JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
28 February 2002 *

In Case T-86/95,

Compagnie Générale Maritime, established in Suresnes (France),

Hapag-Lloyd Aktiengesellschaft, established in Hamburg (Germany),

Kawasaki Kisen Kaisha Limited, established in Tokyo (Japan),

Lloyd Triestino di Navigazione SpA, established in Trieste (Italy),

AP Møller-Mærsk Line, established in Copenhagen (Denmark),

Malaysian International Shipping Corporation Berhad, established in Kuala Lumpur (Malaysia),

Mitsui OSK Lines Ltd, established in Tokyo,

Nedlloyd Lijnen BV, established in Rotterdam (the Netherlands),

Neptune Orient Lines Ltd, established in Singapore (Singapore),

Nippon Yusen Kabushiki Kaisha, established in Tokyo,

Orient Overseas Container Line, established in Hong Kong (China),

* Language of the case: English.

P & O Containers Ltd, established in London (United Kingdom),

Wilh. Wilhemsen Ltd A/S, established in Oslo (Norway),

represented by P. Rutley, Solicitor, J. Pheasant and A. Mariott, lawyers, with an address for service in Luxembourg,

applicants,

supported by

The European Community Shipowners' Associations, having their registered office in Brussels (Belgium), represented by D. Waelbroeck, lawyer, with an address for service in Luxembourg,

and

The Japanese Shipowners' Association, having its registered office in Tokyo, represented by F. Randolph, Barrister, and F. Murphy, Solicitor, with an address for service in Luxembourg,

interveners,

v

Commission of the European Communities, represented by B. Langeheine and R. Lyal, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

The European Council of Transport Users ASBL, having its registered office in Brussels, including The European Shippers' Council, represented by M. Clough, Barrister, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Commission Decision 94/985/EC of 21 December 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/33.218 — Far Eastern Freight Conference) (OJ 1994 L 378, p. 17),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,
Registrar: Y. Mottard, Legal Secretary,

having regard to the written procedure and further to the hearing on 7 June 2000,

gives the following

Judgment [1]

Legal background

1 Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4) provides for block exemption for liner conferences. The eighth recital of the preamble to that regulation is worded as follows:

... provision should be made for block exemption of liner conferences:... liner conferences have a stabilising effect, assuring shippers of reliable services:... they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users;... such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income:... in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport;... the mobility of fleets, which is a characteristic feature

1 — Only the grounds of the judgment which the Court considers it appropriate to publish are reproduced here.

of the structure of availability in the shipping field, subjects conferences to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned'.

2 Pursuant to Article 1(2) of Regulation No 4056/86, that regulation only applies to international maritime transport services from or to one or more Community ports, other than tramp vessel services, that is the transport of goods in bulk in vessels chartered on request. Article 1(3)(b) of Regulation No 4056/86 defines a 'liner conference' in the following terms:

'... a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services'.

3 Article 3 of Regulation No 4056/86 exempts from the prohibition laid down in Article 85(1) of the EC Treaty (now Article 81(1) EC) agreements which have as their objective the fixing of rates and conditions for the provision of scheduled maritime transport services. The exemption extends to agreements having one or more of the following objectives:

'(a) the coordination of shipping timetables, sailing dates or dates of call;

(b) the determination of the frequency of sailings or calls;

(c) the coordination or allocation of sailings or calls among members of the conference;

(d) the regulation of the carrying capacity offered by each member;

(e) the allocation of cargo or revenue among members.'

4 Under Article 23(1) of Regulation No 4056/86, the Commission is required, before taking a decision, to give the undertakings or associations of undertakings concerned an opportunity of being heard on the matters to which objection has been taken against them. Commission Regulation No 4260/88 of 16 December 1988 on the communications, complaints and applications and the hearings provided for in Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1988 L 376, p. 1), in force at the time of the facts, lays down the procedural requirements to be complied with at the hearing.

5 Article 1 of Council Regulation No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302) provides:

'The provisions of this Regulation shall, in the field of transport by rail, road and inland waterway, apply both to all agreements, decisions and concerted practices which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical co-operation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping within the meaning of Article 4 of road or inland waterway transport undertakings, and to the abuse of

a dominant position on the transport market. These provisions shall apply also to operations of providers of services ancillary to transport which have any of the objects or effects listed above.'

