

JUDGMENT OF THE COURT (First Chamber)

14 September 1999 *

In Case C-170/98,

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, 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,

defendant,

APPLICATION for a declaration that, by failing either to adjust the agreement with the Republic of Zaire in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium

* Language of the case: French.

or to denounce that agreement, the Kingdom of Belgium has failed to fulfil its 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,

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

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Judgment

- 1 By application lodged at the Court Registry on 8 May 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 either to adjust the agreement with the Republic of Zaire (now the Democratic Republic of the Congo) in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium or to denounce that agreement, the Kingdom of Belgium had failed to fulfil its 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.

Legal background

- 2 Regulation No 4055/86 is intended, first, to implement Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences (hereinafter 'the Code of Conduct') (OJ 1979 L 121, p. 1) and, second, for Member States which had not yet ratified that convention, to implement the convention itself.
- 3 The Code of Conduct was adopted on 6 April 1974. Its object, according to its first recital, is to improve the system of liner conferences. The Republic of Zaire ratified it in 1974 and the Kingdom of Belgium in 1988.
- 4 The Code of Conduct was applied in Community law by Regulation No 954/79. In order to implement certain specific aspects of the Code and to make it

compatible with Community law, the Council adopted a number of regulations, including Regulation No 4055/86.

5 That regulation gives shipping lines rights relating to the provision of maritime services between Member States and between Member States and third countries.

6 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.’

7 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.’

8 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.’

9 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.’

- 10 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.

- 11 On 5 March 1981 the Kingdom of Belgium and the Republic of Zaire signed an agreement on maritime transport (hereinafter ‘the Agreement’).

- 12 Under Article 1(1) of the Agreement:

‘The term “vessels of either Contracting Party” shall mean merchant vessels registered in the territory of that Party and flying its flag in accordance with its legislation.’

- 13 Article 3(3) of the Agreement provides:

‘As regards maritime freight traffic of any kind between the two Parties, whatever the port of loading or unloading, the system to be applied by the Contracting Parties to vessels operated by their respective national shipping lines shall be based on the allocation formula 40/40/20, with respect to cargoes of freight and by volume.’

14 Article 4 of the Agreement provides:

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

15 Article 18 of the Agreement provides:

‘1. This Agreement shall enter into force once the Contracting Parties have notified each other that the formalities required by their respective legislations have been completed.

2. It shall remain in force for an indefinite period. However, it may be denounced at any time in writing by diplomatic channels, on six months’ notice.’

16 Ratification of the Agreement was notified by the Kingdom of Belgium to the Republic of Zaire on 13 June 1983 and by the Republic of Zaire to the Kingdom of Belgium on 13 April 1987.

The pre-litigation procedure

17 Since it considered that the cargo-sharing provisions in the Agreement were contrary to the provisions of and obligations under Regulation No 4055/86, as they reserve cargo transport between the parties to vessels flying the flag of one of

the parties or operated by persons or lines with the nationality of one of the parties, the Commission sent the Kingdom of Belgium a letter of formal notice on 10 April 1991.

- 18 In its reply of 7 June 1991 the Kingdom of Belgium stated that the Agreement was an existing agreement, since it had been concluded before the date of entry into force of Regulation No 4055/86 and had been applied *de facto* from its signature in 1981, so that it was not contrary to Article 5 of that regulation.

- 19 The Commission was not satisfied with the Belgian Government's reply and on 11 October 1993 sent it a reasoned opinion, stating that the Agreement was contrary to Article 5 of Regulation No 4055/86 and that it reserved 40% of traffic to Belgian shipping lines to the exclusion of those of other Member States. The Commission further claimed that, being discriminatory, that exclusion was clearly prohibited by Article 1 of the regulation.

- 20 The Commission also stated that the Agreement was a new agreement because it had not entered into force until after 1 January 1987.

- 21 However, after a more detailed study of the case, and in view of the fact that the formalities required by Belgian legislation for the entry into force of the Agreement had been completed before Regulation No 4055/86 entered into force, the Commission reached the conclusion that the Agreement could be regarded as an 'existing agreement' governed by Articles 3 and 4 of that regulation.

- 22 The Commission consequently, on 11 April 1996, sent the Kingdom of Belgium a supplementary letter of formal notice. In that letter the Commission noted that despite the statements made by the Belgian Government on several occasions, in particular in its letter of 7 June 1991, it had no information to show that the adjustment of the Agreement had been accomplished. It therefore concluded that by failing either to adjust the Agreement to give all Community nationals, as defined in Article 1 of Regulation No 4055/86, fair, free and non-discriminatory access to the cargo shares due to Belgium or to denounce the Agreement, as provided for by Article 18(2) thereof, the Kingdom of Belgium had failed to fulfil its obligations under Articles 3 and 4 of Regulation No 4055/86.
- 23 In its reply of 30 August 1996 the Belgian Government expressed its satisfaction that the Commission now considered that the Agreement came under Article 4 of Regulation No 4055/86, and stated that it would take the necessary steps for its adjustment.
- 24 Following that reply, the Commission sent the Belgian Government a supplementary reasoned opinion on 23 June 1997.
- 25 The Belgian Government, in its reply of 10 September 1997, primarily contested the Commission's argument in its supplementary reasoned opinion that the period for adjustment of existing cargo-sharing arrangements, with respect to trades governed by the Code of Conduct, had expired on 30 May 1988. It submitted that the Commission had, after that date, favoured a pragmatic solution by recommending an exchange of letters cancelling the existing arrangements, and had even suspended the infringement procedure for a time.
- 26 Since it had not been notified that the Belgium-Zaire Agreement had in fact been adjusted, the Commission brought the present action.

The application

- 27 In the Commission's submission, 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 of the regulation lay down rules on the position as regards third countries; Article 3 applies to existing agreements and Article 5 to future agreements.
- 28 Since the Commission finds that Article 18 of the Agreement provides that the parties' intention is not to be bound until the formalities required by their respective legislations are completed, and those formalities were completed by the Kingdom of Belgium with the enactment of the Law of 21 April 1983 approving the Agreement, which was notified to the Republic of Zaire on 13 June 1983, before the entry into force of Regulation No 4055/86, the Commission contends that the Agreement is an existing agreement subject to Articles 3 and 4 of that regulation.
- 29 The only exceptions to the application of the freedom to provide services made by Article 1(1) of Regulation No 4055/86 are, with respect to unilateral restrictions, in Article 2, 'by way of derogation from Article 1', and, with respect to trades not governed by the Code of Conduct, in Article 4(1)(b), which allows an additional period for adjustment until 1 January 1993 at the latest.
- 30 No such period, on the other hand, is allowed to Member States for adjustment of cargo-sharing arrangements where trades are governed by the Code of Conduct, in accordance with Article 4(1)(a) of Regulation No 4055/86.

- 31 In the Commission's submission, it follows that Member States which had already ratified the Code of Conduct at the date of entry into force of Regulation No 4055/86 were obliged to adjust or phase out without delay the existing bilateral agreements, namely the cargo-sharing arrangements.
- 32 Since the Code of Conduct was ratified by the Kingdom of Belgium in 1988, the Commission submits that the Kingdom of Belgium should have adjusted the cargo-sharing arrangements on that date.
- 33 The Commission adds that even if the trade in question were to be treated as not being a trade governed by the Code of Conduct, under Article 4(1)(b) of Regulation No 4055/86 the deadline for adjustment of the bilateral agreements concerned was 1 January 1993. In short, whether the trades are governed by Paragraph 1(a) or (b) of Regulation No 4055/86, the period for adjustment of the cargo-sharing arrangements has long since expired.
- 34 The Commission stresses that it does not require denunciation of the Agreement, but only the adjustment or phasing out of the arrangements in it, in accordance with Article 3 of Regulation No 4055/86 concerning 'existing' agreements. However, if that adjustment or phasing out was not accepted by the other party to the Agreement, the only available means of terminating the infringement would be to denounce the Agreement. In any event, the object of the present procedure is to ensure that the cargo-sharing arrangements are eliminated.
- 35 The Belgian Government contests the Commission's argument that the Agreement should have been adjusted by the date on which the Code of Conduct was ratified by the Kingdom of Belgium. In its submission, it is nowhere laid down that maritime agreements must be adjusted to the Code of Conduct at the latest by the date of its entry into force for the two contracting parties to the Agreement.

- 36 It contends, moreover, that the Commission's request for the Agreement to be denounced is disproportionate, given that it contains a series of provisions which are not contrary to Community law. The adjustment concerns only Articles 3 and 4(1) of this agreement with the Democratic Republic of the Congo (formerly the Republic of Zaire).
- 37 The Belgian Government submits that it always showed that it was willing to amend the provisions at issue. Furthermore, on 22 July 1998 the Congolese authorities stated that they wished to convene the joint committee provided for in the Agreement, but political events since then made it impossible to arrange negotiations. The Kingdom of Belgium therefore states that it undertakes to finalise the adjustment of the Agreement once the political situation in the Democratic Republic of the Congo allows.
- 38 It is common ground (see in particular paragraphs 21 and 28 above) that the Agreement is not a future agreement within the meaning of Article 5 of Regulation No 4055/86, and is therefore an agreement to which Articles 3 and 4 of that regulation apply.
- 39 As regards determination of the date from which the 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 does the regulation allow Member States a period expiring on 1 January 1993 for the adjustment prescribed. For trades governed by the Code of Conduct, no period is allowed for adjustment of an agreement.
- 40 On 30 March 1988 the Kingdom of Belgium ratified the Code of Conduct. As the Advocate General has observed in point 10 of his Opinion, the fact that no period was allowed for adjustment of trades governed by the Code of Conduct means

that the Agreement should have been adjusted immediately after the Kingdom of Belgium ratified the Code.

- 41 The position of the Belgian Government is essentially that it does not contest the existence of the obligation to amend the provisions at issue, but submits that political developments in the Congo made it impossible to arrange negotiations. It undertakes to finalise the adjustment of the Agreement once the political situation in the Congo so permits.
- 42 The existence of a difficult political situation in a third State which is a contracting party, as in the present case, cannot justify a failure to fulfil obligations. If a Member State encounters difficulties which make it impossible to adjust an agreement, it must denounce the agreement.
- 43 Accordingly, by failing either to adjust the Belgium-Zaire Agreement in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium or to denounce that agreement, the Kingdom of Belgium has failed to fulfil its obligations under Regulation No 4055/86, in particular Articles 3 and 4(1) thereof.

Costs

- 44 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 and the Commission has applied for costs, the Kingdom of Belgium must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber),

hereby:

1. Declares that, by failing either to adjust the agreement with the Republic of Zaire (now the Democratic Republic of the Congo) in such a way as to provide for fair, free and non-discriminatory access by Community nationals to the cargo shares due to Belgium or to denounce that agreement, the Kingdom of Belgium has failed to fulfil its 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;
2. Orders the Kingdom of Belgium to pay the costs.

Jann

Edward

Sevón

Delivered in open court in Luxembourg on 14 September 1999.

R. Grass

Registrar

P. Jann

President of the First Chamber