

OPINION OF ADVOCATE GENERAL

TIZZANO

delivered on 10 March 2005 ¹

I — Introduction

passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services ('Regulation No 1356/96'). ³

1. In the present case, the Commission of the European Communities has brought an action before the Court of Justice, pursuant to Article 226 EC, seeking a declaration that, by having unilaterally negotiated, concluded, ratified and brought into force bilateral agreements on transport by inland waterway with Romania, Poland and Ukraine, 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 ('Regulation No 3921/91'). ² The Commission further alleges that, by refusing to revoke those bilateral agreements, or agreements of similar content concluded with Hungary and Czechoslovakia, all of which are alleged to be incompatible with Regulation No 3921/91, Germany has infringed Council Regulation (EC) No 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or

II — The relevant legal framework

A — *Community law*

1. The Treaty provisions

2. The provision which, for present purposes, is of primary significance is Article 10 EC, under which, as we know:

'Member States shall take all appropriate measures, whether general or particular, to

¹ — Original language: Italian.

² — OJ 1991 L 373, p. 1.

³ — OJ 1996 L 175, p. 7.

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.

of a Member State or passing across the territory of one or more Member States;

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

3. I should also mention certain provisions in Title V of the EC Treaty, relating to transport — which actually forms the subject-matter of this case — the first of which being Article 70 EC, which provides that '[t]he objectives of this Treaty shall, in matters governed by this title, be pursued by Member States within the framework of a common transport policy'.

(c) measures to improve transport safety;

(d) any other appropriate provisions.'

4. For the purposes of implementing that common transport policy, Article 71(1) EC provides that '... 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: [⁴]

5. Article 80(1) EC further specifies that '[t]he provisions of this title shall apply to transport by rail, road and inland waterway'.

2. Regulations Nos 3921/91 and 1356/96

(a) common rules applicable to international transport to or from the territory

6. As part of the process of implementing the common policy on transport by inland waterway, the Council adopted the regulations at issue in the present case, Regulations Nos 3921/91 and 1356/96.

4 — Article 75 of the EEC Treaty, which constitutes the legal basis for Regulation No 3921/91, provided for the consultation procedure rather than the co-decision procedure subsequently selected by Article 75 of the EC Treaty and Article 71 EC.

7. The aim of Regulation No 3921/91 is to abolish any restrictions that may operate against providers of transport services by inland waterway because of their nationality or the fact that they are established in a Member State other than that in which the service is to be provided. In accordance with the general principle of equal treatment, therefore, that regulation requires non-resident carriers to be authorised to provide national transport services for goods or passengers by inland waterway under the same conditions as the Member State in question applies to its own carriers.

8. Regulation No 3921/91 provides, in particular, that, with effect from 1 January 1993, any carrier of goods or passengers is to be temporarily permitted to provide national transport on behalf of third parties in a Member State other than that in which he is established (a practice known as 'cabotage'), subject to compliance with certain conditions regarding both the carrier and the vessels he uses.

9. As regards the conditions relating to the carrier, Article 1 of Regulation No 3921/91 provides that cabotage may be carried out in a Member State by any carrier who is established in a Member State in accordance with its legislation and, where appropriate, who is entitled there to carry out the international transport of goods or passengers by inland waterway.

10. As regards the conditions relating to vessels, Article 2(1) of Regulation No 3921/91 provides that the vessels used must be owned by natural persons domiciled in a Member State who are nationals of Member States or by legal persons who have their registered place of business in a Member State and the majority holding in which or majority of which belongs to nationals of Member States.

11. Lastly, Article 6 of Regulation No 3921/91 provides that that regulation 'shall not affect the rights existing under the Revised Convention for the Navigation of the Rhine (Convention of Mannheim)'.⁵

12. Turning to Regulation No 1356/96, the aim of that regulation is to establish the freedom to provide services in the sector of goods and passenger transport by inland waterway between Member States. To that end, Regulation No 1356/96 seeks — as does Regulation No 3921/91 — to abolish restrictions placed on service providers by reason of their nationality or the fact that they are established in a Member State other than that in which the service is to be provided.

5 — That convention, which was signed at Mannheim on 17 October 1868, establishes the principles governing the freedom of navigation of the Rhine and equal treatment for boatmen and fleets. It is binding on the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation.

13. According to the first recital in the preamble to Regulation No 1356/96, 'the establishment of a common transport policy involves, *inter alia*, laying down common rules applicable to access to the market in the international transport of goods and passengers by inland waterway within the territory of the Community; ... those rules must be laid down in such a way as to contribute to the completion of the internal transport market'.

14. According to the third recital in the preamble to Regulation No 1356/96, following the accession of new Member States, the existence of different arrangements because of bilateral agreements concluded between Member States and new acceding States made it necessary to 'lay down common rules to ensure the proper functioning of the internal transport market and ... to avoid distortions of competition and disturbances in the organisation of the market concerned'.

