member States and in transit through them without discrimination on grounds of his nationality or place of establishment, provided that the following conditions are met: he must be

5 — That convention, signed at Mannheim on 17 October 1868, lays down the principles of freedom of navigation on the Rhine and equality of treatment of shippers and fleets. It binds the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation.

established in a Member State in accordance with the laws of that Member State, be entitled in that Member State to carry out the international transport of goods or passengers by inland waterway, use for such transport operations of inland waterways of vessels which are registered in a Member State or possess a certificate of membership of a fleet of a Member State and, finally, satisfy the conditions laid down in Article 2 of Regulation No 3921/91. [6]

20. Finally, Article 3 of Regulation No 1356/96 provides that the regulation 'shall not affect the rights of third-country operators under the Revised Convention for the Navigation of the Rhine (Mannheim Convention), the Convention on Navigation on the Danube (Belgrade Convention) [7] or the rights arising from the European Community's international obligations'.

B — *The bilateral agreements signed and approved by the Grand Duchy of Luxembourg*

21. The Grand Duchy of Luxembourg has signed three bilateral agreements on inland waterway transport with:

— the Czech and Slovak Federative Republic, on 30 December 1992; that agreement was approved by the Chamber of Deputies of the Grand Duchy of Luxembourg on 10 April 1994 and entered into force on 6 June 1994;

— Romania, on 10 November 1993; that agreement was approved by the Chamber of Deputies of the Grand Duchy of Luxembourg on 6 January 1995 and entered into force on 3 February 1995;

— Poland, on 9 March 1994; that agreement was approved by the Chamber of Deputies of the Grand Duchy of Luxembourg on 24 July 1995 and entered into force on 1 October 1995.

22. Those bilateral agreements lay down the rules on the carriage of passengers and goods by inland waterway between the contracting parties and on the reciprocal use of the inland waterways of each party by the vessels of the other party. They also provide that transport operations carried out by the vessels of one party between the ports of the other party and the ports of a State not party to those agreements, involving the

6 — See point 14 of this Opinion.

7 — That convention regarding the regime of navigation on the Danube was signed in Belgrade on 18 August 1948 by Bulgaria, Hungary, Romania, Czechoslovakia, the Ukraine, the Soviet Union and Yugoslavia. It is intended inter alia to guarantee freedom of navigation on the Danube.

boarding and/or disembarkation of passengers and the loading and/or unloading of goods (transport operations with third States), are subject to prior authorisation by the competent authorities.

C — The draft multilateral agreement between the European Community and various non-member countries

23. As regards the Community's external relations with non-member countries, the Council decided, at its session of 7 December 1992, to authorise the Commission 'to negotiate an agreement between the European Economic Community and Poland and the States parties to the Danube Convention (Hungary, Czechoslovakia, Romania, Bulgaria, ex-USSR, ex-Yugoslavia and Austria)'. [8] The general objective of the negotiations was to conclude a single multilateral agreement between the Community and the abovementioned countries on the rules applying to the transport of passengers and goods by inland waterway between the parties concerned.

24. One of the reasons for holding those negotiations was the need to establish an efficient pan-European inland waterway transport network in order to reduce congestion in the east-west transport networks, particularly since the opening of the Rhine-Main-Danube canal in 1992.

25. Having regard in particular to the political and economic upheavals experienced at that time by some States in the Danube region, the Council decided on 8 April 1994 that priority should be granted to the negotiations with Hungary, Poland, the Czech Republic and Slovakia.

26. Following those negotiations, the Commission submitted to the Council on 13 December 1996 a proposal for a decision on the conclusion of the agreement laying down conditions governing the carriage of goods and passengers by inland waterway between the European Community and the Czech Republic, the Republic of Poland and the Slovak Republic. [9]

27. To date, that proposal for a decision has not been adopted by the Council.

8 — Doc. 10828/92 TRANS 178 RELEX 72. In view of the fact that the relevant reference period for determining this action predates 1 May 2004, the date of accession of some of those countries to the European Union, I shall refer to them here as 'non-member countries'.

9 — COM(96) 634 final.

II — Pre-litigation procedure

28. Following the Council's decision of 7 December 1992 authorising the Commission to negotiate a multilateral agreement on waterway transport with some non-member countries of Central and Eastern Europe, the Commission, by letter of 24 April 1993, called upon several Member States, including the Grand Duchy of Luxembourg, 'to abstain from any invitation likely to compromise the proper conduct of the negotiations initiated at Community level and, in particular, to abandon ratification of the [bilateral] agreements already initialled or signed and to forgo the opening of further negotiations with the countries of Central and Eastern Europe relating to inland waterway transport'.