6 Article 2(a) of Regulation No 1017/68 provides:

'Subject to the provisions of Articles 3 to 6, the following shall be prohibited as incompatible with the common market, no prior decision to that effect being required: all agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix transport rates and conditions or any other trading conditions;

...'.

7 Article 5 of Regulation No 1017/68 provides as follows:

'The prohibition in Article 2 may be declared inapplicable with retroactive effect to:

— any agreement or category of agreement between undertakings,

— any decision or category of decision of an association of undertakings, or

— any concerted practice or category of concerted practice which contributes towards:

— improving the quality of transport services; or

— promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation; or

— increasing the productivity of undertakings; or

— furthering technical or economic progress;

and at the same time takes fair account of the interests of transport users and neither:

(a) imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives; nor

(b) makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.'

8 Under Article 11(4) of Regulation No 1017/68: 'If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 2 and of Article 5, it shall issue a decision applying Article 5. Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.'

9 Pursuant to Article 22(2) of Regulation No 1017/68, the Commission may impose fines on undertakings or associations of undertakings where either intentionally or negligently they infringe, *inter alia*, Article 2 of that regulation.

10 Article 26(1) of Regulation No 1017/68 provides that before taking a decision the Commission must give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which objection has been taken. Commission Regulation No 1630/69 of 8 August 1969 on the hearings provided for in Article 26(1) and (2) of Council Regulation (EEC) No 1017/68 of 19 July 1968 (OJ, English Special Edition 1969 (II), p. 381) sets out the procedural requirements to be complied with at that hearing.

Facts

11 The Far Eastern Freight Conference ('the FEFC') is an association of liner shipping conferences comprising a number of shipping lines which provide

scheduled services shipping containers between northern Europe and South-East and East Asia, and 'door-to-door' or intermodal transport services.

12 The member companies of the FEFC agreed on a common tariff in addition to the general conditions of entry. In order to take account of intermodal transport, in about 1971, when the use of containers first started, the member companies extended the powers of the FEFC to fix prices in the sectors of maritime transport and cargo handling in the port of loading or unloading to that of inland transport.

13 The FEFC's tariff applicable at the material time appears in a document entitled NT90 which came into force on 1 January 1990. It sets out the general conditions of carriage, including payment terms, and is divided into five parts, two of which deal with the inland portions of intermodal transport operations (that is, inland transport in the countries of origin and destination).

14 On 28 April 1989 the Commission received a complaint from the Bundesverband der Deutschen Industrie (BDI), the Deutscher Industrie- und Handelstag (DIHT) and the Bundesverband des Deutschen Gross- und Aussenhandels (BGA), the sponsoring organisations of the Deutsche Seeverladerkomitee (DSVK, or German Shippers' Council), concerning certain price-fixing activities of the members of the FEFC in relation to intermodal transport.

15 The complainants identified the following five activities as making up an intermodal transport service:

(a) inland transport to the port;

(b) cargo handling in the port (transfer from the mode of inland transport to the vessel);

(c) sea transport (maritime transport from the port of origin to the port of destination);

(d) cargo handling in the port of destination (transfer from the vessel to the mode of inland transport);

(e) inland transport from the port of destination to the place of final destination.

16 They claimed that the block exemption provided for in Article 3 of Regulation No 4056/86 covered only the third of those five elements, (sea transport itself), but that the members of the FEFC had agreed between themselves prices not only for sea transport but also for inland transport services and cargo handling operations.

17 They pointed out that, since Article 1(2) of Regulation No 4056/86 applies to 'international maritime transport services from or to one or more Community ports, other than tramp vessel services', the scope of the block exemption contained in Article 3 thereof could not be wider than the scope of the regulation itself. In their opinion, the applicable regulation in the present case is Regulation No 1017/68, Article 2 of which prohibits restrictive practices — including price-fixing — and does not provide exemption for the type of price-fixing for inland transport in which the members of the FEFC engaged.

18 They requested the Commission to take appropriate action in order to put an end to the price-fixing activities of the FEFC in respect of inland transport services.

19 On 18 December 1992 the Commission decided to initiate proceedings in the present case.

20 By letter of 21 December 1992 the Commission addressed a statement of objections to the applicants.

21 The Commission then gave the undertakings concerned the opportunity to make known their views on the objections it had raised and to make any other comments in accordance with Article 26(1) of Regulation No 1017/68 and the provisions of Regulation No 1630/69.