15. Pursuant to Articles 1 and 2 of Regulation No 1356/96, any operator transporting goods or passengers by inland waterway is to be allowed to carry out transport operations between Member States or in transit through them, without discrimination on grounds of his nationality or place of establishment, provided that he meets the following conditions: he must be established in a Member State in accordance with the laws of that Member State; he must be entitled in that Member State to carry out the international

transport of goods or passengers by inland waterway; he must use for such transport operations inland waterway vessels which are registered in a Member State or possess a certificate of membership of a fleet of a Member State; and he must satisfy the conditions laid down in Article 2 of Regulation No 3921/91 (see point 10 above).

16. Lastly, Article 3 of Regulation No 1356/96 states that that regulation 'shall not affect the rights of third-country operators under the Revised Convention for the Navigation of the Rhine (Mannheim Convention), the Convention for Navigation of the Danube (Belgrade Convention) [⁶] or the rights arising from the European Community's international obligations'.

3. The proposed multilateral agreement between the Community and various third countries

17. On 7 December 1992, the Council adopted — in accordance with Article 228 (1) of the EEC Treaty (which then became, after amendment, Article 228(1) of the EC Treaty and, following further amendment, Article 300(1) EC) — a decision authorising the Commission 'to negotiate an agreement between the European Economic Commu-

6 — The purpose of the convention is, in particular, to guarantee the freedom to navigate the Danube, and was signed in Belgrade, on 18 August 1948, by Bulgaria, Hungary, Romania, Czechoslovakia, Ukraine, the Soviet Union and Yugoslavia.

nity, on the one hand, and Poland and the contracting parties to the Danube Convention (Hungary, Czechoslovakia, Romania, Bulgaria, the former Soviet Union, the former Yugoslavia and Austria), on the other.⁷ The main aim of the negotiations was to conclude a single multilateral agreement between the Community and the aforementioned countries, in order to establish the rules applicable to the transport by inland waterway of passengers and goods between the parties concerned. In particular, the negotiations sought to establish an efficient pan-European inland waterway transport network, in order to alleviate the congestion in the east-west transport networks, particularly following the opening of the Rhine-Main-Danube canal in 1992.

18. When the negotiations were completed, the Commission presented to the Council, on 13 December 1996, a proposal for a decision on the conclusion of an agreement laying down the conditions governing the transport by inland waterway of passengers and goods between the European Community, on the one hand, and the Czech Republic, the Republic of Poland and the Slovak Republic, on the other.⁸

19. To date, the Council has not approved the proposal for a decision.

B — *The bilateral agreements at issue*

20. In addition to the aforementioned Community initiative, the transport by inland waterway of passengers and goods is the subject, so far as is material to this case, of a number of bilateral agreements which Germany has concluded with the following countries:

- Hungary: that agreement was signed on 15 January 1988 and ratified by the law of 14 December 1989;⁹ it entered into force on 2 February 1990;
- Czechoslovakia: that agreement was signed on 26 January 1988 and ratified by the law of 14 December 1989;¹⁰ it entered into force on 4 May 1990;
- Romania: that agreement was signed on 22 October 1991 and ratified by the law of 19 April 1993;¹¹ it entered into force on 9 July 1993;

⁷ — Doc. 10828/92 Trans 178 Relex 72. Since the period to be taken into consideration for assessment of the present application falls before 1 May 2004 — the date on which some of those countries acceded to the European Union — those countries are referred to as 'third countries' in the remainder of this Opinion. The translation of the French version of the document cited is not authentic.

⁸ — COM(96) 634 final

⁹ — BGBl. 1989 II, p. 1026.

¹⁰ — BGBl. 1989 II, p. 1035.

¹¹ — BGBl. 1993 II, p. 770.

- Poland: that agreement was signed on 8 November 1991 and ratified by the law of 19 April 1993;¹² it entered into force on 1 November 1993;
 - Ukraine: that agreement was signed on 14 July 1992 and ratified by the law of 2 February 1994;¹³ it entered into force on 1 July 1994.
- authorising the Commission to negotiate a multilateral agreement on transport by inland waterway (see point 17 above), the Commission, by letter of 20 April 1993, requested various Member States — including Germany — to refrain from taking any action that might jeopardise progress in the negotiations at Community level and, in particular, to refrain from ratifying bilateral agreements which had already been initialled or signed, or from opening fresh negotiations with Central or Eastern European countries on transport by inland waterway.

21. Those bilateral agreements establish the rules governing access for a Contracting State's vessels to the inland waterways of the other Contracting State, for the transport of passengers and goods.

22. The agreements provide, in particular, that the authorities of a Contracting State may authorise vessels from the other Contracting State to carry passengers or goods both between ports located in the first State (cabotage) and between such ports and the ports of third countries.

III — Facts and procedure

23. In the wake of the aforementioned Council decision of 7 December 1992

24. On the view that Germany's conclusion of the bilateral agreements with Romania, Poland and Ukraine post-dated its letter of 20 April 1993, the Commission sent Germany a letter of formal notice on 10 April 1995, calling upon it to revoke those agreements.