29. After it had sent a further letter dated 12 April 1994, to which the Luxembourg authorities responded with a statement of position of 9 May 1994, the Commission initiated the pre-litigation procedure pursuant to Article 169 of the EC Treaty (now Article 226 EC) by a letter of formal notice of 10 April 1995. It took the view that, by carrying on the procedures for concluding bilateral agreements with the Czech Republic and Slovakia, the Grand Duchy of Luxembourg was infringing Community law.

30. By letter of 2 December 1998, the Commission served a further formal notice on the Luxembourg Government, inter alia extending its complaints to the bilateral agreements that the Grand Duchy of Luxembourg had concluded with Romania and Poland.

31. As it was not satisfied with the answers provided by the Luxembourg Government, the Commission sent a reasoned opinion to it on 28 February 2000. The Luxembourg Government replied to that reasoned opinion by letter of 17 May 2000.

32. Since the Commission was not satisfied with that reply, it brought the present action under Article 226 EC by application lodged at the Court Registry on 18 June 2003.

III — The action

33. In support of its application, the Commission raises three complaints against the Grand Duchy of Luxembourg.

34. The first complaint concerns that Member State's infringement of the exclusive

external competence of the Community, as defined in the line of authority beginning with the *ERTA* judgment. [10]

35. The second complaint relates to a failure by the Grand Duchy of Luxembourg to fulfil its obligations under Article 10 EC.

36. The third complaint concerns the incompatibility of the bilateral agreements concluded between the Grand Duchy of Luxembourg and the Czech and Slovak Federative Republic, Romania and Poland with Regulation No 1356/96.

A — *The first complaint, alleging infringement of the exclusive external competence of the Community, as defined in the line of authority beginning with the* ERTA *judgment*

1. Arguments of the parties

37. The Commission complains that the Grand Duchy of Luxembourg has infringed the exclusive competence of the Community, as defined in the line of authority beginning with the *ERTA* judgment, by negotiating, concluding, ratifying and bringing into force the bilateral agreements with the Czech and Slovak Federative Republic, Romania and Poland. The Commission claims that those agreements affect the common rules adopted by the Community in Regulation No 3921/91 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State.

38. In particular, the Commission takes the view that the bilateral agreements in question, especially the provisions allowing carriers from the non-member countries concerned access, subject to special authorisation, to cabotage in the Grand Duchy of Luxembourg, affect the common rules contained in Regulation No 3921/91, to the extent that those rules harmonise completely, from 1 January 1993, the conditions for cabotage in the Member States of the Community. Furthermore, by reserving the right unilaterally to grant rights of access to carriers from third countries outside the Community framework, the Grand Duchy of Luxembourg has infringed the exclusive external competence of the Community.

39. Relying on the judgments delivered by the Court of Justice in the *Open skies* cases, the Commission considers that Regulation No 3921/91 does not concern Community carriers alone; it also applies to carriers from

10 — Case 22/70 *Commission* v *Council* ('*ERTA*') [1971] ECR 263.

non-member countries, as is borne out by Article 6 of that regulation which recognises the rights of access of Swiss carriers to cabotage in the Member States under the Convention of Mannheim. [11]

40. In reply to those arguments, the Luxembourg Government first of all contends that the reason for concluding the bilateral agreements at issue was the need, first, to prevent any discrimination between its national economic operators and the economic operators of other Member States which had concluded bilateral agreements with non-member countries and, secondly, to ensure that a legal vacuum is not created pending the conclusion of a Community agreement which may or may not materialise.

41. Pending the conclusion by the Community of a multilateral agreement, the Community may not prohibit its Member States in the meantime from securing provisional bilateral instruments.

42. The Luxembourg Government also states that, under Article 7 of the bilateral agreements, access to cabotage in the Grand Duchy of Luxembourg for non-resident carriers is subject to authorisation by the Luxembourg Minister for Transport, although such authorisation has never been issued.

43. It also submits that Regulation No 3921/91 concerns only Member States of the Community, not non-member countries.

44. Lastly, it argues that the agreements at issue will lose all legal force as from 1 May 2004, the date of accession of the Czech Republic, Poland and Slovakia to the European Union.

2. Assessment

45. I would observe at the outset that the argument that the bilateral agreements will lose their legal force by virtue of the accession to the European Union on 1 May 2004 of the parties concerned has, on any basis, no bearing on the determination of this action. The Court has consistently held that 'the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the

11 — See point 15 of this Opinion.

period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes'. [12] In this case, that period came to an end on 28 April 2000.

