JUDGMENT OF THE COURT (Fifth Chamber)
11 June 1998 *

In Joined Cases C-176/97 and C-177/97,

Commission of the European Communities, represented by Frank Benyon, Legal Adviser, acting as Agent, 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, represented by Jan Devadder, General Adviser at the Ministry of Foreign Affairs, External 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, represented by Nicolas Schmit, Head of the International Economic Relations and Cooperation Directorate in 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,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by introducing and maintaining in force cargo-sharing arrangements, in the Agreement between the Belgo-Luxembourg Economic Union and Malaysia on maritime transport, which was approved by the Kingdom of Belgium both in its own name and on behalf of the Grand Duchy of Luxembourg and which entered into force after 1 January 1987, the Kingdom of Belgium (C-176/97) and the Grand Duchy of Luxembourg (C-177/97) have failed to fulfil their obligations under Article 5 of 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 COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, M. Wathelet, J. C. Moitinho de Almeida, D. A. O. Edward (Rapporteur) and L. Sevón, Judges,

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 5 March 1998,

gives the following

Judgment

1 By applications lodged at the Court Registry on 5 May 1997, the Commission of the European Communities brought two actions under Article 169 of the EC Treaty for a declaration that by introducing and maintaining in force cargo-sharing arrangements, in the Agreement between the Belgo-Luxembourg Economic Union and Malaysia on maritime transport, which was approved by the Kingdom of Belgium both in its own name and on behalf of the Grand Duchy of Luxembourg and which entered into force after 1 January 1987, the Kingdom of Belgium (C-176/97) and the Grand Duchy of Luxembourg (C-177/97) have failed to fulfil their obligations under Article 5 of 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, hereinafter 'the Regulation').

Legislative background

2 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.'

3 Article 6 of the Regulation provides:

'1. If a Member State's nationals or shipping companies, as defined in Article 1, paragraphs 1 and 2, are experiencing, or are threatened by, a situation where they do not have an effective opportunity to ply for trade to and from a particular third country, the Member State concerned shall inform the other Member States and the Commission as soon as possible.

2. The Council, acting by qualified majority on a proposal of the Commission, shall decide on the necessary action. Such action may include, in the circumstances envisaged in Article 5(1), the negotiation and conclusion of cargo-sharing arrangements.

3. If the Council has not decided on the necessary action within six months of a Member State providing information under paragraph 1, the Member State concerned may take such action as may for the time being be necessary to preserve an effective opportunity to ply for trade in accordance with Article 5(1).

4. Any action taken under paragraph 3 shall be in accordance with Community law and provide for fair, free and non-discriminatory access to the relevant cargo shares by nationals or Community shipping companies, as defined in Article 1(1) and (2).

5. National action in pursuance of paragraph 3 shall be notified immediately to the Member States and the Commission. The consultation procedure established by Council Decision 77/587/EEC shall apply.'

4 In accordance with Article 12, the Regulation entered into force on the day following its publication in the *Official Journal of the European Communities*, that is to say, on 1 January 1987.

5 Under Article 31(1) of the Convention of 25 July 1921 (hereinafter 'the Convention') establishing the Belgo-Luxembourg Economic Union (hereinafter 'the BLEU'), tariff and trade treaties and agreements as well as international payment agreements relating to foreign trade are to be common to both parties and are to be concluded by the Kingdom of Belgium on behalf of the BLEU, subject to the right of the Luxembourg Government to sign those treaties or agreements jointly with the Belgian Government.

6 On 12 February 1985 the BLEU and the Government of Malaysia signed an Agreement on maritime transport (hereinafter 'the Agreement') in Kuala Lumpur. The introduction to the Agreement states that the contracting parties are 'the Government of the Kingdom of Belgium, both on its own behalf ... and on behalf of the Government of the Grand Duchy of Luxembourg, and the Government of Malaysia'.

7 According to Article 1(1) of the Agreement,

'...

1. The term "vessels of either Contracting Party" shall mean merchant vessels flying the national flag of and registered in Malaysia or the Belgo-Luxembourg Economic Union respectively.

However, this term does not include:

(1) vessels exclusively used by the armed forces;

...'

8 Article 2(1) of the Agreement provides:

'Vessels of either Contracting Party may sail between the ports of the two countries which are open to foreign trade and engage in passenger and cargo services (hereinafter called the "agreed services") between the two countries.'