25. By its reply of 23 June 1995, the German Government stated that the agreements with Romania, Poland and Ukraine had been signed in advance of the Council's decision authorising the negotiations, and that the Commission — to which the proposed agreements had been notified — had raised no objections of principle. It further pointed out that, since the outcome of the negotiations at Community level was uncertain, compliance with the Commission's request would have resulted in an unacceptable legal vacuum in relations with third countries concerning inland waterway transport. The German Government stated, however, that it was ready to revoke the agreements at issue

¹² — BGBl. 1993 II, p. 779.

¹³ — BGBl. 1994 II, p. 258.

as soon as an agreement had been concluded at Community level; it also pointed out in that regard that, in accordance with the request made by the Commission at the time when the proposed agreements were notified, the period for revocation had been cut to six months.

26. By supplementary letter of formal notice of 24 November 1998, the Commission imputed to the German Government, so far as is material to this case, first of all, failure to fulfil the obligations incumbent upon it by virtue of the division of responsibilities between the Community and the Member States in the field of external relations, on the ground that the bilateral agreements with Romania, Poland and Ukraine infringed the exclusive competence that the Community had acquired, in relation to transport by inland waterway, on the basis of the line of authority beginning with the *AETR* judgment,¹⁴ following the adoption of Regulation No 3921/91. The Commission also alleged that those agreements were incompatible with Regulation No 1356/96, as were those concluded with Hungary and Czechoslovakia.

27. By its reply of 26 February 1999, the German Government denied that its conduct was in breach of Community law. The Commission accordingly issued a reasoned

opinion on 28 February 2000, setting out the infringements alleged: the fact that Germany had negotiated, concluded, ratified, implemented and refused to revoke the bilateral agreements with Romania, Poland and Ukraine constituted a breach of its obligations under, *inter alia*, Article 10 EC and Regulations Nos 3921/91 and 1356/96; in addition, Germany's refusal to revoke the bilateral agreements with Hungary and Czechoslovakia constituted a breach of its obligations under Regulation No 1356/96.

28. In its reasoned opinion, the Commission allowed Germany a period of two months from the date of notification (expiring, therefore, on 28 April 2000) in which to comply with that reasoned opinion.

29. By its reply to the reasoned opinion, dated 11 May 2000, the German Government reiterated that, in its view, the bilateral agreements were not in breach of Community law and that, consequently, it was unnecessary to revoke them.

30. In those circumstances, the Commission brought an action on 10 October 2003 which has resulted in these proceedings.

¹⁴ — See Case 22/70 *Commission v Council* [1971] ECR 263, known as 'the *AETR* judgment' (or 'the *ERTA* judgment').

31. Following the exchange of written pleadings, and since neither of the parties has requested an oral hearing, the Court has decided, pursuant to Article 44a of the Rules of Procedure, to proceed to judgment without an oral hearing.

IV — Legal analysis

A — Admissibility

32. Before considering the Commission's heads of claim, I must deal with the objections of inadmissibility which the German Government has raised, and which seem to me to be manifestly unfounded.

33. According to the German Government, the section of the application concerning the bilateral agreements concluded with Hungary and Czechoslovakia is inadmissible, in the first place because those agreements were not addressed in the reasoned opinion, which focused wholly on the agreements with Romania, Poland and Ukraine.

34. That objection can be disposed of simply by pointing out that it is absolutely clear from the reasoned opinion that, as regards

the infringement of Regulation No 1356/96 (that is to say, the only complaint in the application relating to the agreements with Hungary and Czechoslovakia), the Commission analysed all five agreements.

35. Secondly, the German Government contends that the application is inadmissible because of the large number of references therein to the *Open Skies* case-law.¹⁵ Since those judgments post-date the close of the pre-litigation phase in the present case, the Commission should have issued a new reasoned opinion setting out the new legal framework applicable to the alleged infringements.

36. On closer inspection, however, the *Open Skies* case-law simply sets out the principles governing the Community's exclusive external competence, as recognised since the *AETR* judgment. It cannot be said, therefore, that the line of reasoning which the Commission deduces from *Open Skies* constitutes a new ground of challenge as compared with those invoked during the pre-litigation procedure.

¹⁵ — See 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.

37. Lastly, the German Government is asking the Court to declare that the application has become devoid of purpose in so far as it concerns the agreements which Germany concluded with countries which became Member States of the European Union as of 1 May 2004.

38. In that connection, it is scarcely necessary to point out that it is settled case-law that 'whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes'.¹⁶

39. In the present case, as we have seen, that period expired on 28 April 2000, that is to say, some four years before the enlargement of the Union.

40. I therefore consider that, subject to the considerations that I shall set out below (point 63), the application is admissible.

B — *Merits*

1. Preliminary remarks

41. In its application, the Commission sets out three different heads of claim, alleging

that Germany has infringed, respectively, the Community's exclusive competence to conclude international agreements on transport by inland waterway, Article 10 EC and Regulation No 1356/96.