46. For the purpose of assessing the first complaint raised by the Commission, the conditions in which the Community may invoke exclusive external competence, for the purposes the line of authority beginning with the *ERTA* judgment, should be noted.

47. It is established that the Court laid the foundations in that judgment for what has been called the 'theory of implied external competence of the Community'. Accordingly, the Court recognised that the principle of vesting of powers expressly laid down by the Treaty did not preclude implied competence arising from the system of the Treaty. However, quite apart from the method of vesting — whether express or implied — external competence of the Community, the Court also defined the conditions governing its exclusive nature. Here, I shall look at the latter criterion alone, since the Luxembourg Government does not dispute the external dimension of the Community's competence as regards transport by inland waterway.

48. The Court has held that 'each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules ... As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system'. [13]

49. By those two statements of principle, the Court was pointing out even then that the acquisition by the Community of exclusive external competence is essentially progressive, in that such acquisition is closely dependent on the extent to which the internal provisions of Community law apply to a particular field. [14] Moreover, the Court emphasised the very factor that it would, in its subsequent case-law, confirm to be the main criterion of the exclusive nature of the Community's external competence, that is to say the effect on the common rules of international obligations that Member States enter into with non-member countries.

12 — See, inter alia, Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraph 17.

13 — Paragraphs 17 and 18 of the *ERTA* judgment.

14 — That is why 'the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level'. Opinion 1/94 of 15 November 1994 [1994] ECRI-5267, paragraph 77 (GATS and TRIPs Agreements).

50. The subsequent case-law, which consists mainly of a series of Opinions delivered by the Court on the basis of Article 228 of the EEC Treaty (which became Article 228 of the EC Treaty, which, in turn, became, after amendment, Article 300 EC),[15] made it possible to define specifically what the detrimental effect criterion covers. The Court thus pointed out that detrimental effect does not mean that there is any conflict; in other words, the common rules laid down at Community level may still be affected by provisions of international agreements, even though those provisions do not in any way conflict with those rules. Rules are affected where it is established that an international agreement 'is concerned with an area which is already covered to a large extent by Community rules progressively adopted ...'.[16]

51. The Court summarised those criteria in its *Open skies* judgments, in relation to bilateral agreements between the Member States concerned and the United States of America.[17] It was thus led to note the circumstances in which the scope of common rules may be affected or distorted by international commitments and, therefore, the circumstances in which the Community acquires exclusive external competence by reason of the exercise of its internal competence. The Court stated that 'that is the case where the international commitments fall within the scope of the common rules ..., or in any event within an area which is already largely covered by such rules'.[18]

52. The Court inferred from that that 'whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts ...'.[19]

53. The Court added that 'the same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the [*ERTA*] judgment if the Member States retained freedom to negotiate with non-member countries ...'.[20]

54. On the basis of those considerations concerning the Court's definition of the

15 — I am referring, in particular, to the following Opinions of the Court: 1/75 of 11 November 1975 [1975] ECR 1355 (Understanding on a local cost standard); 1/76 of 26 April 1977 [1977] ECR 741 (European laying-up fund for inland waterway vessels); 2/91 of 19 March 1993 [1993] ECR I-1061 (Convention No 170 of the International Labour Organisation); 1/94; and 2/92 of 24 March 1995 [1995] ECR I-521 (Third Revised Decision of the OECD on national treatment).

16 — See, in particular, Opinion 2/91, paragraph 25.

17 — See footnote 4.

18 — See, inter alia, *Commission* v *Denmark*, paragraphs 81 and 82.

19 — Ibid., paragraph 83.

20 — Ibid., paragraph 84.

exclusive nature of the external competence of the Community, it is necessary here to establish whether the common rules relied on by the Commission in this action, that is to say those resulting from Regulation No 3921/91, are liable to be affected by the international obligations undertaken by the Grand Duchy of Luxembourg.

55. It is clear from the arguments put forward by the Commission that it takes as a basis for the exclusive external competence of the Community the fact, as held by the Court, that 'the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries'. [21]

56. Like the Luxembourg Government, I take the view that Regulation No 3921/91 contains no provision whatsoever laying down the manner in which carriers from non-member countries are to be treated.

