

JUDGMENT OF THE COURT (Grand Chamber)

3 March 2009 (*)

(Failure of a Member State to fulfil obligations – Infringement of the second paragraph of Article 307 EC – Failure to adopt appropriate measures to eliminate the incompatibilities with the EC Treaty of the bilateral agreements entered into with third countries prior to accession of the Member State to the European Union – Investment agreements entered into by the Republic of Austria with the Republic of Korea, the Republic of Cape Verde, the People’s Republic of China, Malaysia, the Russian Federation and the Republic of Turkey)

In Case C-205/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 5 May 2006,

Commission of the European Communities, represented by H. Støvlbæk, B. Martenczuk and C. Tufvesson, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by C. Pesendorfer and G. Thallinger, acting as Agents,

defendant,

supported by:

Federal Republic of Germany, represented by M. Lumma and C. Blaschke, acting as Agents,

Republic of Lithuania, represented by D. Kriaučiūnas, acting as Agent,

Republic of Hungary, represented by J. Fazekas, K. Szíjjártó and M. Fehér, acting as Agents,

Republic of Finland, represented by A. Guimaraes-Purokoski and J. Heliskoski, acting as Agents,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, M. Ilešič, A. Ó Caoimh and J.-C. Bonichot (Rapporteur), Presidents of Chambers, G. Arestis, A. Borg Barthet, J. Malenovský, U. Lõhmus and E. Levits, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 May 2008,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2008,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities requests the Court to declare that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with the Republic of Korea, the Republic of Cape Verde, the People's Republic of China, Malaysia, the Russian Federation and the Republic of Turkey, the Republic of Austria has failed to fulfil its obligations under the second paragraph of Article 307 EC.

Legal framework

- 2 Prior to its accession to the European Union, the Republic of Austria entered into bilateral investment agreements with the People's Republic of China (this agreement entered into force on 11 October 1986 (BGBl. 537/1986)), Malaysia (this agreement entered into force on 1 January 1987 (BGBl. 601/1986)), the Russian Federation (this agreement entered into force on 1 September 1991 (BGBl. 387/1991), initially concluded with the former Union of Soviet Socialist Republics and made applicable between the Republic of Austria and the Russian Federation pursuant to an exchange of letters (BGBl. 257/1994)), the Republic of Korea (this agreement entered into force on 1 November 1991 (BGBl. 523/1991)), the Republic of Turkey (this agreement entered into force on 1 January 1992 (BGBl. 612/1991)) and the Republic of Cape Verde (this agreement entered into force on 1 April 1993 (BGBl. 83/1993)).
- 3 Each of those agreements contains a clause under which each party guarantees to the investors of the other party, without undue delay, the free transfer, in freely convertible currency, of payments connected with an investment.

Pre-litigation procedure

- 4 As it took the view that those bilateral agreements could impede the application of restrictions on movements of capital and on payments which the Council of the European Union might adopt under Articles 57(2) EC, 59 EC and 60(1) EC, the Commission sent a letter of formal notice to the Republic of Austria on 12 May 2004.
- 5 By letter of 14 July 2004, the Republic of Austria submitted its observations to the Commission on that letter of formal notice. It maintained that the disputed provisions of the investment agreements at issue do not, first, impede the measures restricting movements of capital or payments provided for by the EC Treaty or, second, prejudice a vote by that Member State in favour of restrictive measures and would

not, therefore, adversely affect the powers of the Council were the latter to consider the adoption of such measures.