22 On 21 December 1994 the Commission adopted Decision 94/985/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/33.218 — Far Eastern Freight Conference) (OJ 1994 L 378, p. 17, 'the contested decision').

23 The operative part of the contested decision is as follows:

'*Article 1*

The members of the Far Eastern Freight Conference... have infringed the provisions of Article 85 of the EC Treaty and Article 2 of Regulation (EEC)

No 1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the Far East.

Article 2

The conditions of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

Article 3

The members of the Far Eastern Freight Conference... are hereby required to put an end to the infringement referred to in Article 1.

Article 4

The undertakings to whom this decision is addressed are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect [as] the agreement referred to in Article 1.

Article 5

Fines as set out below are hereby imposed on the undertakings to whom this decision is addressed in respect of the infringement of the provisions of Article 85 of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68 referred to in Article 1.

Compagnie Générale Maritime	ECU 10 000
Hapag-Lloyd Aktiengesellschaft	ECU 10 000
Croatia Line	ECU 10 000
Kawasaki Kisen Kaisha Limited	ECU 10 000
Lloyd Triestino di Navigazione SpA	ECU 10 000
AP Møller-Mærsk Line	ECU 10 000
Malaysian International Shipping Corporation Berhad	ECU 10 000
Mitsui OSK Lines Ltd	ECU 10 000
Nedlloyd Lijnen BV	ECU 10 000
Neptune Orient Lines Ltd	ECU 10 000
Nippon Yusen Kabushiki Kaisha	ECU 10 000
Orient Overseas Container Line	ECU 10 000
P & O Containers Ltd	ECU 10 000

Article 6

The fines imposed in Article 5 shall be paid, in ecus, within three months of the date of notification of this decision, into bank account No 310-0933000-43 of the Commission of the European Communities, Banque Bruxelles Lambert, Agence Européenne, Rond-point Schumann 5, B-1040 Brussels.

After expiry of that period, interest shall be automatically payable on the fine at the rate charged by the European Monetary Institute for transactions in ecus on the first working day of the month in which this decision is adopted, plus 3.5 percentage points, namely 9.25%.

Article 7

This decision is addressed to the undertakings listed in the Annex.

This decision shall be enforceable pursuant to Article 192 of the EC Treaty.'

Procedure

24 On 16 March 1995, 13 of the 14 shipping companies to which the contested decision was addressed lodged an application for annulment of that decision under Article 173 of the EC Treaty (now, after amendment, Article 230 EC).

25 By separate document dated 10 April 1995 they also applied for the suspension of the operation of the contested decision, pursuant to Articles 185 and 186 of the EC Treaty (now Articles 242 EC and 243 EC). In light of the order of the President of the Court of Justice of 19 July 1995 in Case C-149/95 P(R), the

parties agreed that the Commission would not pursue the enforcement of the prohibition on the collective fixing of service rates for inland transport agreed by the applicants, pending judgment of the Court of First Instance in either Case T-395/94 or in the present case. In those circumstances the President of the Court of First Instance, on the application of the parties, decided on 31 October 1995 to suspend the application for interim measures until the delivery of judgment in either Case T-395/94 *Atlantic Container Line and Others* v *Commission* or in the present case, whichever is the earlier.

26 By order of 12 December 1995 the President of the Fifth Chamber (Extended Composition) of the Court of First Instance granted The European Community Shipowners' Associations ASBL ('the ECSA') and The Japanese Shipowners' Association ('the JSA') leave to intervene in support of the form of order sought by the applicants. He also granted The European Council of Transport Users ASBL ('the ECTU'), which includes The European Shippers' Council, leave to intervene in support of the form of order sought by the Commission.

27 On 30 October 1995 the High Court of Justice of England and Wales referred several questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EC Treaty (now Article 234 EC), concerning, in particular, the application of Article 85 of the Treaty, and the interpretation of Regulations Nos 4056/86 and 1017/68 to agreements between shipping companies to fix freight rates for intermodal transport operations comprising inland and maritime segments (Case C-339/95 *Compagnia di Navigazione Marittima and Others*, OJ 1995 C 351, p. 4).

