

JUDGMENT OF THE COURT

9 August 1994 *

In Case C-327/91,

French Republic, represented by Jean-Pierre Puissochet, Director of Legal Affairs at the Ministry of Foreign Affairs, and Géraud de Bergues, Principal Assistant Secretary for Foreign Affairs in the same ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

supported by

Kingdom of Spain, represented by Alberto José Navarro González, Director-General for Community Legal and Institutional Coordination, and Gloria Calvo Díaz, Abogado del Estado, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

and

Kingdom of the Netherlands, represented by A. Bos, legal adviser in the Ministry of Foreign Affairs, and J. W. de Zwaan, assistant legal adviser in the same ministry,

* Language of the case: French.

acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

interveners,

v

Commission of the European Communities, represented by Marie-José Jonczy, Legal Adviser, and Pieter-Jan Kuyper and Julian Currall, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that the Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws, which was signed and entered into force on 23 September 1991, is void,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Rapporteur), (Presidents of Chambers),

C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 July 1993,

after hearing the Opinion of the Advocate General at the sitting on 16 December 1993,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 16 December 1991, the French Republic brought an action under the first paragraph of Article 173 of the EEC Treaty and Article 33 of the ECSC Treaty for a declaration that the Agreement signed on 23 September 1991 by the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws (hereinafter 'the Agreement') is void.
- 2 The Agreement was signed in Washington by the Attorney General, W. P. Barr, and by the President of the Federal Trade Commission, L. Steiger, on behalf of the Government of the United States, of the one part, and by the Vice-President of the

Commission, Sir Leon Brittan, on behalf of the Commission of the European Communities, of the other part.

3 Article I(2) of the Agreement defines 'competition law(s)' as follows:

'...

(i) for the European Communities, Articles 85, 86, 89 and 90 of the Treaty establishing the European Economic Community, Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, Articles 65 and 66 of the Treaty establishing the European Coal and Steel Community (ECSC), and their implementing regulations including High Authority Decision No 24-54, and

(ii) for the United States of America, the Sherman Act (15 U. S. C. §§ 1 to 7), the Clayton Act (15 U. S. C. §§ 12 to 27), the Wilson Tariff Act (15 U. S. C. §§ 8 to 11) and the Federal Trade Commission Act (15 U. S. C. §§ 41 to 68, except as these sections relate to consumer protection functions),

... '.

4 Similarly, the Agreement defines ‘competition authorities’ as meaning:

‘...

(i) for the European Communities, the Commission of the European Communities, as to its responsibilities pursuant to the competition laws of the European Communities, and

(ii) for the United States, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission;

...’.

5 The purpose of the Agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the parties in the application of their competition laws (Article I(1)).

6 To that end, it provides for notification by each party to the other of measures taken by it in the enforcement of its competition laws which may affect important interests of the other party (Article II), the exchange of information concerning various matters of mutual interest relating to the application of competition laws (Article III), coordination of enforcement activities (Article IV) and reciprocal consultation procedures (Article VII).

- 7 In addition, Article V of the Agreement provides for cooperation regarding anti-competitive activities in the territory of one party that adversely affect important interests of the other ('positive comity'). In such circumstances, the party whose important interests are affected may notify the other party and request that that party's competition authorities take enforcement measures against the anti-competitive activities carried out on its territory. With a view to avoiding conflicts, Article VI provides that each party is to seek to take into account the important interests of the other party when deciding on enforcement measures ('traditional comity').
- 8 Confidentiality of information is ensured by Article VIII, which allows the parties to refrain from providing information to each other if its disclosure is prohibited by law or is incompatible with important interests of the party possessing such information.
- 9 Article IX provides that 'nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective States or Member States'.
- 10 Article X lays down the form to be taken by communications and notifications, which may be effected by oral, telephonic, written or facsimile communication.
- 11 Lastly, under Article XI(1) the Agreement is to enter into force upon signature and, in accordance with Article XI(2), it is to remain in force until 60 days after the date on which either party notifies the other party in writing that it wishes to terminate the Agreement. Under paragraph (3), the operation of the Agreement is to be reviewed not more than 24 months from the date of its entry into force.

