JUDGMENT OF THE COURT (First Chamber)

14 September 1999 *

In Joined Cases C-171/98, C-201/98 and C-202/98,

Commission of the European Communities, represented by Frank Benyon, Legal Adviser, and Bernard Mongin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium (C-171/98 and C-201/98), represented by Jan Devadder, General Adviser in the Legal Directorate of the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

and

Grand Duchy of Luxembourg (C-202/98), represented by Nicolas Schmit, Conseiller d'État, Head of the International Economic Relations and Coopera-

* Language of the case: French.

tion Directorate of the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the office of that Ministry, 5 Rue Notre-Dame,

defendants,

APPLICATIONS for declarations that, by concluding and maintaining in force the agreements containing cargo-sharing arrangements with the Togolese Republic (C-171/98 and C-202/98) and the Republic of Mali (C-201/98 and C-202/98) and by failing either to adjust the agreements with the Republic of Senegal and the Republic of Côte d'Ivoire (C-201/98 and C-202/98) in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium and Luxembourg or to denounce those agreements, the Kingdom of Belgium (C-171/98 and C-201/98) and the Grand Duchy of Luxembourg (C-202/98) have failed to fulfil their obligations under 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), in particular Articles 3 and 4(1) thereof with respect to the Republic of Senegal and the Republic of Côte d'Ivoire and Article 5 thereof with respect to the Republic of Mali and the Togolese Republic,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward (Rapporteur) and L. Sevón, Judges,

Advocate General: A. La Pergola,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 April 1999,

gives the following

Judgment

1 By applications lodged at the Court Registry on 8 May 1998 (C-171/98) and 25 May 1998 (C-201/98 and C-202/98), the Commission of the European Communities brought three actions under Article 169 of the EC Treaty (now Article 226 EC) for declarations that, by concluding and maintaining in force the agreements containing cargo-sharing arrangements with the Togolese Republic (C-171/98 and C-202/98) and the Republic of Mali (C-201/98 and C-202/98) and by failing either to adjust the agreements with the Republic of Senegal and the Republic of Côte d'Ivoire (C-201/98 and C-202/98) in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium and Luxembourg or to denounce those agreements, the Kingdom of Belgium (C-171/98 and C-201/98) and the Grand Duchy of Luxembourg (C-202/98) had failed to fulfil their obligations under 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), in particular

Articles 3 and 4(1) thereof with respect to the Republic of Senegal and the Republic of Côte d'Ivoire and Article 5 thereof with respect to the Republic of Mali and the Togolese Republic.

2 By order of the President of the Court of 15 July 1998, Cases C-171/98, C-201/98 and C-202/98 were joined for the purposes of the written and oral procedure and judgment.

Legal background

3 Article 1(1) of Regulation No 4055/86 provides:

'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.'

4 Article 2 of that regulation provides:

'By way of derogation from Article 1, unilateral national restrictions in existence before 1 July 1986 on the carriage of certain goods wholly or partly reserved for vessels flying the national flag, shall be phased out at the latest in accordance with the following timetable:

— carriage between Member States by vessels flying the flag of a Member State: 31 December 1989,

— carriage between Member States and third countries by vessels flying the flag of a Member State: 31 December 1991,

— carriage between Member States and between Member States and third countries in other vessels: 1 January 1993.'

5 Article 3 of the regulation provides:

'Cargo-sharing arrangements contained in existing bilateral agreements concluded by Member States with third countries shall be phased out or adjusted in accordance with the provisions of Article 4.'

6 Article 4(1) provides:

'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.'

7 Article 5(1) of the regulation provides:

'Cargo-sharing arrangements in any future agreements with third countries 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 permitted in accordance with the provisions of Article 6.'

8 In accordance with Article 12, Regulation No 4055/86 entered into force on the day following its publication in the *Official Journal of the European Communities*, that is, on 1 January 1987.

9 Under Article 3(1) of the agreement between the Belgo-Luxembourg Economic Union (hereinafter 'the BLEU') and the Republic of Côte d'Ivoire, which entered into force on 25 October 1979:

'As regards maritime freight traffic of any kind between the countries of 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 fleets shall be based on the allocation formula 40/40/20, with respect to cargoes by value of freight and by volume.'