28 By order of 26 June 1996 (not published in the ECR) the Court of First Instance ordered, pursuant to the third paragraph of Article 47 of the EC Statute of the Court of Justice and Articles 77(a) and 78 of the Rules of Procedure of the Court of First Instance, that proceedings in the present case be stayed pending delivery of the judgment in Case C-339/95. Following the removal from the Register of Case C-339/95 by order of the President of the Court of Justice of 11 March 1998 (not published in the ECR), proceedings in the present case were resumed.

29 After reading the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and invited the applicants to reply to certain written questions by way of measures of organisation of procedure.

30 The Court of First Instance heard the parties' oral arguments and replies to the Court's questions at the hearing on 7 June 2000.

Forms of order sought by the parties

31 The applicants, supported by the JSA and the ECSA, interveners, claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

32 The Commission, supported by the ECTU, contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

33 The applicants advance five pleas in support of their application. The first plea is breach of Article 85(1) of the Treaty. The second plea is breach of Article 3 of Regulation No 4056/86, which provides for block exemption. The third plea is breach of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68 concerning the grant of individual exemption. The fourth plea alleges that there were procedural irregularities in the administrative procedure. The fifth plea seeks the cancellation or reduction of the fines.

I. *Preliminary observations*

34 The applicants refer expressly to Cases T-395/94 and T-395/94 R and adopt the arguments they advanced in those cases for the purposes of the present case. As the Commission rightly remarked, such a global reference to the arguments advanced in another case cannot be taken into consideration. Under the first paragraph of Article 19 of the EC Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 46 of the same Statute, and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, an applicant must set out, at least in summary form, the pleas in law on which the application is based. The purpose of those provisions is to enable the defendant to prepare its defence and the Court to exercise its power of judicial review (see, in particular, Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28, and Case T-85/92 *de Hoe* v *Commission* [1993] ECR II-523, paragraphs 20 to 22).

35 In the present case, the reference in the application (paragraph 1.37), '[i]n so far as applicable and necessary... the arguments and evidence submitted... in Cases T-395/94 and T-395/94 R to the extent that these relate to the issue of conference

multimodal tariffing', is such a general reference to the arguments in Case T-395/94 that the Court of First Instance is not in a position to exercise its power of judicial review. That conclusion applies also in respect of the reference at paragraph 11.25 of the application to the arguments put forward in Case T-395/94 R, which are set out in summary form at paragraph 11.26 of the application. Accordingly the Court of First Instance will confine the exercise of its judicial review to the pleas and arguments expressly set out in the application.

II. *The first plea: breach of Article 85(1) of the Treaty*

A — *Arguments of the parties*

Relevant market

36 to 69 ...

Appreciable restriction of competition

70 to 82 ...

Effect on trade between Member States

83 to 109 ...

B — *Findings of the Court*

110 As regards the first plea, breach of Article 85(1) of the Treaty, it should be noted at the outset that the applicants do not deny that the agreement forming the subject of the contested decision, by which they collectively fixed the price for the FEFC's inland transport services supplied in the context of intermodal transport, is capable of restricting competition. It will be recalled in this respect that Article 85(1)(a) of the Treaty expressly identifies an agreement to fix selling prices as a restriction of competition (see, in particular, Case 8/72 *Cement-handelaren* v *Commission* [1972] ECR 977, paragraphs 18 and 19, and Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 198).

111 They deny, however, that the agreement is capable of restricting competition and affecting trade between Member States to an appreciable extent in the relevant market, properly defined, and, accordingly, that it is prohibited by Article 85(1) of the Treaty. The applicants' primary complaint in that respect is that the Commission has not defined the relevant market in the contested decision. In the alternative they submit that the definition of the relevant market implicitly adopted by the Commission in the contested decision is wrong in that it assumes that the inland haulage of containers as part of intermodal transport arranged by the FEFC constitutes a market separate from that for maritime transport. Lastly, they repeat that if the transport services in question form part of an inland transport services market, that market should include all inland transport services.

The definition of the relevant market

112 As regards the primary complaint, it should be noted that, contrary to the applicants' allegations, the Commission clearly identified, at recitals 10 and 42 of

the contested decision, the inland transport services in question as being the market affected by the contested agreement. The Commission stated that the services to which the contested decision refers are inland transport services supplied, within the European Community, to shippers by the member shipping companies of the FEFC as part of the intermodal transport of cargo in containers between northern Europe and the Far East. Moreover, at recitals 12 to 37 of the contested decision, the Commission described those services in greater detail, identifying the economic operators involved on the supply and demand sides (recitals 16 to 27), together with the relevant conditions of competition, in particular as regards price (recitals 26, 28 and 30).

