JUDGMENT OF THE COURT

4 July 2000 *

In Case C-84/98,

Commission of the European Communities, represented by A. Caeiro, Principal Legal Adviser, B. Mongin and M. Afonso, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, Director of the Legal Service of the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, and M.L. Duarte, Legal Adviser in the same directorate, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

defendant,

* Language of the case: Portuguese.

APPLICATION for a declaration that, by failing to denounce or adjust the agreement concerning merchant shipping concluded with the Federal Republic of Yugoslavia, approved by Decree No 74/81 of 28 June 1979, which entered into force on 19 May 1981, so as to provide for fair, free and non-discriminatory access by all Community nationals to the cargo-shares due to the Portuguese Republic, as provided for in 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), the Portuguese Republic has failed to fulfil its obligations under Articles 3 and 4(1) thereof,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward (Rapporteur), L. Sevón and R. Schintgen (Presidents of Chambers), C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: J. Mischo,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 September 1999,

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

gives the following

Judgment

1 By application lodged at the Registry of the Court on 27 March 1998 the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to denounce or adjust the agreement concerning merchant shipping concluded with the Federal Republic of Yugoslavia, approved by Decree No 74/81 of 28 June 1979, which entered into force on 19 May 1981 (hereinafter 'the contested agreement'), so as to provide for fair, free and non-discriminatory access by all Community nationals to the cargo-shares due to the Portuguese Republic, as provided for in 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), the Portuguese Republic has failed to fulfil its obligations under Articles 3 and 4(1) of that regulation.

2 The Federal Republic of Yugoslavia, as constituted when the contested agreement was concluded, has split up. The Republic of Croatia and the Republic of

Slovenia were recognised by all the Member States acting together on 15 January 1992. The Republic of Bosnia-Hercegovina was recognised on 7 April 1992. The former Yugoslav Republic of Macedonia was recognised by the Member States, with the exception of the Hellenic Republic, in 1993.

3 Following the disintegration of the Federal Republic of Yugoslavia, the Portuguese authorities decided to contact each of those third countries in order to adjust the contested agreement.

4 In the case of the Republic of Slovenia, the Commission accepted at the hearing that the necessary adjustment had been the subject of an agreement between that third country and the Portuguese Republic.

The relevant Community legislation

5 Article 234 of the EC Treaty (now, after amendment, Article 307 EC) provides:

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand,

and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

6 Regulation No 4055/86 contains the following provisions:

Article 1(1):

'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.'

Article 2:

'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.'

Article 3:

'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.'

Article 4(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.'

7 Pursuant to Article 12 thereof, Regulation No 4055/86 entered into force on 1 January 1987.

The contested agreement

8 The contested agreement entered into force on 19 May 1981, that is to say several years before the accession, on 1 January 1986, of the Portuguese Republic to the Communities.

9 Article 3, second paragraph, of the contested agreement provides:

'The shipping undertakings of both contracting parties shall have the same rights in respect of cargo transport in bilateral trade between the ports of the respective countries.'

10 Article 13, third paragraph, of that agreement provides:

'This agreement shall remain in force for 12 months following the date on which either of the contracting parties notifies the other of its decision to denounce it.'

11 The contested agreement reserves the carriage of cargo between the contracting parties to vessels flying the flag of either of the parties or to vessels operated by persons or undertakings having the nationality of either of the parties. Thus, vessels operated by nationals of other Member States are excluded from trade covered by the contested agreement.

The pre-litigation procedure

12 Taking the view that the cargo-sharing clauses contained in the contested agreement are subject to Regulation No 4055/86, and in particular Article 4(1)

thereof, and that they should have been adjusted in order to conform to that regulation, the Commission sent a number of letters to the Portuguese Republic.

13 In reply to a letter from the Commission of 30 July 1993, the Portuguese authorities indicated, by letter of 28 October 1993, that their diplomatic approaches to the new countries had not yet been successful. They stated that, in practice, the Portuguese Government was complying with Regulation No 4055/86 and that it was not applying any of the cargo-sharing clauses in the contested agreement.

14 On 28 March 1994 the Commission sent the Portuguese Republic a letter of formal notice.

15 In its reply of 21 June 1994, the Portuguese Government recognised the need to adjust the contested agreement. It also stated that the procedure for that purpose had already been initiated and that it expected it to be completed in the near future.