42. I must preface my observations by pointing out that similar allegations have been made before, in relation to the Grand Duchy of Luxembourg, which had also concluded agreements with third countries in this same area. In the related case,¹⁷ which is currently pending before the Court, Advocate General Léger delivered his Opinion on 25 November 2004. Since I agree with that Opinion, I shall for the most part refer to the points made therein.

2. The first head of claim

43. By its first head of claim, as we have seen, the Commission alleges that Germany has infringed the Community's exclusive competence to conclude international agreements on transport by inland waterway, a competence that the Community enjoys in accordance with the principles established by the Court since the *AETR* judgment.

¹⁶ — See, among many, Case C-152/00 *Commission v France* [2002] ECR I-6973, paragraph 15.

¹⁷ — See Case C-266/03 *Commission v Luxembourg* (not yet published in ECR).

44. In particular, the Commission submits that the bilateral agreements with Romania, Poland and Ukraine — and, notably, the provision (Article 6) which allows the national authorities to authorise carriers from third countries to have access to cabotage in Germany — affect the Community rules laid down in Regulation No 3921/91 in so far as those rules fully harmonise, as of 1 January 1993, the conditions governing cabotage in the Member States of the Community. In consequence, by reserving the right unilaterally to accord rights of access for third-country carriers outside the Community framework, the German Government has infringed the Community's exclusive external competence.

45. Referring to the *Open Skies* judgments, the Commission submits that Regulation No 3921/91 covers not only Community carriers but also third-country carriers. According to the Commission, that view is borne out by Article 6 of Regulation No 3921/91, which recognises a right of access for Swiss carriers to cabotage in the Member States, pursuant to the Convention of Mannheim.

46. Let me say straightaway that, in my view, this head of claim is unfounded, for the reasons already set out in detail by Advocate General Léger in points 46 to 63 of the Opinion referred to in point 42 above, and I shall confine myself here to citing the most important passages below.

47. I would first point that, according to well-known case-law of the Court, and, in particular, the much cited *AETR* judgment, even if it is not expressly conferred, an exclusive Community competence may flow by implication from the Treaty 'in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies'.¹⁸

48. In point of fact, according to the Court, '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, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which *affect* those rules'. That is because '[a]s and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system'.¹⁹

49. The Court has clarified what it means by *affect* on a number of occasions and, most recently, in the *Open Skies* judgments, where it explains that this does not require there to

18 — See Opinion 1/76 of 26 April 1977 [1977] ECR 741, paragraph 4, and *Commission v Germany* (cited in footnote 15 above), paragraph 82.

19 — *AETR* judgment (cited in footnote 14 above), paragraphs 17 and 18. My emphasis.

be a contradiction between the international obligations entered into unilaterally by the Member States and the Community rules; on the contrary, 'that is the case where the international commitments [of the Member States] fall within the scope of the common rules ... or in any event within an area which is already largely covered by such rules'.²⁰

50. It follows — again according to the Court — 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 exclusive external competence in the spheres covered by those acts ...'.²¹

51. However, '[t]he 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 ...'.²²

52. In the present case, however, as Advocate General Léger specifically noted in his Opinion and as the German Government has pointed out in these proceedings, by the Treaty, Regulation No 3921/91 does not seem to contain any provision specifying the treatment to be accorded to third-country carriers.

53. As we have seen, Regulation No 3921/91 simply lays down the conditions governing access for non-resident (Community) carriers to the national transport of goods or passengers by inland waterway in a Member State. Its provisions therefore relate solely to carriers who are established in a Member State and are using vessels owned by natural persons domiciled in a Member State, who are nationals of Member States, or vessels owned by legal persons who have their registered place of business in a Member State, and the majority holding in which or majority of which belongs to nationals of Member States.

54. It follows that bilateral agreements such as those at issue, which concern the treatment of the third-country carriers concerned, cannot affect, within the meaning of the aforementioned case-law of the Court, the rules laid down in Regulation No 3921/91, since those rules refer only to Community carriers.

²⁰ — See, in particular, *Commission v Germany* (cited in footnote 15 above), paragraph 108. For an analysis of the concept of 'affect', I would refer to my Opinion in the *Open Skies* cases (cited in footnote 15 above) (joined Opinion of 31 January 2002, point 63 et seq.).

²¹ — See *Commission v Germany* (cited in footnote 15 above), paragraph 109.

²² — *Ibidem*, paragraph 110.

55. Furthermore, as the Court stated in *Open Skies*, the very fact that the regulation at issue does not govern the situation of third-country carriers operating within the Community demonstrates that total harmonisation has not been achieved under that regulation.²³

56. Consequently, since there are no Community rules in the field at issue the application of which could be adversely affected by agreements independently concluded by the Member States, the Community cannot claim to have exclusive external competence within the meaning of the *AETR* case-law.

57. It follows therefore that the conclusion, ratification and entry into force of the bilateral agreements between Germany, on the one hand, and Romania, Poland and Ukraine, respectively, on the other, cannot constitute an infringement of an exclusive external Community competence.