10 Article 4(2) of the agreement between the BLEU and the Republic of Senegal, which entered into force on 3 September 1984, provides *inter alia*:

'As regards maritime freight traffic (liner traffic) between the countries of the two Parties, whatever the port of loading, 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 by value of freight and by volume.'

11 Under Article 4(2) of the agreement between the BLEU and the Republic of Mali, which entered into force on 26 June 1987:

'As regards maritime freight traffic (liner traffic) between the countries of 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 by value of freight and by volume. If the 20% allocated to third countries is not transported by them, the remainder shall be divided equally by freight and volume between the national shipping lines of the Republic of Mali and the national shipping lines of the BLEU.'

12 Article 4(2) of the agreement between the BLEU and the Togolese Republic, which was signed on 19 October 1984 and entered into force on 19 October 1987, provides:

'As regards maritime freight traffic (liner traffic) between the countries of the two Parties, whatever the port of loading or unloading, the Contracting Parties agree to apply the principle of sharing cargoes on the basis of strict equality of rights

and according to criteria of tonnage of paying unit and value of the freight, the latter criterion taking precedence.

The share of trade reserved to vessels operated by their respective shipping lines shall be equal to at least 40% of total traffic, the share available to third countries' fleets not exceeding 20%.'

13 Under Article 5 of that agreement:

'Without prejudice to its international commitments, each Contracting Party shall have absolute disposal of its rights of traffic under the present agreement.'

14 Under Article 21 of that agreement:

'The present Agreement shall enter into force once each Contracting Party has notified the other Party by diplomatic channels that the necessary constitutional procedures have been completed.

The present Agreement shall be concluded for a period of five years. It shall be automatically extended for a period of one year at a time unless

denounced by diplomatic channels by either Contracting Party on six months' notice.'

The pre-litigation procedure

15 By letter of 10 April 1991 to the Belgian Government (C-171/98) and two letters of 9 November 1995 to the Belgian Government (C-201/98) and the Luxembourg Government (C-202/98) respectively, the Commission stated that those two Member States had failed to fulfil their obligations under Regulation No 4055/86, in particular Articles 3 and 4(1) thereof with respect to the agreements between the BLEU and the Republic of Senegal and the Republic of Côte d'Ivoire and Article 5 with respect to the agreements between the BLEU and the Republic of Mali and the Togolese Republic, and therefore gave them formal notice to submit their observations within two months.

16 In Case C-171/98 the Commission sent the Kingdom of Belgium a reasoned opinion by letter of 11 October 1993, and a supplementary reasoned opinion on 26 January 1996.

17 In Cases C-201/98 and C-202/98 the Commission sent a reasoned opinion to the Kingdom of Belgium on 16 June 1997 and to the Grand Duchy of Luxembourg on 29 July 1997.

18 In Case C-171/98 the Commission, in reply to a letter of the Belgian Government of 7 June 1991 stating that in its opinion the agreement between the BLEU and the Togolese Republic was an existing agreement within the meaning of Articles 3 and 4 of Regulation No 4055/86, set out in its supplementary reasoned opinion the reasons for which that agreement was to be regarded as a future agreement governed by Article 5 of that regulation. The Commission explained that it

followed from Article 21 of the agreement between the BLEU and the Togolese Republic that each contracting party had to carry out the 'necessary constitutional procedures' before actually being bound by the agreement. In those circumstances, the signing of the agreement in 1984 did no more than authenticate the text, and it was by the Belgian law of 9 October 1987 'approving the agreement' that the Kingdom of Belgium actually approved the agreement with the Togolese Republic, that being after the entry into force of Regulation No 4055/86.

19 The Belgian Government, in its reply of 30 April 1996, contested the view taken by the Commission, arguing that the provisions of the agreement with the Togolese Republic had in fact been implemented before the constitutional procedures were completed. It also maintained that:

— a distinction between existing and future agreements is unknown to the usual terminology of the law of treaties;

— as from the signature of the agreement, the contracting parties had to refrain from any act contrary to the agreement;

— the parties to the agreement expressed their intention of being bound by it as from its conclusion;

— the stated intention of the parties is the essential factor;

— the agreement had effect as from its signature, without there being any need to wait for its ratification.