16 Since the contested agreement had not been adjusted or denounced within the period specified by the Commission, on 6 December 1995 the Commission issued

a reasoned opinion calling on the Portuguese Republic, in accordance with Article 169 of the Treaty, to take the measures necessary to comply with it within a period of two months as from its notification.

17 By letter of 8 September 1997, the Portuguese authorities stated that, following the disintegration of the Federal Republic of Yugoslavia, they had decided to contact each of the resultant republics and that, in order to adjust the contested agreement, they had sent the authorities of those republics a note containing the Portugese authorities' proposal as to the adjustments to be made to that agreement. The Portuguese Government also emphasised the urgent need to adjust that agreement.

18 The Portuguese authorities then informed the Commission that they were awaiting replies from the administrations of the countries which had resulted from the ex-Federal Republic of Yugoslavia.

19 By letter of 3 December 1997, the Portuguese Republic forwarded to the Commission all the available information as to the results obtained.

20 In the absence of specific adjustments to the contested agreement, the Commission decided to bring the present action.

Arguments of the parties

21 The Commission observes that the purpose of Regulation No 4055/86 is to ensure the freedom to provide maritime transport services between Member States and between Member States and third countries. The contested agreement reserves the carriage of goods between the parties to vessels flying the flag of one of the parties or to those operated by persons or undertakings having the nationality of one of the parties. It follows that vessels operated by nationals of other Member States are excluded from the trade covered by that agreement. The Commission therefore contends that that agreement should have been adjusted in order to conform to Regulation No 4055/86 and in particular Article 4(1) thereof.

22 The Commission observes that Article 2 of Regulation No 4055/86 fixes the dates by which adjustment of agreements was to take place and thus gives concrete form to the only derogations from the freedom to provide services in the maritime transport sector for which Article 1(1) of that regulation provides.

23 Pursuant to Article 4(1)(b) of Regulation No 4055/86, in the case of trade not governed by the United Nations Code of Conduct for Liner Conferences, the agreement should have been adjusted promptly and, in any event, before 1 January 1993. In the case of trade governed by the United Nations Code of Conduct for Liner Conferences referred to in Article 4(1)(a) of that regulation, no time was granted for the adjustments to be made.

24 Since the Code of Conduct did not enter into force until 6 October 1983 for the Federal Republic of Yugoslavia and until 13 December 1990 for the Portuguese Republic, the Commission submits that Article 4(1)(a) of Regulation No 4055/86 could apply to that agreement only from the latter date. The adjustments should therefore have been completed by 13 December 1990.

25 However, the Commission contends that, regardless of whether trade be governed by Article 4(1)(a) or (b) of Regulation No 4055/86, the period within which the contested agreement should have been adjusted expired long ago. It submits that the period which has elapsed since the entry into force of that regulation was more than sufficient for the agreements to be adjusted, or as a last resort denounced, and for the Portuguese Republic to fulfil its obligations.

26 The Portuguese Government does not deny that the wording of the cargo-sharing clauses contained in the contested agreement must be adjusted pursuant to Articles 3 and 4 of Regulation No 4055/86 and emphasises that it has endeavoured, by all diplomatic means available to it, to encourage the competent authorities of the third countries to accept such an adjustment. It also decided, pending completion of the diplomatic process of revision of the agreement, not to rely on the cargo-sharing clauses.

27 The Portuguese Government contends that, since the Federal Republic of Yugoslavia has ceased to exist, the Commission should have amended its request to reflect the new circumstances.

28 According to the Portuguese Government, the Treaty-infringement proceedings are premature in view of the advanced state of negotiations with the four countries concerned.

29 Moreover, the Commission's request is, in its view, vitiated by the absence of any legal foundation because it makes no reference to Article 234 of the Treaty. The legal framework guaranteed by that provision must be reflected in the statement of reasons for any request that a convention concluded before accession to the Communities (hereinafter 'pre-Community convention') be adjusted or denounced.

30 The Portuguese Government contends that, in view of the terms of Article 234 of the Treaty, it cannot be accused of failing to fulfil its obligations. Where pre-Community conventions are concerned, which wholly or partly frustrate application of the EC Treaty or legislation adopted under it, the second paragraph of Article 234 of the Treaty requires the Member States to take all appropriate steps to eliminate incompatibilities between a provision of a convention and a Community provision. However, it does not impose the obligation to achieve a specific result, in the sense of requiring them, regardless of the legal consequences and political price, to eliminate the incompatibility.