9 Article 3 of the Agreement provides:

'Chartered vessels flying the flag of third countries but operated by national shipping companies of either Contracting Party, may also take part in the agreed services, unless otherwise notified by either Contracting Party.'

10 Article 16 of the Agreement provides:

'1. The Contracting Parties express their will to cooperate in the field of maritime transport in the spirit of the UN Code of Conduct for Liner Conferences.

2. The national shipping companies of the Contracting Parties may participate in the freight and volume of the seaborne trade between the Contracting Parties in accordance with the principles of equitable sharing and mutual benefit.

3. As regards seaborne freight traffic (liner traffic), both Parties shall have equal rights to participate in the traffic generated by the mutual foreign trade. Third country shipping lines shall have the right to acquire a significant part of this traffic in accordance with the principles of the UN Code of Conduct for Liner Conferences.

4. The control of cargo sharing for inward and outward traffic in the ports of both Parties shall be entrusted to their national shipping companies.'

11 According to Article 21, the Agreement was to enter into force on the date when the contracting parties had notified one another through diplomatic channels that their respective constitutional requirements had been complied with.

12 On 15 July 1987 the Kingdom of Belgium notified to the Malaysian authorities its law of 29 June 1987 approving the Agreement.

The pre-litigation procedure

13 By letter of 23 June 1992 the Commission proposed to the Belgian authorities that they should adapt the Agreement as it considered that Articles 2, 3 and 16 thereof contained cargo-sharing clauses which were not in conformity with the obligations laid down by the Regulation.

14 The Belgian authorities expressed their Agreement to the proposal by letter of 12 November 1992. By letter of 22 July 1992 the Luxembourg authorities informed the Commission that they supported the position of the Kingdom of Belgium with regard to their bilateral Agreements.

15 By letter of 3 December 1992 the Commission reminded both the Luxembourg and the Belgian authories of their obligations under the Regulation.

16 By letter of 19 February 1993 the Belgian authorities replied that they were cooperating with the Luxembourg authorities in adapting the Agreement.

17 As the Agreement remained unchanged, on 28 March 1994 the Commission sent the Kingdom of Belgium and the Grand Duchy of Luxembourg letters of formal

notice requesting them to submit their observations within two months regarding their failure to fulfil their obligations under the Regulation. In those letters the Commission maintained that, since the entry into force of the Agreement, the cargo-sharing clauses which it contained infringed the principle of freedom to provide services as applied to maritime transport.

18 In their reply of 11 July 1994 the Belgian authorities stated that they had proposed to the Malaysian authorities that the Agreement should be amended to bring it into line with Community law.

19 In a letter of 15 July 1994 the Luxembourg authorities, for their part, explained that the matter was covered by the BLEU and that its settlement involved concerted action with its Belgian partner, which required a certain amount of time. However, as they were not apprised of all the aspects of the matter, the Luxembourg authorities reqested an extension of the time allowed for replying to the letter of formal notice. The Commission therefore granted it a further period of one month.

20 By letter of 25 January 1995 the Luxembourg authorities then reminded the Commission that they were engaged in concerted action with the Belgian authorities, that the Kingdom of Belgium was acting on behalf of the Grand Duchy of Luxembourg in negotiations with the Government of Malaysia and that the dialogue with that country was being actively pursued.

21 In a letter dated 6 July 1995 the Commission replied that the Grand Duchy of Luxembourg was none the less still responsible for the proper implementation of the Regulation.

22 On 21 December 1995, since the Belgian and Luxembourg authorities had still not made the amendments to the Agreement which it considered necessary, the Commission issued two reasoned opinions, one addressed to the Kingdom of Belgium and the other to the Grand Duchy of Luxembourg, reiterating the points it made in its letters of formal notice.

23 By letter of 21 March 1996 the Belgian authorities stated in reply to the reasoned opinion that the various representations it had made to the Malaysian authorities had not achieved any positive result. They contended, moreover, that, since the contracting parties had respected the Agreement since the date of its signature, the Agreement was not, contrary to the Commission's allegations, a 'future agreement' within the meaning of Article 5(1) of the Regulation.