- 12 The Agreement has not been published in the *Official Journal of the European Communities*.

Admissibility

- 13 In its defence, the Commission raises the question whether the French Government should have challenged the decision whereby it authorized its Vice-President to sign the Agreement with the United States on its behalf, rather than challenging the Agreement itself.
- 14 Suffice it to note that, in order for an action to be admissible under the first paragraph of Article 173 of the EEC Treaty, the contested act must be an act of an institution which produces legal effects (see Case 22/70 *Commission v Council* [1971] ECR 263 (the 'ERTA' case)).
- 15 The Court finds that, as is apparent from its actual wording, the Agreement is intended to produce legal effects. Consequently, the act whereby the Commission sought to conclude the Agreement must be susceptible to an action for annulment.
- 16 Exercise of the powers delegated to the Community institutions in international matters cannot escape judicial review, under Article 173 of the Treaty, of the legality of the acts adopted.
- 17 The French Republic's action must be understood as being directed against the act whereby the Commission sought to conclude the Agreement. Consequently, the action is admissible.

Substance

- 18 The French Government puts forward three pleas in support of its application. The first plea alleges that the Commission was not competent to conclude such an agreement, the second that there is no statement of reasons for the Agreement and that the principle of legal certainty has been contravened, and the third that Community competition law has been infringed.

The first plea

- 19 Article 228(1) of the EEC Treaty, in the version in force at the time of the events material to this case, provided as follows:

‘Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the European Parliament where required by this Treaty.’

- 20 The French Republic argues that that provision expressly reserves to the Council the power to conclude international agreements. Consequently, by concluding the Agreement, the Commission, which is empowered merely to conduct negotiations in that field, exceeded its powers.

- 21 The Commission contends that the Agreement in fact constitutes an administrative agreement which it is competent to conclude. In view of the nature of the obligations which it lays down, failure to perform the Agreement would result, not in an

international claim capable of giving rise to liability on the part of the Community, but merely in termination of the Agreement.

22 The Commission further points out that, in any event, Article IX of the Agreement, cited above, precludes the parties from interpreting its provisions in a manner inconsistent with their own laws (and, moreover, as regards the European Communities, with the laws of the Member States) or as requiring any change in their own laws.

23 As the Court has already found, the Agreement produces legal effects.

24 Next, it is the Community alone, having legal personality pursuant to Article 210 of the Treaty, which has the capacity to bind itself by concluding agreements with a non-member country or an international organization.

25 There is no doubt, therefore, that the Agreement is binding on the European Communities. It falls squarely within the definition of an international agreement concluded between an international organization and a State, within the meaning of Article 2(1)(a)(i) of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organizations or between International Organizations. In the event of non-performance of the Agreement by the Commission, therefore, the Community could incur liability at international level.

26 That being so, the question is whether the Commission was competent under Community law to conclude such an agreement.

- 27 As the Court explained in Opinion 1/75 of 11 November 1975 ([1975] ECR 1355), Article 228 uses the expression 'agreement' in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation.
- 28 Furthermore, as the Advocate General has pointed out in paragraph 37 of his Opinion, Article 228 constitutes, as regards the conclusion of treaties, an autonomous general provision, in that it confers specific powers on the Community institutions. With a view to establishing a balance between those institutions, it provides that agreements between the Community and one or more States are to be negotiated by the Commission and then concluded by the Council, after consulting the European Parliament where required by the Treaty. However, the power to conclude agreements is conferred on the Council 'subject to the powers vested in the Commission in this field'.
- 29 According to the French Government, those powers vested in the Commission are limited to agreements to be concluded by the Commission for the recognition of Community laissez-passers (Article 7 of the Protocol on the Privileges and Immunities of the European Communities). The French Government acknowledges that those powers may also extend to the conclusion of agreements which it describes as administrative or working agreements and which include, by way of example, the establishment of relations with the organs of the United Nations and the other international organizations referred to in Article 229 of the EEC Treaty.
- 30 The Commission, relying on what it describes as international administrative agreements, maintains, first, that the exception provided for in Article 228 should not be interpreted in the restrictive manner suggested by the French Government. It points out that, if those who drafted the Treaty had really sought to limit its

power to conclude treaties, the French version of Article 228 would have conferred power on the Council 'sous réserve des compétences *attribuées* à la Commission' and not '*reconnues* à la Commission'.