113 It follows that the Commission has set out the proper context in which the agreement in question was concluded and is intended to take effect, as well as the structure and operation of the services in question.

114 Furthermore, it is irrelevant that the Commission has not included in the contested decision a specific section dealing with the definition of the relevant market and headed as such.

115 Accordingly, the applicants' complaint that the relevant market was not defined in the contested decision must be rejected.

116 In any event, it should be borne in mind that, for the purposes of Article 85 of the Treaty, the reason for defining the relevant market when necessary is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230, and Joined Cases T-374/94, T-375/94,

T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 103). Consequently, for the purposes of Article 85 the applicants' objections to the market definition adopted by the Commission cannot be seen in isolation from those concerning the impact on trade between Member States and the impairing of competition (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 75, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1093).

117 Next, as regards the alternative complaint that the definition of the relevant market on which the contested decision is based is wrong, it should be noted that the agreement restricting competition identified in the contested decision concerns the fixing, by the members of the FEFC, of a common rate for 'inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the Far East' (Article 1 of the contested decision).

118 The concept of 'intermodal transport' (also referred to in the industry as 'multimodal transport', 'direct transport' or 'combined transport') refers to the combined transport of containers by land and sea. As regards transport by land, it is not in dispute that the carriage of maritime containers from the shipper's premises to the port of loading (on-carriage) and from the port of unloading to the recipient's premises (off-carriage) can be provided either by the shipper himself or by the carrier, as noted in recital 16 of the contested decision. The shipper has a free choice in this respect as to which of the two methods to use (recital 17 of the contested decision). In either case, the inland transport service may be subcontracted out (recitals 19 to 24 of the contested decision).

119 Where the inland carriage is provided by the shipper, the shipper must obtain any necessary containers from the shipping company of his choice in order to pack them with the cargo in question on his own premises and then transport the containers to the delivery address for the goods designated by the shipping company. Similarly, it is for the shipper or the recipient of the cargo to organise the inland haulage of the containers from the port of unloading to his own premises for unpacking, and then to arrange for their return when empty to the shipping company. If he does not carry out the inland transport himself, the shipper may, as the contested decision states (recitals 21 to 24), call upon the services of an independent contractor such as, for example, a forwarding agent, a road haulier, a railway company or an inland waterway company.

120 Where the inland haulage is done by the carrier, it is the shipping company that provides the shipper with the containers and transports them to the port of loading or to the premises of the recipient from the port of unloading. In that case, the inland transport of the container is usually carried out physically not by the shipping company itself but by a road haulier, railway company or inland waterway company independent of the shipping company, to which the latter has subcontracted the operation (recitals 19 and 20 of the contested decision). Only a limited number of shipping companies have set up subsidiaries to provide inland transport services. It is not in dispute that the purpose of the agreement in question is for the FEFC members to fix the price for shippers of those inland transport services organised by the shipping companies as part of intermodal transport.

121 By their alternative complaint, that the relevant market was wrongly defined, the applicants allege that those inland transport services fall within the scope of the wider market of maritime transport performed as part of intermodal transport. The relevant market must therefore be defined as that of scheduled maritime transport as part of port-to-port or intermodal transport services between northern Europe and the Far East with calls in ports located in those territories. The applicants stress in particular in that respect that the inland transport of

containers offered by them to shippers forms an integral part of, and is indistinguishable from, the scheduled maritime transport services provided by the FEFC to shippers for the carriage of their cargo in containers between northern Europe and the Far East.

122 It is apparent from the case-law that, in order to be considered a sufficiently distinct market, it must be possible to distinguish the service or the goods in question by virtue of particular characteristics that so differentiate them from other services or other goods that it is only to a small degree interchangeable with those alternatives and affected by competition from them (see, to that effect, Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraphs 39 and 40, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 11 and 12, and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 64). The degree of interchangeability between products must be assessed in terms of their objective characteristics, as well as the structure of supply and demand on the market, and competitive conditions (see Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37, and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 63).