57. It should be noted that the regulation, which lays down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State, applies only to carriers who are established in a Member State and who use vessels whose owner or owners are either natural persons domiciled in a Member State and who are Member State nationals or legal persons which have their registered place of business in a Member State and the majority holding in which or majority of which belongs to Member State nationals. [22]

58. I would also observe that the fact that Regulation No 3921/91 provides in Article 6 that it 'shall not affect the rights existing under the Revised Convention for the Navigation of the Rhine (Convention of Mannheim)' confirms, in my opinion, the view that the Community legislature has not regulated access by carriers from non-member countries to the intra-Community market in inland waterway transport. By that provision, the Community — in my opinion — is merely taking formal note of Switzerland's rights under the Convention of Mannheim. If the opposite view were taken, the negotiations conducted at Community level, on the initiative of the Council, for the purpose of concluding a multilateral agreement intended, in particular, to regulate the situation of carriers from the non-member countries concerned would be entirely pointless.

59. Therefore, in accordance with the Court's case-law, as set out most recently in its *Open skies* judgments, I take the view that, since they concern only Community carriers, the common rules in Regulation No

21 — Ibid., paragraph 83.

22 — See points 13 and 14 of this Opinion.

3921/91 cannot be affected by bilateral agreements which, for their part, concern carriers from the non-member countries that are parties to them.

60. Moreover, and in line with the approach adopted by the Court in its *Open skies* judgments, the very fact that the regulation on which the Commission relies does not govern the situation of carriers from non-member countries which operate within the Community shows that the harmonisation achieved by that regulation is not complete. [23]

61. It is, in my view, clear from those considerations that the Community cannot rely on exclusive external competence, as defined by the *ERTA* judgment, on the basis of an argument that the common rules in Regulation No 3921/91 are affected by the international obligations undertaken by the Grand Duchy of Luxembourg in the bilateral agreements contested by the Commission.

62. In those circumstances and in the light of the reasons for the complaint as set out by the Commission in its application, I take the view that the negotiation, conclusion, ratification and entry into force of the bilateral agreements between the Grand Duchy of Luxembourg and the Czech and Slovak Federative Republic, Romania and Poland do not constitute an infringement of an exclusive external competence of the Community.

63. For those reasons, I propose that the Court should find the first complaint raised by the Commission to be unfounded.

B — *The complaint alleging infringement of Article 10 EC*

1. Arguments of the parties

64. By the second complaint, the Commission claims that the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 10 EC. By continuing to negotiate, sign, ratify and bring into force the bilateral agreements in question after the Council decided on 7 December 1992 to authorise the Commission to negotiate an agreement on behalf of the Community, the Grand Duchy of Luxembourg has jeopar-

23 — See, inter alia, *Commission* v *Denmark*, paragraph 93.

dised the implementation of that Council decision. Thus, the negotiation by the Commission of an agreement on behalf of the Community and the subsequent conclusion of such an agreement by the Council are inevitably made more difficult by interference from a Member State's own initiatives. The Community's negotiating position in relation to non-member countries is also weakened, because the Community and its Member States appear fragmented.

65. In addition to the arguments set out at points 40 and 41 of this Opinion, the Luxembourg Government contends that the bilateral agreements at issue were negotiated before 7 December 1992, the date on which the Council authorised the Commission to negotiate a multilateral agreement between the Community and Poland and the States parties to the Danube Convention.

66. It also considers that the Council's decision of 8 April 1994 calling on the Commission to give special attention to the negotiations with Hungary, Poland, the Czech Republic and Slovakia in fact constitutes a new negotiating mandate which replaces the mandate set out in the Council's decision of 7 December 1992.

67. Lastly, the Luxembourg Government states that it has declared its willingness to terminate all its bilateral agreements on inland waterway navigation immediately after a multilateral agreement has entered into force.

2. Assessment

68. I would point out first of all that it is clear from the documents before the Court that, even though the bilateral agreements concerned were probably negotiated in part before the Council's decision of 7 December 1992 authorising the Commission to negotiate a multilateral agreement, they were all none the less signed and approved subsequent to that Community decision. Furthermore, the negotiations on the bilateral agreements concluded with Romania and Poland were most likely carried out after the Council's decision of 7 December 1992, given that they were signed on 10 November 1993 and 9 March 1994 respectively.

69. In my view, moreover, there is nothing in the documents before the Court to support the argument raised by the Luxembourg Government that the Council's decision of 8 April 1994 calling on the Commission to give special attention to the negotiations with Hungary, Poland, the Czech Republic and Slovakia in fact constitutes a new mandate for negotiation which replaces the mandate set out in the Council's decision of 7 December 1992. The 1994 decision should,

in my opinion, be regarded as serving merely to clarify the initial negotiating instructions contained in the 1992 decision.