31 Instead, the use of the term 'reconnues' in the French version shows, according to the Commission, that it may derive its powers from sources other than the Treaty, such as the practices followed by the institutions. Moreover, reasoning by analogy from the third paragraph of Article 101 of the Euratom Treaty, the Commission considers that it can itself negotiate and conclude agreements or contracts whose implementation does not require action by the Council and can be effected within the limits of the relevant budget without giving rise to any new financial obligations on the part of the Community, provided that it keeps the Council informed.

32 That argument cannot be accepted.

33 First, the expression 'sous réserve des compétences reconnues à la Commission' derogates from the rule empowering the Council to conclude international agreements.

34 Second, according to the second subparagraph of Article 4(1) of the EEC Treaty, 'each institution shall act within the limits of the powers conferred upon it by this Treaty'. Consequently, the term 'reconnues' in the French version of Article 228 of the Treaty cannot have any meaning other than 'attribuées'.

35 Third, other language versions of Article 228 use terms suggesting that the powers in question are 'attribuées' rather than 'reconnues'. That is the case in particular as regards the versions in Danish ('som på dette område er tillagt Kommissionen'), German ('der Zuständigkeit, welche die Kommission auf diesem Gebiet besitzt'),

Dutch ('van de aan de Commissie te dezer zake toegekende bevoegheden') and English ('the powers vested in the Commission in this field').

36 Fourth, and in any event, a mere practice cannot override the provisions of the Treaty.

37 It follows from the foregoing that the Commission cannot claim to derive from Article 228 of the Treaty powers analogous to those which it enjoys by virtue of the third paragraph of Article 101 of the Euratom Treaty.

38 First, as the Advocate General has pointed out in paragraph 26 of his Opinion, Article 101 provides for a procedure which is quite different from that referred to in Article 228 of the EEC Treaty.

39 Second, the EEC and the Euratom Treaties were negotiated simultaneously and signed on the same day; accordingly, if those negotiating the two treaties had intended to grant the Commission the same powers, they would have done so expressly.

40 The Commission's final argument against the French Government's plea is that its power to conclude international agreements is all the more clear-cut in the present case, since the EEC Treaty has conferred on it specific powers in the field of competition. Under Article 89 of the Treaty and Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87), the Commission is entrusted with the task of ensuring the application of the principles laid down in Articles 85 and 86 of the EEC Treaty and the application of Council Regulation

(EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 14).

- 41 That argument cannot be accepted either. Even though the Commission has the power, internally, to take individual decisions applying the rules of competition, a field covered by the Agreement, that internal power is not such as to alter the allocation of powers between the Community institutions with regard to the conclusion of international agreements, which is determined by Article 228 of the Treaty.
- 42 The plea alleging lack of competence on the part of the Commission to conclude the Agreement at issue must therefore be upheld.
- 43 It follows, without there being any need to examine the other pleas relied on by the French Republic, that the act whereby the Commission sought to conclude the Agreement with the United States regarding the application of the competition laws of the European Communities and the United States must be declared void.

Costs

- 44 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission of the European Communities has been unsuccessful, it must be ordered to pay its own costs and those of the French Republic.

- 45 Pursuant to Article 69(4) of the Rules of Procedure, the Kingdom of Spain and the Kingdom of the Netherlands, which have intervened in support of the form of order sought by the French Republic, must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Declares void the act whereby the Commission of the European Communities sought to conclude the Agreement with the United States of America regarding the application of the competition laws of the European Communities and the United States, which was signed and entered into force on 23 September 1991;
2. Orders the Commission to pay its own costs and those of the French Republic;
3. Orders the Kingdom of Spain and the Kingdom of the Netherlands to bear their own costs.

Due

Mancini

Moitinho de Almeida

Diez de Velasco

Edward

Kakouris

Joliet

Schockweiler

Rodríguez Iglesias

Grévisse

Zuleeg

Kapteyn

Murray

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass

O. Due

Registrar

President