20 In Case C-201/98 the Belgian Government stated, in its reply of 7 February 1996 to the Commission's letter of formal notice, that the agreements between the BLEU and the Republic of Senegal, the Republic of Côte d'Ivoire and the Republic of Mali were in the course of adjustment. On 31 October 1996 the Belgian Government sent the Commission a copy of a letter of 26 February 1996 from the Senegalese Ministry of Foreign Affairs in which that country accepted the adjustment of the bilateral agreement. However, the Commission was not given any information on the substance of that agreement.

21 As regards Case C-202/98, the Luxembourg Government stated, in its reply of 14 March 1996 to the Commission's letter of formal notice, that the Kingdom of Belgium had concluded maritime agreements on behalf of the BLEU, in the tradition of the BLEU Convention, and that the practice was not to subject such agreements to the ratification procedure in the Grand Duchy of Luxembourg or even to publish them in the *Mémorial*. The Luxembourg Government also questioned whether the Grand Duchy of Luxembourg, as opposed to the BLEU, was in breach of obligations, given that the agreement names the Belgian administration as the competent authority, that it contains several provisions which have no real consequences for Luxembourg, and that it has not been shown that any Luxembourg shipping lines are involved.

22 Since it found that the adjustment procedures had not been completed, the Commission brought the present actions for failure to fulfil obligations.

The applications

23 The Commission observes that it is clear from Article 1(1) of Regulation No 4055/86 that the regulation applies the freedom to provide maritime transport services between Member States and between Member States and third countries to nationals of Member States who are established in a Member

State other than that of the person for whom the services are intended. Articles 3 and 5 cover the situation concerning third countries, Article 3 applying to existing agreements and Article 5 to future agreements.

24 For trades governed by the United Nations Code of Conduct for Liner Conferences (hereinafter 'the Code of Conduct'), covered by Article 4(1)(a) of Regulation No 4055/86, no period is allowed for adjustment of an agreement. In contrast, for trades not governed by the Code of Conduct, Article 4(1)(b) allows a period for adjustment extending to 1 January 1993 at the latest. The Commission therefore finds that whichever the provision applicable to the various trades, Article 4(1)(a) or Article 4(1)(b) of Regulation No 4055/86, the agreements in question should long since have been adjusted.

25 Since the agreements between the BLEU and the Republic of Senegal, the Republic of Côte d'Ivoire, the Republic of Mali and the Togolese Republic contain cargo-sharing arrangements which reserve part of the traffic for Belgian and Luxembourg shipping lines to the exclusion of shipping lines from other Member States of the Community, the Commission considers that they are contrary to Regulation No 4055/86.

26 As the agreements between the BLEU and the Republic of Senegal and the Republic of Côte d'Ivoire entered into force on 3 September 1984 and 25 October 1979 respectively, before the entry into force of Regulation No 4055/86, the Commission contends that they are existing agreements which come under Articles 3 and 4 of that regulation and that, since they are discriminatory, they should, under Article 3, be phased out or adjusted in accordance with the provisions of Article 4.

27 The agreement between the BLEU and the Republic of Mali entered into force on 26 June 1987 and that between the BLEU and the Togolese Republic on

19 October 1987. The Commission contends that those agreements are future agreements within the meaning of Article 5 of Regulation No 4055/86, and should therefore be phased out or adjusted in accordance with that provision.

28 In Case C-171/98, the Belgian Government states that by exchanges of letters confirming a verbal agreement between the BLEU and the Togolese Republic, Articles 4 and 5 of the agreement, which are considered to be contrary to Article 5(1) of Regulation No 4055/86, have been adjusted in accordance with the Commission's wishes. However, because of a material error, it proved necessary to proceed to a new exchange of letters, which should be done in the near future.

29 In Case C-201/98, the Belgian Government observes that from the start of the procedure it has always stated that it never intended to evade its obligations concerning the implementation of Regulation No 4055/86. However, negotiations with the various countries took longer than expected.

30 By letter of 25 November 1998 the Belgian Government informed the Commission that the obligations under Regulation No 4055/98 were now complied with as regards the agreements with the Republic of Mali and the Republic of Senegal.

31 In Case C-202/98, the Luxembourg Government concurs with the observations submitted by the Belgian Government in its defence in Case C-201/98.