70. In the light of that, I share the Commission's view that the conduct attributed to the Grand Duchy of Luxembourg does indeed constitute an infringement of its obligations of genuine cooperation laid down in Article 10 EC.

71. That article requires Member States inter alia, in positive terms, to facilitate the achievement of the Community's tasks and, in negative terms, to abstain 'from any measure which could jeopardise the attainment of the objectives of this Treaty'.

72. Therefore, irrespective of whether the external Community competence is exclusive, Member States are required, in my view, to observe special duties to act and to abstain from acting once the Council has decided to undertake specific Community action. [24]

24 — See Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, paragraph 28. That judgment falls within the specific context of the exclusive competence of the Community in relation to measures for the conservation of resources of the sea. However, the principle that Article 10 EC imposes on Member States special duties to act and to abstain from acting once the Community has decided to undertake Community action must, in my opinion, be applied generally.

73. In this case, the actual implementation of the Council's decision of 7 December 1992 authorising the Commission to negotiate a multilateral agreement on behalf of the Community thus precluded any action by an individual State involving the negotiation, signature, ratification and entry into force of concurrent bilateral agreements in the same field.

74. The negotiation, signature, ratification and bringing into force of such bilateral agreements in an area covered by the Commission's express negotiating mandate may be regarded as measures that were liable to jeopardise the adoption of a multilateral agreement at Community level. I would also add that the danger of creating a legal vacuum with regard to inland waterway transport that the Luxembourg Government claims to have sought to avoid was, on the contrary, probably increased at Community level by the paralysing effect of the bilateral agreements thus concluded.

75. Moreover, it is clear from the documents before the Court that the Luxembourg Government did not seek in any way to cooperate with the Commission or to consult it over its draft bilateral agreements; on the contrary, it adapted a course of conduct that was separate from and ran parallel to the negotiations conducted by the Commission at Community level.

76. In this regard, the fact that the Luxembourg Government has declared its willingness to terminate all its bilateral agreements on inland waterway navigation immediately after the entry into force of a multilateral agreement binding the Community and that it has included provisions to that effect in its bilateral agreements does not, in my view, demonstrate compliance with Article 10 EC.

77. In the light of those considerations, I propose that the Court should find the Commission's complaint alleging that the Grand Duchy of Luxembourg has infringed Article 10 EC to be well founded.

C — *The complaint alleging that the bilateral agreements concluded between the Grand Duchy of Luxembourg and the Czech and Slovak Federative Republic, Romania and Poland are incompatible with Regulation No 1356/96*

1. Arguments of the parties

78. The Commission submits that the bilateral agreements between the Grand Duchy of Luxembourg and the Czech and Slovak Federative Republic, Romania and Poland are incompatible with Regulation No 1356/96 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services.

79. More specifically, the Commission claims that maintaining in force in those bilateral agreements, after the adoption of Regulation No 1356/96, the provisions which allow vessels registered in non-member countries to provide services between the Grand Duchy of Luxembourg and other Member States of the Community, subject to special authorisation from the competent authority, is incompatible with that regulation. The regulation applies to carriers of goods or passengers by inland waterway between Member States and in transit through them (Article 1) and lays down the conditions to be satisfied by any carrier of goods or passengers by inland waterway in order to be allowed to carry out transport operations between Member States and in transit through them (Article 2).

80. The Commission takes the view that the Grand Duchy of Luxembourg is using the contested provisions of the bilateral agree-

ments to modify unilaterally and beyond the Community's control the nature and scope of the rules concerning the freedom to provide intra-Community inland waterway navigation services which are laid down by Community law. Consequently, the unilateral grant of rights of access by that Member State, or at least the fact that it reserves the right unilaterally to grant rights of access, on routes within the Community, to shippers other than those who fulfil the conditions laid down by Regulation No 1356/96, is incompatible with the system established by that regulation. According to the Commission, Polish, Romanian, Czech and Slovak shippers and navigation companies likely to be authorised under the bilateral agreements to carry out transport operations between the Grand Duchy of Luxembourg and the other Member States of the Community clearly did not meet any of those conditions at the time relevant to this action.

2. Assessment

82. I consider this final complaint raised by the Commission to be unfounded for the reasons set out below.

83. First of all, it is necessary to focus on the main objective of Regulation No 1356/96, which is to establish *freedom to provide services* in the field of transport of goods or passengers by inland waterway *between Member States*. For that purpose, it aims to eliminate *restrictions*, including any discrimination, as regards providers of services on the grounds of their nationality or the fact that they are established in a Member State other than that in which the service is to be provided.