31 The Portuguese Government contends that the second paragraph of Article 234 of the Treaty must be read in conjunction with the first paragraph thereof, so that any incompatibilities must be eliminated in a manner which, whilst guaranteeing the full effect of Community law, affects to the least extent possible the law of the third-country parties to a pre-Community convention.

32 If the second paragraph of Article 234 of the Treaty imposed an obligation on the Member States to denounce a pre-Community convention where adjustment of the incompatible clauses through diplomatic channels could not be achieved or proved very difficult, the last sentence of the provision would be devoid of meaning. In order to denounce a pre-Community convention, the Member State needs neither aid nor assistance from the other Member States since what is involved is a unilateral act of will.

33 According to the Portuguese Government, an obligation to denounce an agreement can arise under the second paragraph of Article 234 of the Treaty only exceptionally and in extreme situations. Accordingly, since denunciation is a measure which in principle gives rise to international liability, it is justified only if two conditions are fulfilled, namely total incompatibility between a provision of a pre-Community convention and Community law and the impossibility of safeguarding, by political or other means, the Community interest involved.

34 In this case, the second condition is not fulfilled: the cargo-sharing arrangements that need to be adjusted are not being applied and, therefore, their formal scope does not affect the Community interest in securing full and effective freedom to provide services in the maritime transport sector.

35 Denunciation may be required only where it is clear that the third country does not wish to renegotiate. Difficulties, political or otherwise, in adjusting the agreement are not sufficient to make denunciation necessary.

36 Moreover, the delicate situation in which those new third countries find themselves within the international community and, above all, the question of priorities and courses of strategic action, defined in the context of foreign policy and common security, render inexpedient any unilateral decision to denounce the contested agreement.

37 According to the Portuguese Government, denunciation is a disproportionate means of achieving the objective sought by the second paragraph of Article 234 of the Treaty and involves disproportionate disregard of Portuguese foreign-policy interests as compared with the Community interest which, in practice, does not suffer any actual harm. Such denunciation would have an extremely

pernicious effect on that Member State's diplomatic, political and economic relations with the third countries concerned.

Findings of the Court

38 It should be noted at the outset that the Commission and Portuguese Republic agree that the cargo-sharing clauses in the contested agreement call for adjustment in order to render the agreement compatible with Articles 3 and 4 of Regulation No 4055/86.

39 In this case, the Portuguese Government has not succeeded in adjusting the contested agreement by recourse to diplomatic means within the time-limit laid down by Regulation No 4055/86.

40 It must be borne in mind that the Court has already held that, in such circumstances, in so far as denunciation of such an agreement is possible under international law, it is incumbent on the Member State concerned to denounce it (see, to that effect, Case C-170/98 *Commission* v *Belgium* [1999] ECR I-5493, paragraph 42).

41 However, the Portuguese Government denies any failure to fulfil its obligations, essentially for four reasons.

42 First, it contends that, following the disintegration of the Federal Republic of Yugoslavia, the Commission should have amended its request to reflect the new circumstances.

43 As to that point, according to settled case-law (Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 22), the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the complaints made by the Commission.

44 In this case, the Portuguese Government has given no indication why it considers that the Commission's failure to amend its request following disintegration of the Federal Republic of Yugoslavia has affected either its ability to comply with its obligations under Community law or its rights of defence.

45 Second, the Portuguese Republic contends that the Commission's action is premature in view of the advanced stage reached in negotiations with the third countries concerned.

46 In that regard, it must be borne in mind that, given its role as guardian of the Treaty, it is for the Commission alone to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations (see Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22).

47 Third, the Portuguese Government submits that the complexity of the situation resulting from the disintegration of the Federal Republic of Yugoslavia justifies its position.

48 As to that, the existence of a difficult political situation in a third country which is a contracting party, as in the present case, cannot justify a continuing failure on

the part of a Member State to fulfil its obligations under the Treaty (see *Commission* v *Belgium*, cited above, paragraph 42).