32 The Court finds, first, that since the Belgian law approving the agreement between the BLEU and the Togolese Republic was adopted on 9 October 1987,

that is, after the date of entry into force of Regulation No 4055/86, that agreement is to be categorised as a future agreement within the meaning of Article 5 of that regulation. Similarly, in that it entered into force on 26 June 1987, the agreement between the BLEU and the Republic of Mali likewise constitutes a future agreement. On the other hand, the agreements between the BLEU and the Republic of Senegal and the Republic of Côte d'Ivoire entered into force on 3 September 1984 and 25 October 1979 respectively, before the entry into force of Regulation No 4055/86, so that they constitute agreements governed by Articles 3 and 4 of that regulation.

33 Second, as regards determination of the date from which an agreement should have been adjusted, Article 4(1) of Regulation No 4055/86 distinguishes between trades governed by the Code of Conduct and trades not so governed. Only with respect to the latter trades does the regulation allow Member States a period expiring on 1 January 1993 for the adjustment prescribed. Where trades are governed by the Code of Conduct, no period is allowed for adjustment of an agreement.

34 The Code of Conduct was ratified by the Kingdom of Belgium on 30 March 1988. The Grand Duchy of Luxembourg, on the other hand, has not ratified it.

35 However, as the Commission observes, whatever the time-limit applicable, the agreements at issue in the present cases should long since have been phased out or adjusted by the Kingdom of Belgium and the Grand Duchy of Luxembourg.

36 The Belgian Government does not dispute that there has been a failure to fulfil obligations and states that it never intended to evade its obligations concerning the implementation of Regulation No 4055/86. On the other hand, the Grand Duchy of Luxembourg denies that there is a failure to fulfil obligations. However,

since it refers to the Belgian Government's observations on the substance, the Luxembourg Government contests the failure to fulfil obligations only in a formal sense.

37 In those circumstances, since the agreements between the BLEU and the Republic of Mali, the Togolese Republic, the Republic of Senegal and the Republic of Côte d'Ivoire were not adjusted within the prescribed periods, the actions brought by the Commission must be regarded as well founded.

38 Accordingly, by concluding and maintaining in force the agreements on cargo-sharing arrangements with the Togolese Republic (C-171/98 and C-202/98) and the Republic of Mali (C-201/98 and C-202/98) and by failing either to adjust the agreements with the Republic of Senegal and the Republic of Côte d'Ivoire (C-201/98 and C-202/98) in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium and Luxembourg or to denounce those agreements, the Kingdom of Belgium (C-171/98 and C-201/98) and the Grand Duchy of Luxembourg (C-202/98) have failed to fulfil their obligations under Regulation No 4055/86, in particular Articles 3 and 4(1) thereof with respect to the Republic of Senegal and the Republic of Côte d'Ivoire and Article 5 thereof with respect to the Republic of Mali and the Togolese Republic.

Costs

39 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 Belgium has been unsuccessful in Cases C-171/98 and C-201/98, it must be ordered to pay the costs. Since the Grand

Duchy of Luxembourg has been unsuccessful in Case C-202/98, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Declares that, by concluding and maintaining in force the agreements containing cargo-sharing arrangements with the Togolese Republic (C-171/98 and C-202/98) and the Republic of Mali (C-201/98 and C-202/98) and by failing either to adjust the agreements with the Republic of Senegal and the Republic of Côte d'Ivoire (C-201/98 and C-202/98) in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium and Luxembourg or to denounce those agreements, the Kingdom of Belgium (C-171/98 and C-201/98) and the Grand Duchy of Luxembourg (C-202/98) have failed to fulfil their obligations under 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, in particular Articles 3 and 4(1) thereof with respect to the Republic of Senegal and the Republic of Côte d'Ivoire and Article 5 thereof with respect to the Republic of Mali and the Togolese Republic;

2. **In Cases C-171/98 and C-201/98, orders the Kingdom of Belgium to pay the costs and, in Case C-202/98, orders the Grand Duchy of Luxembourg to pay the costs.**

Jann Edward Sevón

Delivered in open court in Luxembourg on 14 September 1999.

R. Grass P. Jann

Registrar President of the First Chamber