123 It should be borne in mind that the parties agree that, notwithstanding the fact that the shipping companies supply inland transport services as well as maritime transport services, the shippers have the option to buy the two types of services separately from different economic operators. Indeed, Article 5(3) of Regulation No 4056/86 ensures that shippers are entitled to approach their chosen undertaking to supply inland transport services. In the supply of those services to shippers, the shipping companies are therefore competing with the inland carriers. It cannot be disputed that the latter are engaged only in the market for inland transport services.

124 Furthermore, it should be noted that, before the shipping companies begin to offer the inland transport services of on-carriage and off-carriage of containers, the shippers must arrange for the carriage of the cargo to and from the ports. The

market for that inland carriage of goods was present before the arrival of the shipping companies in that market. Even after the introduction of the use of containers and the shipping companies' arrival on the market for inland transport services, it was important, as the economic report prepared by Professors Gilman and Graham (paragraph 4.42 of their report, cited at recital 17 of the contested decision) and submitted by the applicants in support of their argument observed, 'that shippers should retain the option to carry on as before and continue to arrange their own merchant haulage [if they so wished]'. Even if it is undeniable that the use of containers facilitated the combination of different modes of transport, the on-carriage and off-carriage of goods remains an inland transport service. That fact demonstrates the existence of a market for inland transport services that is closely associated with, but distinct from, the market for maritime transport services as part of an intermodal transport service (see, to that effect, for example, Case 311/84 *CBEM* [1985] ECR 3261, paragraph 26).

125 Furthermore, it is not in dispute, as the contested decision points out (recitals 19 to 24), that the inland transport services necessary for the on- and off-carriage of containers as part of intermodal transport are, as a general rule, provided by inland transport undertakings independent of both the shipping companies and the shippers, and that the inland haulage is carried out by the shipper or the shipping company. In both cases, the inland transport services required for the on-carriage and off-carriage of the containers are generally subcontracted to independent inland transport undertakings specialised in transport by road, rail or inland waterway.

126 It thus appears that the on-carriage and off-carriage of containers as part of intermodal transport constitutes a specific supply and demand. There are inland transport undertakings independent of the shippers and shipping companies that supply the latter with specialised services for the inland transport of maritime containers with a view to their carriage by sea, or subsequent to their carriage by sea, as part of intermodal transport.

127 The particular characteristic referred to above is also confirmed by the fact that supply and demand for inland transport services for the purpose of intermodal transport reflect particular competitive conditions, which differ from those prevailing on other markets, particularly that for maritime transport. Thus, whilst the price for maritime transport depends effectively on the value of the cargo transported, it is not in dispute that the price for inland transport is fixed for each container without any direct relation to the value of the cargo transported. Moreover, the parties agree that inland haulage is invoiced in the local currency, whilst maritime transport is invoiced in US dollars.

128 In that context, and contrary to what the applicants maintain, the Commission was entitled to find in the contested decision that the inland transport services for the on-carriage and off-carriage of containers as part of intermodal transport constitute a market distinct from maritime transport services supplied in that context by the member shipping companies of the FEFC. As may be seen from the case-law, a sub-market which has specific characteristics from the point of view of demand and supply, and which offers products which occupy an essential and non-interchangeable place in the general market of which it forms part, must be considered to be a distinct product market (see Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraphs 61 and 62, Case T-70/89 *BBC* v *Commission* [1991] ECR II-535, paragraph 50, and Case T-76/89 *ITP* v *Commission* [1991] ECR II-575, paragraphs 47 and 48).

129 The applicants' allegation that the inland transport services carried out by the shipping companies as part of intermodal transport are provided by the latter to the shippers as an integral part of their maritime transport services is irrelevant in this respect. Once there is a specific supply and demand for the inland transport of maritime containers and those services are provided, *inter alia*, by undertakings which are independent of the shipping companies, there is necessarily a separate market (see, by analogy, Case 22/78 *Hugin* v *Commission* [1979] ECR 1869, paragraphs 7 and 8; *Hilti*, cited above, paragraph 67, confirmed on appeal in Case C-53/92 P [1994] ECR I-667, paragraphs 13 and 14; *Tetra Pak*, cited above, paragraph 82, confirmed on appeal in Case C-333/94 P [1996] ECR

I-5951, paragraph 36). Thus in the field of the inland transport of maritime containers this Court has already held that rail services concerning, *inter alia*, access to the rail network, and the provision of rolling stock and engines constitute, by virtue of their specificity, a market separate from the market for rail transport in general, and from the market for transport by road and river (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraphs 55 and 56).