49 Finally, the Portuguese Government contends, in essence, that, with regard to pre-Community conventions concluded between a Member State and a third country, although Article 234 of the Treaty imposes the obligation to take all appropriate steps to eliminate any incompatibility between a rule of the convention and a Community rule, that provision is not indifferent to the legal consequences and political costs flowing from that obligation. Cases where a convention must be denounced under Article 234 of the Treaty arise only exceptionally and in extreme circumstances. Such denunciation would involve a disproportionate disregard of the interests linked to its foreign policy as compared with the Community interest. Moreover, the Commission should have referred to that provision in the statement of the reasons for a request for a pre-Community convention to be adjusted or denounced.

50 It is therefore necessary to consider in what circumstances a Member State may maintain measures contrary to Community law in reliance upon a pre-Community convention concluded with a third country.

51 The first paragraph of Article 234 of the Treaty provides that the rights and obligations arising from agreements concluded before the entry into force of the Treaty between, on the one hand, one or more Member States and, on the other, one or more third countries shall not be affected by the provisions of the Treaty. However, the second paragraph requires the Member States to take all appropriate steps to eliminate any incompatibilities between such an agreement and the EC Treaty.

52 Article 234 of the Treaty is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting applica-

tion of the Treaty (Case 812/79 *Attorney General* v *Burgoa* [1980] ECR 2787, paragraph 6, and Case C-158/91 *Levy* [1993] ECR I-4287, paragraph 11).

53 As is clear from *Burgoa*, cited above, the purpose of the first paragraph of Article 234 of the Treaty is to make it clear, in accordance with the principles of international law (see, in that connection, Article 30(4)(b) of the 1969 Vienna Convention on the Law of Treaties), that application of the EC Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder.

54 It follows that the Portuguese Republic must in all cases respect the rights which the Federal Republic of Yugoslavia derives from the contested agreement.

55 However, the contested agreement contains a clause (Article 13) which expressly enables the contracting parties to denounce it, so that denunciation by the Portuguese Republic would not encroach upon the rights which the Federal Republic of Yugoslavia derives from that agreement.

56 Consequently, the obligations to which the Portuguese Republic is subject by virtue of Articles 3 and 4 of Regulation No 4055/86 are not affected by the principle laid down in the first paragraph of Article 234 of the Treaty.

57 As regards the Portuguese Government's argument that the obligation to have recourse to denunciation constitutes an exceptional obligation in the context of Article 234 of the Treaty, it is enough to note that, in this case, the obligation

incumbent on the Portuguese Republic is based not on that provision of the Treaty but on the provisions of Regulation No 4055/86.

58 Furthermore, although, in the context of Article 234 of the Treaty, the Member States have a choice as to the appropriate steps to be taken, they are nevertheless under an obligation to eliminate any incompatibilities existing between a pre-Community convention and the EC Treaty. If a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded.

59 As regards the argument that such denunciation would involve a disproportionate disregard of foreign-policy interests of the Portuguese Republic as compared with the Community interest, it must be pointed out that the balance between the foreign-policy interests of a Member State and the Community interest is already incorporated in Article 234 of the Treaty, in that it allows a Member State not to apply a Community provision in order to respect the rights of third countries deriving from a prior agreement and to perform its obligations thereunder. That article also allows them to choose the appropriate means of rendering the agreement concerned compatible with Community law.

60 Finally, with regard to the absence of a legal basis as a result of the Commission's failure to refer to Article 234 of the Treaty, suffice it to note that in this case the Commission's request was based on Regulation No 4055/86.

61 In those circumstances, it must be held that, by failing either to denounce or to adjust the contested agreement so as to provide for fair, free and non-discriminatory access by all Community nationals to the cargo-shares due to the Portuguese Republic, as provided for in Council Regulation (EEC)

No 4055/86, the Portuguese Republic has failed to fulfil its obligations under Articles 3 and 4(1) of that regulation.

Costs

62 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 Commission has applied for costs and the Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing either to denounce or to adjust the agreement on merchant shipping with the Federal Republic of Yugoslavia so as to provide for fair, free and non-discriminatory access by all Community nationals to the cargo-shares due to the Portuguese Republic, as provided for in 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, the Portuguese Republic failed to fulfil its obligations under Articles 3 and 4(1) of that regulation;

2. Orders the Portuguese Republic to pay the costs.

Rodríguez Iglesias Moitinho de Almeida Edward Sevón

Schintgen Gulmann Puissochet Hirsch

Jann Ragnemalm Wathelet

Delivered in open court in Luxembourg on 4 July 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President