58. I therefore consider that the Court should hold the first head of claim to be unfounded.

3. The second head of claim

59. By its second head of claim, the Commission alleges that Germany has failed to fulfil its obligations under Article 10 EC in that, by ratifying and implementing the bilateral agreements with Romania, Poland and Ukraine after the Council had authorised the Commission to negotiate an agreement on behalf of the Community, it has jeopardised the implementation of the Council's decision.

60. In fact, according to the Commission, both the negotiation and the conclusion of the agreement by the Community are likely to be adversely affected by interference in the form of unilateral initiatives on the part of a Member State. In particular, the Community's negotiating position is weakened in relation to third countries if the Community and its Member States do not present a united front.

61. The Commission then points out that it was specifically in order to avoid a situation of that kind that it had sent various Member States — including Germany — the letter of 20 April 1993, requesting them to refrain from taking any action that might jeopardise progress in the negotiations at Community level and, in particular, to refrain from ratifying bilateral agreements which had

²³ — See, in particular, *Commission v Germany* (cited in footnote 15 above), paragraph 119.

already been initialled or signed, as well as from opening fresh negotiations with Central or Eastern European countries on transport by inland waterway.

62. In its reply, the Commission added that Germany had also infringed Article 10 EC in the case of its agreement with Czechoslovakia, given that in 1993 — subsequent, therefore, to the Council's decision — it 'transposed'²⁴ that agreement to both the Czech Republic and Slovakia.

63. I must immediately point out that this head of claim is new and separate as compared with those raised in the pre-litigation phase and the application. I therefore consider it to be inadmissible.

64. For its part, the German Government contends, principally, that the Council's decision authorising the commencement of negotiations could not of itself impose upon the Member States a *standstill* obligation to refrain from action, since that would be tantamount to conferring on the Community exclusive external competence, without the conditions laid down to that end in the *Open Skies* case-law being satisfied.

65. Moreover, according to the German Government, breach of the principle of proportionality is entailed if the effect of the Council's decision authorising the negotiations is to prevent the Member States from concluding bilateral agreements while awaiting an agreement at Community level. Rather than preventing the Member States from taking action, the Community institutions should arrange 'in the common rules laid down by them, concerted action in relation to non-member countries' or ... prescribe 'the approach to be taken by the Member States in their external dealings', as the Court held in the *Open Skies* judgments.²⁵

66. In any event, the German Government contends that it could not have acted otherwise since, without the bilateral agreements, the procedures governing access for Romanian, Polish and Ukrainian carriers to German inland waterways (and vice versa) would have been left in a kind of legal vacuum until the conclusion — which was by no means a certainty — of an agreement at Community level.

67. Germany points out that specifically in order to avoid compromising the Community initiative in any way, it offered the Commission every possible form of cooperation: (i) it consulted the Commission throughout the process of negotiating the agreements; (ii) it undertook — and

²⁴ — The term used in the German original of the reply is 'umgeschrieben'.

²⁵ — See, in particular, *Commission v Germany* (cited in footnote 15 above), paragraph 112.

informed the other parties accordingly — to revoke the agreements as soon as the Community had concluded its own agreement; and (iii) it cut the time-limit for revocation to six months, as the Commission had requested.

68. Moving on, then, to appraise the head of claim at issue, I would first point out that, by raising that head of claim, the Commission has in effect adjusted its aim, so to speak, in relation to its assessment of Germany's conduct.

69. The Commission is in fact no longer alleging infringement of an exclusive external Community competence, but rather infringement of Article 10 EC, in terms of the harm that Germany's action could cause to action taken by the Community in accordance with the negotiating mandate conferred on the Commission by the Council.

70. It follows that, contrary to what the German Government feared (and challenged), the Commission has not taken the view that the negotiating mandate established an exclusive Community competence.

71. It is true, as we shall soon see again, that the duty under Article 10 EC to cooperate in good faith applies whatever the nature of the

Community's competence in a given field, and, therefore, plainly also in the event that its competence is claimed to be exclusive. It is also true, however, that, if the Commission considered the Community's competence to be exclusive, it would have been easier for it to challenge the legality of Germany's conduct. Indeed, the Commission could have claimed — as in its first head of claim — that Germany's conduct was illegal simply because the agreements at issue had been concluded in breach of Community competence, whether or not any adverse effect in relation to the exercise of that competence was actually established.

72. As I pointed out a moment ago, the Commission did not take that approach and, in my view, it acted correctly. In fact, it seems to me also that, in the present case, exclusive external competence on the part of the Community is out of the question.