24 In their reply of 14 March 1996 the Luxembourg authorities, for their part, stated that the Kingdom of Belgium had concluded maritime agreements in the name of the BLEU and that, therefore, according to established practice, those agreements were not subject to the ratification procedure of the Grand Duchy of Luxembourg. They also pointed out that the Belgian authorities had made efforts to have the Agreement adapted and cited the arguments advanced by the Belgian authorities on the question whether the Agreement was a 'future agreement'. Finally, they raised the question whether the Grand Duchy of Luxembourg itself, as distinct from the BLEU, was in breach of its obligations.

25 Having received no notification that any modification of the Agreement had been effected, the Commission brought the present actions for failure to fulfil obligations.

26 By order of the President of the Court of 13 November 1997, the two cases were joined for the purposes of the oral procedure and judgment.

The application

27 The Commission submits that, since, under Articles 2, 3 and 16 of the Agreement, only national shipping companies of the contracting parties can participate in the freight and volume of maritime trade between those States, ships operated by nationals of other Member States are excluded from that traffic.

28 That Agreement is therefore, in its submission, contrary to Article 5(1) of the Regulation under which, save in exceptional circumstances, cargo-sharing arrangements in any future agreements with third countries are prohibited.

29 The Commission adds that the concept of 'future agreement' in Article 5(1) covers agreements which did not bind Member States at the time when the Regulation entered into force, that is to say, on 1 January 1987.

30 This was the case with the Agreement since, under Article 21 thereof, it could not enter into force before the conditions required by the constitutions of the

contracting parties had been fulfilled. The Belgian law approving the Agreement was not notified to Malaysia until 15 July 1987.

31 The Commission states that, in this case, no request was sent to the Council on the basis of Articles 5(1) and 6 which would allow that institution to authorise such arrangements in 'exceptional circumstances'.

32 Finally, the Commission argues, the Grand Duchy of Luxembourg is also a party to the Agreement since, pursuant to Article 31(1) of the Convention, it was represented by the Kingdom of Belgium when the Agreement was concluded and approved.

33 The Kingdom of Belgium concedes that the Agreement must be characterised as a future agreement within the meaning of Article 5(1) of the Regulation and that its provisions must be amended to bring them into line with the provisions of the Regulation on cargo-sharing arrangements.

34 The Grand Duchy of Luxembourg, for its part, acknowledges that it is a party to the Agreement and, for the rest, supports the position of the Kingdom of Belgium.

35 It must first be observed that, since the Belgian law approving the Agreement was not notified to the Malaysian authorities until July 1987, the Agreement, in accordance with Article 21 thereof, entered into force after 1 January 1987, the date on

which the Regulation entered into force. It therefore constitutes a 'future agreement' within the meaning of Article 5(1) of the Regulation.

36 Second, as the defendant governments have themselves acknowledged, that Agreement, which is binding on both the Kingdom of Belgium and on the Grand Duchy of Luxembourg, contains, in Articles 2, 3 and 16, cargo-sharing arrangements which, in the absence of an authorisation granted under Article 5(1) of the Regulation, are contrary to that provision.

37 It must therefore be declared that, by introducing and maintaining in force cargo-sharing arrangements, in the Agreement between the BLEU and Malaysia on maritime transport which was approved by the Kingdom of Belgium both in its own name and on behalf of the Grand Duchy of Luxembourg and which entered into force after 1 January 1987, the Kingdom of Belgium and the Grand Duchy of Luxembourg have failed to fulfil their obligations under Article 5 of the Regulation.

Costs

38 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 and the Grand Duchy of Luxembourg have been unsuccessful and the Commission has applied for costs, those States must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Declares that, by introducing and maintaining in force cargo-sharing arrangements, in the Agreement between the Belgo-Luxembourg Economic Union and Malaysia on maritime transport which was approved by the Kingdom of Belgium both in its own name and on behalf of the Grand Duchy of Luxembourg and which entered into force after 1 January 1987, the Kingdom of Belgium and the Grand Duchy of Luxembourg have failed to fulfil their obligations under Article 5 of 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;**

2. **Orders the Kingdom of Belgium and the Grand Duchy of Luxembourg to pay the costs.**

Gulmann Wathelet Moitinho de Almeida

Edward Sevón

Delivered in open court in Luxembourg on 11 June 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber