

JUDGMENT OF THE COURT (Second Chamber)

14 July 2005^{*}

In Case C-433/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 10 October 2003,

Commission of the European Communities, represented by C. Schmidt, W. Wils and A. Manville, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing, acting as Agent, and G. Schohe, Rechtsanwalt,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), C. Gulmann, J. Makarczyk and P. Kūris, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 10 March 2005,

gives the following

Judgment

1 By its application the Commission of the European Communities seeks a declaration from the Court that:

(a) by individually negotiating, concluding, ratifying and arranging for the entry into force of:

— the agreement between the Government of the Federal Republic of Germany and the Government of Romania on inland waterway transport, signed in Bonn on 22 October 1991 (BGBl. 1993 II, p. 770), ('the agreement concluded with Romania'),

- the agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on inland waterway transport, signed in Warsaw on 8 November 1991 (BGBl. 1993 II, p. 779), ('the agreement concluded with Poland'), and

 - the agreement between the Government of the Federal Republic of Germany and the Government of Ukraine on inland waterway transport, signed in Bonn on 14 July 1992 (BGBl. 1994 II, p. 258), ('the agreement concluded with Ukraine'), and
- (b) by refusing to denounce the agreements concluded with Romania, Poland and Ukraine and:
- the agreement between the Federal Republic of Germany and the Government of the Socialist Republic of Czechoslovakia on inland waterway transport, signed in Prague on 26 January 1988 (BGBl. 1989 II, p. 1035), ('the agreement concluded with Czechoslovakia'), and

 - the agreement between the Federal Republic of Germany and the People's Republic of Hungary on inland waterway transport, signed in Budapest on 15 January 1988 (BGBl. 1989 II, p. 1026), ('the agreement concluded with Hungary'),

the Federal Republic of Germany has failed to fulfil its obligations under Article 10 EC and 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 (OJ 1991 L 373, p. 1), as regards the agreements mentioned in point (a), and 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 (OJ 1996 L 175, p. 7), as regards the agreements mentioned under point (b).

Legal background

Community legislation

The provisions of the EC Treaty

- 2 Article 10 EC is worded as follows:

‘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.’

3 As regards transport, Article 70 EC provides that the objectives of the Treaty are to be pursued by Member States within the framework of a common transport policy.

4 Article 71(1) EC provides:

'For the purpose of implementing Article 70, and taking into account the distinctive features of transport, 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.'

5 On the basis of that provision the Council adopted Regulations No 3921/91 and No 1356/96.

Regulation No 3921/91

- 6 In the third recital in its preamble, Regulation No 3921/91 provides that non-resident carriers should be allowed to carry out national transport operations for goods and passengers by inland waterway under the same conditions as those imposed by the Member State concerned on its own carriers.
- 7 For that purpose the first paragraph of Article 1 of Regulation No 3921/91 provides that, with effect from 1 January 1993, any carrier of goods or passengers by inland waterway is to be permitted to carry out the national transport of goods or persons by inland waterway for hire or reward in a Member State in which he is not established, a practice known as ‘cabotage’, provided that he is established in a Member State in accordance with its legislation and, where appropriate, he is entitled there to carry out the international transport of goods or persons by inland waterway. The second paragraph of Article 1 provides that if he fulfils those conditions, the carrier may temporarily carry on cabotage in the Member State concerned without having to set up a registered office or other establishment there.
- 8 Furthermore, Article 2(1) of Regulation No 3921/91 provides that, for a carrier to be permitted to carry out cabotage, he may use for this purpose only vessels the owner or owners of which are natural persons domiciled in a Member State and 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.
- 9 Finally, according to Article 6 of Regulation No 3921/91, its provisions do not affect the rights existing under the Revised Convention for the navigation of the Rhine, signed in Mannheim on 17 October 1868 (‘Mannheim Convention’).

Regulation No 1356/96

- 10 As is clear from its title and the second recital in its preamble, Regulation No 1356/96 has as its purpose to establish freedom to provide services in the sphere of the transport of goods or passengers by inland waterway between Member States by eliminating all restrictions on the provider of services on the grounds of his nationality or the fact that he is established in a Member State other than that in which the service is to be provided.
- 11 Articles 1 and 2 of Regulation No 1356/96 provide that any operator transporting 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. Article 2 also sets out the conditions for that authorisation.
- 12 Article 3 of Regulation No 1356/96 states that its provisions '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) or the rights arising from the European Community's international obligations'.

The bilateral agreements concluded by the Federal Republic of Germany

- 13 The agreements mentioned in paragraph 1 of this judgment ('the bilateral agreements') contain provisions on the transport of passengers and goods by inland waterway between the contracting parties and the reciprocal use of their inland waterways.

- 14 Those agreements provide, inter alia, that the transport of passengers and/or goods by vessels of one contracting party between ports of the other party (cabotage), and the carriage of passengers and/or goods by vessels of one contracting party between ports of the other party and those in a non-member country (transport operations with non-member countries) are subject to special authorisation by the competent authorities of the contracting parties concerned.
- 15 The agreements concluded with Hungary and Czechoslovakia were ratified by two laws of 14 December 1989 and entered into force on 31 January and 4 May 1990 respectively. The agreements concluded with Romania and Poland were ratified by two laws of 19 April 1993 and entered into force on 9 July and 1 November 1993 respectively. The agreement concluded with Ukraine was ratified by a law of 2 February 1994 and entered into force on 1 July 1994.

Background to the dispute and the pre-litigation procedure

- 16 On 28 June 1991, the Commission submitted a recommendation for a decision to the Council on the opening of negotiations for the conclusion of a multilateral agreement between the Community and third countries in the field of transport of passengers and goods by inland waterway.
- 17 By decision of 7 December 1992, the Council 'authorised the Commission to negotiate a multilateral agreement on the rules applicable to the transport of passengers and goods by inland waterway between the European Economic Community and Poland and the Contracting States of the Danube Convention (Hungary, Czechoslovakia, Romania, Bulgaria, the ex-USSR, ex-Yugoslavia and Austria)' ('Council Decision of 7 December 1992').

- 18 Following that decision of the Council, the Commission, by letter of 20 April 1993, called on several Member States, including the Federal Republic of Germany, 'to abstain from any initiative likely to compromise the proper conduct of the negotiations initiated at Community level and, in particular, to abandon ratification of 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'.
- 19 On 8 April 1994 the Council decided that priority was to be given to the conduct of negotiations with the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic.
- 20 The multilateral negotiations conducted by the Commission led, on 5 August 1996, to the initialling of a draft multilateral agreement on the basis of which the Commission presented to the Council, on 13 December 1996, a proposal for a decision on the conclusion of the agreement laying down the conditions governing the transport by inland waterway of goods and passengers between the European Community and the Czech Republic, the Republic of Poland and the Slovak Republic.
- 21 To date, however, no multilateral agreement has been concluded by the European Community with the countries concerned.
- 22 By letter of formal notice of 10 April 1995 and a supplementary letter of formal notice of 24 November 1998, the Commission initiated the procedure for failure to fulfil obligations laid down by Article 226 EC and called on the Federal Republic of Germany to denounce the bilateral agreements.

- 23 Since the German Government, in its responses of 23 June 1995 and 26 February 1999, denied that the conclusion of the bilateral agreements constituted an infringement of Community law, the Commission issued a reasoned opinion on 28 February 2000 calling on the Federal Republic of Germany to take the measures necessary to comply with that opinion within two months of its notification.
- 24 Taking the view that the situation remained unsatisfactory, the Commission decided to bring the present proceedings.

Admissibility

- 25 The German Government submits, first of all, that the action is inadmissible as regards the agreements concluded with Hungary and Czechoslovakia. Those agreements, it argues, were not examined in the reasoned opinion.
- 26 It is sufficient to observe that, as regards the complaint relating to the incompatibility of the bilateral agreements with Regulation No 1356/96, the reasoned opinion refers, unequivocally and on several occasions, to the agreements concluded with Hungary and Czechoslovakia and that, in paragraph 2 of its response to the reasoned opinion, the Federal Republic of Germany expressly stated its views on that matter.
- 27 Second, the German Government contests the admissibility of the action in so far as the Commission makes reference in it to the ‘*Open Skies*’ judgments in 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, even though they were delivered after the pre-litigation procedure had been concluded. The German Government argues that before bringing the action for failure to fulfil obligations the Commission ought to have sent the Federal Republic of Germany a further reasoned opinion setting out the recent changes in the case-law.

28 Although it is true that the subject-matter of the proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, both the Commission's reasoned opinion and the application must be based on the same complaints, that requirement cannot be stretched so far as to mean that in every case the statement of the subject-matter of the proceedings in the reasoned opinion must be exactly the same as the form of order sought in the originating application if the subject-matter of the proceedings has not been extended or altered but simply limited (see, in particular, Case C-279/94 *Commission v Italy* [1997] ECR I-4743, paragraphs 24 and 25, Case C-52/00 *Commission v France* [2002] ECR I-3827, paragraph 44, and Case C-139/00 *Commission v Spain* [2002] ECR I-6407, paragraphs 18 and 19).

29 By referring to the *Open Skies* judgments in its originating application the Commission merely intended to set out the most recent case-law relating to the principles governing the exclusive external competence of the Community, without extending, modifying or even limiting the subject-matter of the dispute, as defined in the reasoned opinion of 28 February 2000.

30 It follows that the action is admissible.

The action

31 As a preliminary point the German Government asks the Court to declare that the action has become devoid of purpose as regards the agreements concluded with

Czechoslovakia, Hungary and Poland on account of the accession to the European Union on 1 May 2004 of the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic.

- 32 Suffice it in this regard to point out that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-110/00 *Commission v Austria* [2001] ECR I-7545, paragraph 13, and Case C-310/03 *Commission v Luxembourg* [2004] ECR I-1969, paragraph 7).
- 33 In the present case, the period prescribed in the reasoned opinion expired on 28 April 2000, with the result that the accession of the Czech Republic, the Republic of Hungary, the Republic of Poland and the Slovak Republic to the European Union is irrelevant to the present dispute.
- 34 The Commission raises three complaints in support of its action. First, it complains that the Federal Republic of Germany has infringed the exclusive external competence of the Community within the meaning of the ‘AETR’ judgment in Case 22/70 *Commission v Council* [1971] ECR 263. Second, it relies on an infringement of Article 10 EC. Third, it submits that the bilateral agreements are incompatible with Regulation No 1356/96.

The first complaint: infringement of the exclusive external competence of the Community

Arguments of the parties

- 35 By its first complaint, the Commission submits that, by negotiating, concluding, ratifying and implementing the agreements concluded with Poland, Romania and

Ukraine, the Federal Republic of Germany has infringed the exclusive external competence of the Community to negotiate international agreements within the meaning of the *AETR* judgment. Those agreements affect the common rules adopted by the Community in Regulation No 3921/91.

36 In particular, the Commission takes the view that by permitting, subject to special authorisation, access to cabotage in Germany by transporters from the non-member countries concerned, those agreements affect the common rules contained in Regulation No 3921/91 in so far as those rules harmonise completely, from 1 January 1993, the conditions for cabotage in the Member States of the Community.

37 The Commission submits, in that connection, that Regulation No 3921/91 covers not only Community carriers, but also carriers from non-member countries, because Article 6 recognises the rights of access of Swiss carriers under the Mannheim Convention.

38 The German Government maintains that the provisions laid down by the agreements concluded with Poland, Romania and Ukraine are not covered by Regulation No 3921/91 and do not fall within an area already largely covered by it, with the result that those agreements do not affect the common rules adopted by the Community in that regulation.

39 The German Government takes the view that Regulation No 3921/91 has a purely internal character. It organises only cabotage on the inland waterways of a Member State by carriers established in other Member States, and it does not contain any clause concerning the conditions under which carriers from non-member countries may be authorised to provide cabotage on Community inland waterways.

- 40 In that connection, the German Government argues that the reference to the Mannheim Convention, in Article 6 of Regulation No 3921/91, cannot be interpreted as a clause relating to the treatment of non-member-country nationals. That provision concerns only Switzerland and simply confirms the rights derived by the latter from that convention.

Findings of the Court

- 41 It must be observed that, although the Treaty does not explicitly attribute external competence to the Community in the sphere of inland waterway transport, Articles 71(1) EC and 80(1) EC provide nevertheless for a Community power to act in that field.
- 42 In paragraphs 16 to 18 and 22 of the *AETR* judgment, the Court held that the competence of the Community to conclude international agreements arises not only from an express conferment by the Treaty but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions; that in particular, 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, Member States no longer have the right, acting individually or even collectively, to undertake obligations with non-member countries which affect those rules; that, as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards non-member countries affecting the whole sphere of application of the Community legal order; and that, to the extent to which Community rules are adopted for the attainment of the objectives of the Treaty, Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

- 43 If Member States were free to conclude international agreements affecting the common rules, that would compromise the attainment of the objective pursued by those rules as well as the Community's tasks and the objectives of the Treaty (Case C-266/03 *Commission v Luxembourg* [2005] ECR I-4804, paragraph 41).
- 44 The circumstances in which the scope of the common rules may be affected or distorted by international commitments entered into by Member States and, therefore, the circumstances in which the Community acquires exclusive external competence by reason of the exercise of its internal competence have been set out by the Court in, inter alia, its *Open Skies* judgments.
- 45 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, even if there is no contradiction between those rules and the commitments (*Commission v Germany*, paragraph 108).
- 46 Thus it is 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 (*Commission v Germany*, paragraph 109).
- 47 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 *AETR* judgment, if the Member States retained freedom to negotiate with non-member countries (*Commission v Germany*, paragraph 110).

- 48 As is clear from its title and from Articles 1 and 2, Regulation No 3921/91 lays down the conditions for access to the national transport of goods or passengers by inland waterway in Member States only in respect of Community carriers. Those provisions cover only carriers of goods or passengers by inland waterway established in a Member State, which use vessels whose owner or owners are natural persons domiciled in a Member State and 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 (Case C-266/03 *Commission v Luxembourg*, paragraph 46).
- 49 The reference in Article 6 of Regulation No 3921/91 to rights existing on the basis of the Mannheim Convention cannot alter that conclusion since by that provision the Community is merely taking formal note of Switzerland's rights under that convention (Case C-266/03 *Commission v Luxembourg*, paragraph 47).
- 50 It follows that Regulation No 3921/91 does not govern the conditions for access by non-Community carriers to the national transport of goods or passengers by inland waterway in a Member State (Case C-266/03 *Commission v Luxembourg*, paragraph 48).
- 51 Since the agreements concluded with Poland, Romania and Ukraine do not fall within an area already covered by Regulation No 3921/91, they cannot, therefore, be regarded as affecting it on the ground relied on by the Commission.
- 52 Furthermore, the very fact that Regulation No 3921/91 does not govern the situation of carriers established in non-member countries operating within the Community demonstrates that the harmonisation achieved by that regulation is not complete.

- 53 The Commission's claim that the Community has acquired exclusive external competence, as defined by the *AETR* judgment, in the area governed by the agreements concluded with Poland, Romania and Ukraine is therefore unfounded.
- 54 In those circumstances the first complaint must be dismissed.

The second complaint: infringement of Article 10 EC

Arguments of the parties

- 55 By its second complaint the Commission submits that, by ratifying and implementing the agreements with Poland, Romania and Ukraine after the Council had decided, on 7 December 1992, to authorise the Commission to negotiate a multilateral agreement on behalf of the Community, and in view of the fact that in its letter of 20 April 1993 it had requested the German Government to forgo ratification of those agreements, the Federal Republic of Germany has jeopardised the implementation of that decision and has thus failed to fulfil its obligations under Article 10 EC. The negotiation by the Commission of a multilateral agreement on behalf of the Community and its subsequent conclusion by the Council are, it argues, made more difficult by interference from a Member State's own initiatives.
- 56 In its reply the Commission adds that the maintenance in force of the agreement concluded with Czechoslovakia, by a notice of 24 March 1993 published on 22 April 1993 in the *Bundesgesetzblatt* (BGBl. 1993 II, p. 762), also constitutes an infringement of Article 10 EC.

57 The German Government submits that Member States cannot, by virtue of the principle of loyal cooperation, be obliged to denounce bilateral agreements already concluded with non-member countries by reason of the fact that negotiations have been initiated by the Commission in the same area as that governed by those agreements. In so far as the outcome of such negotiations and the conclusion of a multilateral agreement on behalf of the Community are by nature uncertain, a denunciation would create a legal vacuum until the entry into force of such a multilateral agreement.

58 In any event the German Government takes the view that it has complied with the requirements of Article 10 EC since, having consulted the Commission during the negotiation of the bilateral agreements, it undertook to denounce them as soon as a Community agreement was signed and reduced the period within which they were to be denounced to six months.

59 It further submits that the bilateral agreements were signed before the adoption of the Council Decision of 7 December 1992.

Findings of the Court

60 First, as regards the admissibility of the complaint relating to the maintenance in force of the agreement concluded with Czechoslovakia, it must be held that this was raised by the Commission in its reply and therefore cannot be examined by the Court. Such a complaint is not mentioned by the Commission in its originating application (see, to that effect, Case 298/86 *Commission v Belgium* [1988] ECR 4343, paragraph 8).

- 61 According to settled case-law, a party may not alter the actual subject-matter of the dispute during the proceedings, so that the substance of the application must be examined solely with reference to the conclusions contained in the application instituting the proceedings (see, in particular, Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 3, and Case C-256/98 *Commission v France* [2000] ECR I-2487, paragraph 31).
- 62 Accordingly, in so far as it concerns the maintenance in force of the agreement concluded with Czechoslovakia, the Commission's complaint must be dismissed as inadmissible.
- 63 Second, as regards the substance of the complaint, it must be recalled that Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.
- 64 It should also be recalled that this duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries (Case C-266/03 *Commission v Luxembourg*, paragraph 58).
- 65 In that connection, the Court has already held that Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action (Case 804/79 *Commission v United Kingdom* [1981] ECR I-1045, paragraph 28, and Case C-266/03 *Commission v Luxembourg*, paragraph 59).

- 66 The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation (Case C-266/03 *Commission v Luxembourg*, paragraph 60).
- 67 In this case, as the Advocate General has noted in point 92 of his Opinion, the adoption of the Council Decision of 7 December 1992 led to a substantial change in the legal framework in which the agreements with Poland, Romania and Ukraine were concluded, and required closer cooperation and concerted action with the Commission before those agreements could be ratified and implemented.
- 68 As the Advocate General has further stated, in points 90 and 91 of his Opinion, although the consultations between the German Government and the Commission did in fact take place at the time of the negotiation and signature of the agreements concluded with Poland, Romania and Ukraine, that is to say, before the adoption of the Council Decision of 7 December 1992, it is common ground that after that date the Federal Republic of Germany proceeded to ratify and implement those agreements without cooperating or consulting with the Commission.
- 69 By acting in that manner, that Member State jeopardised the implementation of the Council Decision of 7 December 1992 and, consequently, the accomplishment of the Community's task and the attainment of the objectives of the Treaty.

- 70 Consultation with the Commission was all the more necessary because the Council and the Commission had agreed, as regards the negotiation procedure for the multilateral agreement on behalf of the Community, to apply the rules of conduct set out in a gentleman's agreement annexed to the mandate for negotiation of 7 December 1992, providing for close coordination between the Commission and the Member States. In that respect, Title II, paragraph 3(d), of the Gentleman's Agreement provides that 'the Commission shall be the spokesman during the negotiations, and the representatives of the Member States shall speak only if requested to do so by the Commission' and that 'the representatives of the Member States must take no action which is likely to handicap the Commission in its work'.
- 71 Although it is true, as the German Government stresses, that the bilateral agreements were signed before the adoption of the Council Decision of 7 December 1992, the fact remains that the agreements concluded with Poland, Romania and Ukraine were ratified and implemented after that date.
- 72 Finally, the fact that the German Government has undertaken to denounce the bilateral agreements as soon as a multilateral agreement has been concluded on behalf of the Community does not establish that the obligation of loyal cooperation laid down in Article 10 EC has been complied with. As it was to take place after the negotiation and conclusion of that agreement, such a denunciation would have had no practical effect since it would not have facilitated the multilateral negotiations conducted by the Commission.
- 73 It follows that, by ratifying and implementing the agreements concluded with Poland, Romania and Ukraine without cooperating or consulting with the Commission, the Federal Republic of Germany has failed to fulfil its obligations under Article 10 EC.

74 Therefore, the second complaint is well founded to the extent set out in the previous paragraph.

The third complaint: incompatibility of the bilateral agreements with Regulation No 1356/96

Arguments of the parties

75 By its third complaint the Commission submits that the maintenance in force of the provisions of the bilateral agreements, after the adoption of Regulation No 1356/96, which provide that vessels registered in the non-member countries concerned may provide transport services by inland waterway between the Federal Republic of Germany and other Member States of the Community subject to special authorisation from the competent authority, is incompatible with Articles 1 and 2 of that regulation and with its general objectives.

76 By permitting the unilateral grant of rights of access by the Federal Republic of Germany, or at least by reserving to that Member State the right to grant unilaterally rights of access on routes within the Community to carriers who do not satisfy the conditions laid down by Regulation No 1356/96, the bilateral agreements modify, unilaterally and beyond the Commission's control, the nature and scope of the rules defined by Community law concerning the freedom to provide inland waterway transport services between Member States. According to the Commission, it is common ground that the Czech, Hungarian, Polish, Romanian, Slovak and Ukrainian transport carriers and undertakings likely to be authorised, in accordance with the contested bilateral agreements, to provide transport services between the Federal Republic of Germany and the other Member States of the Community do not satisfy any of those conditions.

- 77 The German Government argues that the bilateral agreements do not fall within the scope of Regulation No 1356/96 or of an area largely covered by it.
- 78 The German Government argues that the sole objective of Regulation No 1356/96 is to establish the internal market by defining the common rules applicable to the transport of goods or persons by inland waterway between Member States, and that it does not contain any provision governing the access by undertakings from non-member countries to the transport of persons or goods by inland waterway on Community territory.

Findings of the Court

- 79 It must be recalled that the main objective of Regulation No 1356/96 is to establish freedom to provide services in the field of the transport of goods or passengers by inland waterway between the Member States by eliminating all restrictions or discrimination as regards the provider of services on the grounds of his nationality or the place of establishment.
- 80 According to Article 2 of Regulation No 1356/96, the benefit of the arrangements involving the freedom to provide inland waterway transport services for goods or passengers is for carriers who:

— are established in a Member State in accordance with the laws of that Member State,

- are entitled in that Member State to carry out the international transport of goods or passengers by inland waterway,

- use for such transport operations inland waterways vessels which are registered in a Member State or, in the absence of registration, possess a certificate of membership of a fleet of a Member State, and

- satisfy the conditions laid down in Article 2 of Regulation No 3921/91, that is to say, they use vessels whose owner or owners are natural persons domiciled in a Member State and are Member State nationals, or legal persons which have their registered place of business in a Member State and the majority of which belongs to Member State nationals.

81 Whilst Regulation No 1356/96 organises 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, it is clear that the system established by Regulation No 1356/96 does not have as its purpose or effect to prevent operators established in non-member countries or vessels registered in the latter from carrying out services between Member States of the Community (see Case C-266/03 *Commission v Luxembourg*, paragraph 73).

82 Furthermore, the bilateral agreements do not establish the freedom to provide services for the transport by inland waterway of goods or passengers between Member States by Czech, Hungarian, Polish, Romanian, Slovak or Ukrainian carriers, but merely provide that, in strictly defined circumstances and subject to authorisation by the competent authorities of the parties to those agreements, vessels registered in the non-member countries concerned may operate such services between the Federal Republic of Germany and other Member States of the Community.

83 It follows that, contrary to the Commission's submissions, the provisions of the bilateral agreements have not modified either the nature or the scope of the provisions of Regulation No 1356/96.

84 In those circumstances the third complaint must be dismissed.

85 Having regard to all of the foregoing considerations it must be held that, by ratifying and implementing the bilateral agreements without cooperating or consulting with the Commission, the Federal Republic of Germany has failed to fulfil its obligations under Article 10 EC and that the remainder of the action should be dismissed.

Costs

86 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the Commission's application has been upheld only in part, each party must be ordered to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that, by ratifying and implementing:

- **the agreement between the Government of the Federal Republic of Germany and the Government of Romania on inland waterway transport, signed in Bonn on 22 October 1991,**

- **the agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on inland waterway transport, signed in Warsaw on 8 November 1991, and**

- **the agreement between the Government of the Federal Republic of Germany and the Government of Ukraine on inland waterway transport, signed in Bonn on 14 July 1992,**

without consulting or cooperating with the Commission of the European Communities, the Federal Republic of Germany has failed to fulfil its obligations under Article 10 EC;

- 2. Dismisses the remainder of the action;**

- 3. Orders the Commission of the European Communities and the Federal Republic of Germany to bear their own costs.**

[Signatures]