73. It is perfectly true, again according to the Court's case-law, that a competence of that nature may also be inferred by implication — as well as in the cases, cited above (see point 47 *et seq.*), in which internal powers have already been used in order to adopt measures for implementing common policies — in circumstances in which 'the conclusion [by the Community] of the international agreement [is] *necessary* in order to attain objectives of the Treaty that cannot be

attained by establishing autonomous rules'.²⁶

74. In such cases, however, for the reasons I endeavoured to set out in my Opinion in the *Open Skies* cases, the Community's external competence, even when considered 'necessary', can become exclusive only once it has actually been exercised, because only then can the assumption of international obligations in the same field by the Member States jeopardise the attainment of the Community objective for which the agreement was considered necessary.²⁷ Otherwise, the Community's competence will remain merely potential, and the Member States will remain free to assume international commitments in the relevant field, albeit in compliance with the duty to cooperate in good faith with the Community institutions.²⁸

75. In the present case, admittedly, that alternative appears less clear cut. While it is in fact true that no agreement at Community level capable of automatically triggering exclusive Community competence has yet been concluded, it is also true that the Council has adopted a decision authorising the Commission to negotiate. The question might arise, therefore, whether that decision

may not in itself be considered to constitute the actual exercise of Community competence — hence capable per se of rendering that competence exclusive — or whether in fact the definitive conclusion of an agreement is essential for those purposes, as provided for in Article 300(2) EC.

76. However, I have already pointed out, in that regard, that when, in Opinion 1/76, the Court first envisaged such a possibility, it referred not just to the negotiation of an international agreement but to the point at which 'the international agreement is concluded and made enforceable',²⁹ a finding which it confirmed in later opinions.³⁰

77. I would also point out that the negotiation of an agreement at Community level may be a lengthy process and may also be unsuccessful. It would therefore be excessive — or, taking up the German Government's argument, contrary to the principle of proportionality — to rule out any action by the Member States for the duration of the negotiations, particularly when that action is needed in order to prevent a legal vacuum.

26 — See, most recently, in particular, *Commission v Germany* (cited in footnote 15 above), paragraph 83 (my emphasis). Clearly, the first occasion when an external competence of that nature was recognised is referred to in Opinion 1/76 (cited in footnote 18 above), paragraphs 3 and 4.

27 — Opinion, point 49.

28 — *Ibidem*, point 54 and footnote 26.

29 — Opinion 1/76 (cited in footnote 18 above), paragraph 4. My emphasis.

30 — It is, in fact, pointed out that where 'the conclusion of an international agreement is necessary to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules', the external competence based on the Community's internal powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted' (Opinion 2/92 of 24 March 1995 [1995] ECR I-521, paragraph 32; my emphasis). In a similar vein, see Opinion 1/94 of 15 November 1994 [1994] ECR I-5267, paragraph 85.

78. It therefore seems to me that the German Government is right to reject the notion that the negotiating mandate is in itself sufficient in this case to establish an exclusive Community competence, and it is understandable that the Commission has merely alleged that Germany's conduct subsequent to the conferment of the Council's mandate constitutes an infringement of Article 10 EC.

challenged (as indeed the Commission did by its first head of claim); in those circumstances, any reference to Article 10 EC is merely a corollary. However, in the context of the head of claim at issue, as we have seen, the Commission has imputed to Germany solely and separately failure to comply with Article 10 EC.

79. Let me be clear: that does not mean that Article 10 EC cannot be relied upon also in the event of an infringement of exclusive competence. It is in fact clear from the wording of Article 10 EC, as Advocate General Léger also pointed out in his Opinion in Case C-266/03 *Commission v Luxembourg*,³¹ that the principle of cooperation in good faith is of general application and may therefore be invoked regardless of the nature of the Community competence at issue in a given set of circumstances.³² It is clear, however, that if that competence is exclusive, it is above all and directly the infringement of that competence that can be

80. That said, it is therefore necessary in the present case only to assess, in the light of Article 10 EC, whether the conduct of Germany at issue (namely ratification of the bilateral agreements signed prior to the Council's decision) is in fact likely to jeopardise the attainment of the objectives pursued by the Community, as defined in the negotiating mandate.

31 — The differences are that not only were the bilateral agreements concluded by the Grand Duchy of Luxembourg ratified (like those of Germany) after the Council had adopted its decision, they were also signed after the decision. Unlike Germany, the Grand Duchy had not consulted the Commission at the stage prior to the signature of the bilateral agreements.

32 — At points 71 and 72 of his Opinion, Advocate General Léger refers, in that connection, to Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paragraph 28, in which the Court ruled on a matter of exclusive Community competence (fisheries), but in terms which, in my view, justify the conclusion arrived at here. It is stated in that judgment that, '[a]ccording to [Article 10 EC], Member States are required to take all appropriate measures to facilitate the achievement of the Community's task and to abstain from any measure which might jeopardise the attainment of the objectives of the Treaty. This provision imposes on the Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, 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*' (my emphasis).

81. There is in fact no doubt that the mandate represents, in the words of the Court, 'the point of departure for concerted Community action'³³ aimed at achieving an objective of the Treaty; all the more so here, in fact, since we are dealing not just with a Commission proposal but with a Council decision. By virtue of that 'concerted action', it is therefore incumbent on the Member

33 — Case 804/79 *Commission v United Kingdom* (cited in footnote 32 above), paragraph 28.

States to abstain, as specifically laid down in Article 10 EC, 'from any measure which could jeopardise the attainment of the objectives of [the] Treaty'.

82. In my view, it is difficult to deny that measures of that nature also include a Member State's ratification of bilateral agreements in a field in which the Community is preparing to negotiate and conclude its own agreements.