- 6 Taking the view that the arguments put forward by the Republic of Austria were insufficient and that it had failed, contrary to the requirements of the second paragraph of Article 307 EC, to take appropriate steps to eliminate the incompatibilities concerning the provisions on transfer contained in the various investment agreements at issue, the Commission sent a reasoned opinion to that Member State on 21 March 2005.
- 7 By letter of 19 May 2005, the Republic of Austria submitted to the Commission its observations on that reasoned opinion. It maintained the arguments put forward in its observations on the letter of formal notice and referred, in addition, to the possibility, were the European Community minded to adopt measures, of arriving at a mutually satisfactory solution in accordance with the dispute-resolution mechanism contained in the agreements at issue. It also stated that, in the course of the revision being undertaken of the Austrian model bilateral investment agreement, the adoption of a ‘regional economic international organisation’ (REIO) clause was envisaged, which would take into account the possible restrictions on the free movement of capital which might be decided upon by the Union or the Community and on which, in future, all international treaty negotiations would be based.
- 8 As it took the view that those arguments were not capable of rebutting the heads of complaint set out in the reasoned opinion, the Commission decided to bring the present action.

The action

The request to reopen the oral procedure

- 9 By letter of 30 July 2008, the Republic of Austria requested the Court to reopen the oral procedure pursuant to Article 61 of the Rules of Procedure, on the ground that the Commission had unlawfully introduced a new head of complaint during the oral procedure and that, as a consequence, the Advocate General’s Opinion was based on facts and arguments which it had not been possible for the parties to debate properly.
- 10 The Commission, it argued, had, for the first time and in succinct terms, claimed that the maintenance in force, in their present terms, of the bilateral investment agreements at issue was incompatible with Article 10 EC.
- 11 The Advocate General, it contends, proposes, in points 33 to 43 and 71 of his Opinion, that the Court base the alleged failure to fulfil obligations on Article 10 EC as well as on Articles 57(2) EC, 59 EC and 60(1) EC.
- 12 In addition, as several Member States have pointed out, the Commission set out this line of argument – which was subsequently developed – very belatedly and in rather unclear terms.
- 13 In that regard, it must be pointed out, first, that the Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure under Article 61 of its Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see

Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25; Case C-138/05 *Stichting Zuid-Hollandse Milieufederatie* [2006] ECR I-8339, paragraph 23; and order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18).

- 14 Second, under the second paragraph of Article 222 EC, it is the Advocate General's duty, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement. Since the Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based, it is not absolutely necessary to reopen the oral procedure, under Article 61 of the Rules of Procedure, each time the Advocate General raises a point of law which was not the subject of debate between the parties.
- 15 In the present case, since the Court considers that it has sufficient information to make a ruling and since the case does not have to be resolved on the basis of arguments which were not the subject of debate between the parties, in particular in the course of the hearing, it is not appropriate to grant the request that the oral procedure be reopened.

The incompatibility of the investment agreements with the Treaty

Arguments of the parties

- 16 The Commission takes the view that the absence, in the agreements at issue, of any provision expressly reserving for the Republic of Austria the possibility of applying measures which may, where appropriate, be decided upon by the Council on the basis of Articles 57 EC, 59 EC and 60 EC is liable to make it more difficult, or even impossible, for that Member State to comply with its Community obligations and that, by not taking appropriate steps to remove such an incompatibility, that Member State has failed to fulfil its obligations under the second paragraph of Article 307 EC.
- 17 The Commission claims that, were the Council to adopt restrictions on movements of capital and on payments, the period of time required for the denunciation or renegotiation of the agreements at issue would have the consequence that the Republic of Austria would be obliged, in the intervening period, under international law, to continue to apply the agreements in question, including their respective transfer clauses, in accordance, moreover, with the first paragraph of Article 307 EC. As a result, the measures adopted by the Council would not be uniformly applied within the Community.
- 18 The Republic of Austria considers that, in the absence of restrictions on movements of capital and on payments decided upon by the Council, it is free to regulate the movement of capital with third countries on the basis of Article 56 EC. It contends that, so long as no restriction has been decided upon by the Council, the question of the compatibility of the agreements at issue with a provision of the Treaty which has not been the subject of any application does not arise.
- 19 The Federal Republic of Germany, the Republic of Lithuania, the Republic of Hungary and the Republic of Finland concur with the arguments put forward by the Republic of Austria and take the view that the investment agreements in question are not incompatible with existing Community measures on free movement of capital, as those measures do not affect such agreements. According to those Member States, the failure to fulfil obligations relied on by the Commission is purely hypothetical in nature.
- 20 Those Member States contend that the objective of an action for failure to fulfil obligations under

Article 226 EC is not to review situations in which the alleged failure is hypothetical, but to remedy actual failures by Member States to fulfil their obligations.

- 21 The Federal Republic of Germany and the Republic of Hungary point out that a potential future incompatibility with secondary Community legislation on the part of an agreement entered into with a third country does not fall within the scope of application of Article 307 EC and can, if at all, be confirmed only if the Council actually exercises its competence within the area covered by that article.
- 22 The Republic of Finland points out that the Commission has failed to prove the existence of the alleged failure to fulfil obligations and cannot, according to the case-law of the Court, act on the basis of assumptions.
- 23 The Republic of Lithuania adds that the objective of the second paragraph of Article 307 EC is not to ensure formal compliance with Community law on the part of the provisions of international agreements entered into by the Member States, but to ensure effective application of the provisions of Community law, in particular where the Member States have, prior to the respective dates of their accession, concluded international agreements with third countries on the same matters.

Findings of the Court

- 24 The various investment agreements at issue concluded by the Republic of Austria contain equivalent provisions which guarantee the free transfer, without undue delay and in freely convertible currency, of payments connected with an investment.
- 25 In particular, the following matters are thus guaranteed: the free transfer of funds in order to create, manage or extend an investment; the freedom to repatriate the income from that investment; and the freedom to transfer the funds necessary to repay loans and the funds arising from the liquidation or assignment of that investment.
- 26 Those agreements are to that extent consistent with the wording of Article 56(1) EC, according to which ‘... all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited’, and of Article 56(2) EC, under which ‘all restrictions on payments between Member States and between Member States and third countries shall be prohibited’, and are in line with the objective pursued by that article.
- 27 It is true that the Treaty provisions to which the present action by the Commission refers grant the Council the power to restrict, in certain circumstances, the movement of capital and payments between Member States and third countries, including the movements covered by the transfer clauses here at issue.
- 28 The provisions in question, contained in Articles 57(2) EC, 59 EC and 60(1) EC, introduce, with a view to protecting the general Community interest and enabling the Community to comply, as appropriate, with its international obligations and with those of the Member States, exceptions to the principle of free movement of capital and payments between Member States and between Member States and third countries.
- 29 Article 57(2) EC allows the Council, acting by qualified majority on a proposal from the Commission, to adopt certain measures restricting the movement of capital to or from third countries involving, inter

alia, direct investment. Where those measures constitute a 'step back' in Community law as regards the liberalisation of the movement of capital to or from third countries, unanimity is required.

- 30 Article 59 EC authorises the Council, on a proposal from the Commission and after consulting the European Central Bank, to take safeguard measures where movements of capital to or from third countries 'cause, or threaten to cause, serious difficulties for the operation of economic and monetary union', provided that they are strictly necessary and that they relate to a period 'not exceeding six months'.
- 31 Article 60(1) EC allows the Council, on a proposal from the Commission, in order to implement a common position or a joint action in the area of the common foreign and security policy, to take 'necessary urgent measures' on the movement of capital and on payments. Such action could, for example, be required in order to give effect to a resolution of the Security Council of the United Nations Organisation.
- 32 It is common ground that the agreements at issue do not contain any provision reserving such possibilities for the Community to restrict movements of funds connected with investments. It is therefore necessary to examine whether the Republic of Austria was, for that reason, under an obligation to take the appropriate steps to which the second paragraph of Article 307 EC refers.
- 33 Under the first paragraph of Article 307 EC, the rights and obligations arising from an agreement concluded before the date of accession of a Member State between it and a third country are not affected by the provisions of the Treaty. The purpose of that provision is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder (see Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8; Case C-84/98 *Commission v Portugal* [2000] ECR I-5215, paragraph 53; and Case C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paragraphs 144 and 145).
- 34 The second paragraph of Article 307 EC obliges the Member States to take all appropriate steps to eliminate incompatibilities with Community law which have been established in agreements concluded prior to their accession. Under that provision, the Member States are required, where necessary, to assist each other to that end and, where appropriate, to adopt a common attitude.
- 35 The provisions of Articles 57(2) EC, 59 EC and 60(1) EC confer on the Council the power to restrict, in certain specific circumstances, movements of capital and payments between Member States and third countries.
- 36 In order to ensure the effectiveness of those provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately with regard to the States to which they relate, which may include some of the States which have signed one of the agreements at issue with the Republic of Austria.
- 37 Accordingly, those powers of the Council, which consist in the unilateral adoption of restrictive measures with regard to third countries on a matter which is identical to or connected with that covered by an earlier agreement concluded between a Member State and a third country, reveal an incompatibility with that agreement where, first, the agreement does not contain a provision allowing the Member State concerned to exercise its rights and to fulfil its obligations as a member of the

Community and, second, there is also no international-law mechanism which makes that possible.

- 38 Contrary to what is contended by the Republic of Austria, the measures put forward by it and which, in its view, are such as to enable it to fulfil its Community obligations do not appear to guarantee that this will be the case.
- 39 In the first place, the periods of time necessarily involved in any international negotiations which would be required in order to reopen discussion of the agreements at issue are inherently incompatible with the practical effectiveness of those measures.
- 40 In the second place, the possibility of relying on other mechanisms offered by international law, such as suspension of the agreement, or even denunciation of the agreements at issue or of some of their provisions, is too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively.
- 41 Moreover, as it pointed out again at the hearing, the Republic of Austria intends to introduce, in the investment agreements under negotiation or when the existing agreements are renewed, a clause which would reserve certain powers to regional organisations and would, therefore, make it possible to apply any measures restricting movements of capital and payments which might be adopted by the Council.
- 42 While acknowledging that such a clause should, in principle, as the Commission admitted at the hearing, be considered capable of removing the established incompatibility, it is common ground that, in the cases referred to by the Commission, the Republic of Austria has not taken any steps, within the period prescribed by the Commission in its reasoned opinion, with regard to the third countries concerned, designed to eliminate the risk of conflict with measures liable to be adopted by the Council under Articles 57(2) EC, 59 EC and 60(1) EC which may arise from the application of the investment agreements concluded with those third countries.
- 43 It must be added that, as follows from the judgment delivered today in Case C-249/06 *Commission v Sweden* [2009] ECR I-0000, the incompatibilities with the Treaty to which the investment agreements with third countries give rise and which militate against the application of the restrictions on movement of capital and on payments which the Council may adopt under Articles 57(2) EC, 59 EC and 60(1) EC are not limited to the Member State which is the defendant in the present case.
- 44 It must therefore be stated that, in accordance with the second paragraph of Article 307 EC, where necessary, the Member States must assist each other with a view to eliminating the incompatibilities established and must adopt, where appropriate, a common attitude. In the context of its duty, under Article 211 EC, to ensure that the provisions of the Treaty are applied, it is for the Commission to take any steps which may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude.
- 45 It follows from the foregoing that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with the Republic of Korea, the Republic of Cape Verde, the People's Republic of China, Malaysia, the Russian Federation and the Republic of Turkey, the Republic of Austria has failed to fulfil its obligations under the second paragraph of Article 307 EC.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Republic of Austria, and the latter has been unsuccessful, the Republic of Austria must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Federal Republic of Germany, the Republic of Lithuania, the Republic of Hungary and the Republic of Finland, which have intervened in the proceedings, are to bear their own costs.

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

1. **Declares that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with the Republic of Korea, the Republic of Cape Verde, the People's Republic of China, Malaysia, the Russian Federation and the Republic of Turkey, the Republic of Austria has failed to fulfil its obligations under the second paragraph of Article 307 EC;**
2. **Orders the Republic of Austria to pay the costs;**
3. **Orders the Federal Republic of Germany, the Republic of Lithuania, the Republic of Hungary and the Republic of Finland to bear their own respective costs.**

[Signatures]

* Language of the case: German.