81. The Luxembourg Government replies that it follows from the wording of the regulation in question that the regulation concerns only Community carriers and that carriers from non-member countries are excluded or fall within the scope of other Community provisions.

84. Under Article 2 of that regulation, the benefit of those arrangements involving the freedom to provide inland waterway transport services between Member States is subject to a number of conditions: establishment in a Member State in accordance with the laws of that Member State, entitlement in that Member State to carry out the international transport of goods or passengers by

inland waterway, use for such transport operations of inland waterways of vessels which are registered in a Member State or possession of a certificate of membership of a fleet of a Member State and, finally, satisfaction of the conditions laid down in Article 2 of Regulation No 3921/91. [25]

85. The definition and framework of such arrangements governing the freedom to provide inland waterway transport services between the Member States of the Community to the benefit of carriers established in one of those Member States must not, in my view, be construed as an absolute prohibition against services being carried out between various Member States of the Community by vessels registered in non-member countries.

86. Indeed, I consider that, although Regulation No 1356/96 may be construed, as the Commission suggests in its observations, as establishing a Community preference with regard to inland waterway transport within the Community, that preference relates, in my view, only to the benefit deriving from the arrangements involving the *freedom* to provide services, which is enjoyed, as I have already indicated, only by carriers who are closely connected with a Member State. However, there is nothing in the substance of that regulation to indicate that its purpose or effect is, generally, to prevent vessels registered in countries outside the European Community from carrying out services between various Member States of the Community.

87. Moreover, the Commission does not maintain that the bilateral agreements have created a parallel system of freedom to provide services for the benefit of vessels registered in the Czech and Slovak Federative Republic, Romania and Poland. It clearly recognises, in its observations, that those bilateral agreements provide only for the *possibility*, not for the right, for those vessels registered in those non-member countries to operate services between various Member States of the Community. It states that such an opportunity to provide services is subject to special authorisation by the competent authority.

88. The bilateral agreements at issue do not therefore establish freedom to provide services for the transport by inland waterway of goods or passengers between the Member States of the Community by Czech, Slovak,

25 — See, in that regard, point 14 of this Opinion.

Romanian and Polish carriers; they merely introduce restrictive arrangements under which such services may be provided in strictly defined circumstances and subject to authorisation.

89. Thus, by reference to the wording of the bilateral agreements, it is possible to conclude that, under Article 1(2)(d), 'the expression "transport operations with third States" [26] means transport operations carried out by the vessels of one party between the ports of the other party and the ports of a third State involving the boarding and/or disembarkation of passengers and the loading and/or unloading of goods'. [27] In that context, Article 6 of the bilateral agreements provides, essentially, that transport operations with third States are to be subject to authorisation by the competent authorities of the parties and/or may be carried out only in the circumstances defined by the joint committee responsible for the enforcement of the agreements. The agreements therefore do not involve arrangements relating to the *freedom* to provide services.

26 — These are States which are not parties to the bilateral agreements concerned.

27 — For the bilateral agreement concluded with Romania, reference should be made to Article 1(k).

90. Therefore, having regard to the different nature of the Community arrangements and the bilateral arrangements on services for the transport of goods or passengers by inland waterway, I consider that, contrary to what the Commission claims, the Grand Duchy of Luxembourg has not, by way of the criticised provisions of the bilateral agreements, modified the nature and scope of the rules concerning the freedom to provide intra-Community transport services by inland waterway which are laid down in Regulation No 1356/96.

91. In the light of all those factors, I conclude that the Commission has failed to provide proper justification for its complaint that the bilateral agreements between the Grand Duchy of Luxembourg and the Czech and Slovak Federative Republic, Romania and Poland are incompatible with Regulation No 1356/96.

92. Lastly, in accordance with Article 69(3) of the Rules of Procedure of the Court of Justice and since I suggest allowing the Commission's application only in part, each of the parties should bear its own costs.

IV — Conclusion

93. Consequently, I propose that the Court should:

(1) declare that, by negotiating, signing, ratifying and bringing into force, subsequent to the Council's decision of 7 December 1992 on the initiation of negotiations between the Community and non-member countries concerning the rules applying to the transport of passengers and goods by inland waterway between the parties concerned, bilateral agreements on transport operations by inland waterway with the Czech and Slovak Federative Republic, Romania and Poland, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Article 10 EC;

(2) dismiss the remainder of the action;

(3) order each of the parties to bear its own costs.