83. It is in fact clear that an initiative of that nature is likely to limit, if not undermine, the common action which the institutions are preparing to take and, in any event, prevents them from presenting themselves as the architects of a common position on the part of all the Member States, unless it is at the same time guaranteed that the agreement concluded by the Member State in question is in accordance with the common interest and follows the line desired and decided by the Community bodies. Still less then can it be guaranteed that the rules laid down in the Member State's agreement will exactly reflect the terms that the Community intends to lay down in the common agreement.

84. I therefore consider that Germany's ratification of the bilateral agreements already signed in the field encompassed by the Council's negotiating mandate constitutes per se a measure 'which could jeopardise the attainment of the objectives of [the] Treaty'.

85. But, as we have seen, the German Government objects that, since a Community agreement had yet to materialise, it had no choice but to ratify the bilateral agreements at issue, since it had promptly to establish rules to apply to third-country carriers.

86. In that connection, however, I should point out that, even accepting that this was the case, it also follows from Article 10 EC that, in circumstances of this nature, the Member States must always act in accordance with the duty of cooperation in good faith laid down in that provision, and must therefore do everything in their power to prevent their action from jeopardising the exercise of Community competence.

87. As the Court has in fact explained, albeit in regard to a different set of circumstances, even where competences are distributed between the Community and the Member States 'the requirement of unity in the international representation' of the Community imposes a duty of 'close cooperation' on the Member States 'both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into'.³⁴ And, as I pointed out in my Opinion in the *Open Skies* cases,³⁵ that duty arises even where, for internal or external reasons, the Community is unable directly to conclude

34 — Opinion 2/91 of 19 March 1993 [1993] ECR I-1061, paragraph 36.

35 — Point 74.

the agreements needed to attain the objectives it has set itself and has, therefore, to do so 'through the medium of the Member States acting jointly in the Community's interest'.³⁶ Plainly, that all applies a fortiori when in fact the Community has already decided that it is going to act directly in a specific sector.

88. It therefore follows that even in circumstances of the kind described by the German Government, and thus where it may be necessary for the Member States to compensate for difficulties or delays which the Community might encounter in exercising its own competence, the Member States must always act in a way that is consonant with the duty to cooperate in good faith, that is to say, in such a way as not to jeopardise the attainment of the common objectives.

89. That means, more specifically, that the Member States must act in close cooperation with the Community institutions and agree with them the requisite initiatives. As the Court has once again explained, a Member State wishing to adopt measures in an area in which the Community intends to act but has yet fully to exercise its competence 'is required to seek the approval of the Commission which must be consulted at all stages of the procedure'.³⁷

90. It does not seem to me that this happened in the present case. It would appear from the file that Germany did not enter into any form of consultation with the Commission after the Council adopted its decision conferring the negotiating mandate.

91. All of the cooperation which Germany claims to have provided in that regard (see point 67 above) was in fact provided, as a matter of chronology, during the period when the agreements were negotiated and signed, and thus at a stage *prior to* the Council's decision.

92. However, as we have seen, the adoption of that decision prompted a significant change in the legal framework applicable to the agreements in question and ought, therefore, to have resulted in a stage of new and closer cooperation with the Commission before ratification.

93. Nor can it be objected, though Germany seeks to do so, that the Commission raised no objections at the time when the bilateral agreements were signed. Even in the case of the agreements with Romania and Poland, in fact, it could not be assumed that, following the Council's decision, the Commission would take the same view of such agreements. That applies all the more in the case of the agreement with Ukraine, given that, before that agreement was ratified, Germany

36 — Opinion 2/91 (cited in footnote 34 above), paragraphs 5 and 37.

37 — Case 141/78 *France v United Kingdom* [1979] ECR 2923, paragraph 9.

was in receipt of the letter by which the Commission specifically requested that no agreement falling within the negotiating mandate be ratified.

96. However, Germany did none of that. On the contrary, instead of deferring ratification in order to be able to coordinate with the Commission and await its instructions, Germany proceeded unilaterally to ratify the agreements, thus enabling their entry into force.

94. If, once the Council had adopted its decision, Germany had complied with the duty of 'cooperation in good faith' with the Commission, the latter would have been in a position to set out the Community's reasons appropriately and in good time and to provide the information needed to ensure that, while respecting the international obligations entered into in the meantime, the Member State's unilateral initiative would proceed in accordance with, or at least without prejudice to, Community requirements.

97. I therefore conclude that, by ratifying the agreements in question without entering into any form of cooperation with the Commission, Germany failed to act in accordance with the requirements of Article 10 EC and the principles laid down by the Court in that regard.

98. I propose therefore that the Court should uphold this head of claim, declaring that Germany has failed to fulfil its obligations under Article 10 EC.

95. The Commission could, for instance, have sought amendments designed to ensure that the rules contained in the bilateral agreements were essentially in line with the provisions that the Commission intended to include in the Community agreement, in accordance with guidelines provided by the Council. Furthermore, even if the Commission had considered it necessary — in order to avoid the legal vacuum feared by Germany — to preserve those agreements until the Community had reached an agreement (see point 66 above), it would still have been able to request changes to the agreements, designed, for instance, to make it clear that they were of a purely temporary nature and would automatically expire once agreement at Community level had been reached.

4. The third head of claim

99. The Commission, finally, alleges that the bilateral agreements with Hungary, Czechoslovakia, Romania, Poland and Ukraine are incompatible with Regulation No 1356/96.

100. In particular, the Commission contends that it is incompatible with that regulation that, even after its adoption, certain clauses were maintained in those agreements which provided that with an authorisation granted by the German authorities vessels registered in third countries could provide services between Germany and other Member States of the Community (Article 5 of the agreements).

101. In so acting, Germany in fact reserved to itself the power unilaterally to grant rights of access — to transport links within the Community — to carriers other than those fulfilling the conditions laid down in Regulation No 1356/96 (see point 15 above and point 104 below). In the Commission's view, that constitutes a breach of the system set in place by the regulation, given that Hungarian, Czech, Slovakian, Polish, Romanian and Ukrainian carriers — which could be authorised, under the bilateral agreements, to provide transport between Germany and the other Member States of the Community — did not fulfil the conditions laid down by the regulation at the material time.

102. I have to say that not even that complaint seems to me to be founded, for the reasons highlighted by the German

Government and by Advocate General Léger in his Opinion in Case C-266/03 *Commission v Luxembourg*.³⁸

103. In the first place, the main aim of Regulation No 1356/96 is to secure the freedom to provide services in regard to the transport of goods or passengers by inland waterway between the Member States, by abolishing any restrictions based on the nationality of the service provider or his place of establishment.

104. In particular, Articles 1 and 2 of Regulation No 1356/96 guarantee any carrier the freedom to provide transport services by inland waterway between the Member States, provided that the following conditions are met: (i) the carrier must be established in a Member State in accordance with its legislation and entitled to carry out there the international transport of goods or passengers by inland waterway; (ii) the carrier must use for such transport operations 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; (iii) the carrier must satisfy the conditions laid down in Article 2 of Regulation No 3921/91, that is to say, he must use vessels owned by natural persons domiciled in a Member State who are nationals of Member States, or vessels owned by legal persons who have their registered place of business in a Member State and the majority holding in which or majority of which belongs to nationals of Member States.

38 — Cited in footnote 17 above, points 82 to 91.

105. However, the introduction of those arrangements, for the purposes of securing the freedom to provide services by inland waterway between the Member States of the Community, for carriers established in any one of those Member States, must not be construed as an absolute prohibition in terms of which vessels registered in third countries may not provide services between different Member States of the Community. It is in fact the case that Regulation No 1356/96 may be viewed, as the Commission suggests, as an instrument establishing a Community preference in the field of transport by inland waterway within Community territory. But it seems to me that this preference consists solely in introducing preferential arrangements in relation to the freedom to provide services exclusively for carriers who are closely linked to a Member State. But there is nothing in Regulation No 1356/96 to suggest that its aim or effect is also generally to prevent vessels registered in third countries from providing services between different Member States of the Community.

106. Furthermore, the bilateral agreements at issue do not constitute a system establishing freedom to provide services for vessels of the third countries concerned: they merely make it possible for the latter to provide transport services between Germany and other Member States of the Community, once authorised to do so by the competent German authorities. Arrangements of that nature cannot therefore be equated with freedom for Hungarian, Czech, Slovakian, Romanian, Polish and Ukrainian carriers to provide transport services, for goods or passengers, by inland waterway between the Member States of the Community.

107. Consequently, in the light of the differences between the arrangements set in place by the bilateral agreements at issue and the system based on Regulation No 1356/96, I conclude that the Commission is incorrect to allege that the German Government has altered the nature and scope of the rules relating to the freedom to provide intra-Community transport services by inland waterway, as laid down in that regulation.

108. On the basis of the foregoing, I therefore consider that the Commission has failed to demonstrate that the agreements concluded by Germany with Hungary, Czechoslovakia, Romania, Poland and Ukraine are incompatible with Regulation No 1356/96.

109. I therefore consider that the Court should dismiss the third head of claim as unfounded.

V — Costs

110. Under 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 where each party succeeds on some heads and fails on others. Since I have proposed that the Commission's application be upheld only in part, I consider that the parties should each bear their own costs.

VI — Conclusion

111. In the light of the foregoing, I propose that the Court declare that:

- (1) The Federal Republic of Germany has failed to fulfil its obligations under Article 10 EC in so far as it autonomously ratified and brought into force bilateral agreements on transport by inland waterway, concluded with Romania, Poland and Ukraine after the Council had adopted its decision of 7 December 1992 on the opening of negotiations between the Community and third countries concerning the rules applicable to the transport by inland waterway of passengers and goods between the parties concerned;
- (2) The remainder of the application is dismissed;
- (3) The Commission of the European Communities and the Federal Republic of Germany are each to bear their own costs.