130 Consequently, contrary to the applicants' submission, the Commission correctly decided in the contested decision that the relevant market in the present case was that for specialised services of inland transport of maritime containers for the purpose of their carriage by sea, as part of intermodal transport between northern Europe and the Far East, excluding the maritime transport of containers supplied by the shipping companies in that context.

131 Finally, if the Court were to find that inland transport services form a separate market the applicants also claim that it would be appropriate to include in the relevant market, at the very least, all similar inland transport. In this respect they allege, in particular, that the relevant market should include, in addition to the inland transport of containers for the purpose of their carriage by the FEFC by sea between northern Europe and the Far East, the inland transport of containers by independent shipping companies serving the same route, the inland transport of containers by the FEFC and independent companies on other routes, the inland transport of any other container between points within Europe, and the inland transport of other cargo carried out in a similar fashion but not by container.

132 That argument must be rejected as being manifestly unfounded.

133 It is apparent from recitals 10 and 42 of the contested decision, and from Article 1 of the operative part, that the common tariff in question in the present proceedings relates to inland transport services supplied to shippers in combination with other services as part of an intermodal transport operation of cargo in containers between northern Europe and the Far East carried out by member shipping companies of the FEFC. Clearly, therefore, the relevant market does not comprise all inland transport services of whatever type, but only the inland transport of containers as part of an intermodal transport service.

134 Moreover, and for the same reason, the geographical market in question is not that of all inland transport of containers as part of intermodal transport services on all sea routes, but solely the inland transport of containers on the route between northern Europe and the Far East. The common tariff in question in the present case applies exclusively in the context of intermodal transport services only on the sea route between northern Europe and the Far East, which is not in fact substitutable for other routes (see, by analogy, *Ahmed Saeed Flugreisen and Silver Line Reisebüro*, cited above, paragraphs 40 and 41). It is sufficient to hold that it is apparent from recital 33 of the contested decision that the Commission did assess the effect on competition by reference to the wider context of the second of the two suggested hypotheses, and it is thus unnecessary in the present case to rule on the question whether the relevant market must be confined to the inland transport of containers intended for loading on the vessels of the member companies of the FEFC alone, as appears to be the case from recital 11 of the contested decision, or, more generally, on any vessels serving the maritime route in question. The Commission was therefore entitled not to include, in the definition of the relevant market, inland transport services provided as part of intermodal transport services on maritime routes other than that between northern Europe and the Far East.

135 In the light of the foregoing, it is evident that the definition of the relevant market as that for the inland transport of containers supplied to shippers in combination with other services within the European Community as part of the intermodal

transport of cargo in containers between northern Europe and the Far East cannot be challenged.

136 In those circumstances, the applicants' complaints based primarily on the alleged failure to define the relevant market and, in the alternative, on the allegedly incorrect definition of that market must be rejected.

Appreciable restriction of competition

137 As regards, first, the applicants' complaint that the contested decision fails to apply the criteria for determining whether the restriction of competition in question is appreciable and does not define the relevant market in relation to which the appreciable effect is to be determined, it is sufficient to note that there is evidence to the required legal standard in recital 33 of the contested decision, which is not challenged by the applicants, that in 1993 (that is, at the time of the facts in issue) the member shipping companies of the FEFC held 38.5% of the market for the inland transport of maritime containers as part of an intermodal transport operation between northern Europe and the Far East. As has been found in considering the complaint relating to the definition of the relevant market, the Commission was entitled to decide that that market was the relevant market for the purposes of applying Article 85 of the Treaty to the contested agreement.

138 It follows that the applicants' complaint must be rejected for that reason alone. The fact that they held almost 40% of the relevant market is sufficient proof that the agreement which is the subject of the contested decision is such as to restrict competition to an appreciable extent on that market. A market share of that size cannot reasonably be considered to be insignificant within the meaning of the case-law (see, *inter alia*, Case 5/69 *Völk* [1969] ECR 295, paragraph 7, and Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v

Commission [1983] ECR 1825, paragraph 86). Accordingly, since the contested decision expressly refers to the FEFC member shipping companies' share of the relevant market, it must be held that in so doing the Commission properly applied the criteria for determining whether the restriction of competition in question was appreciable.

139 As to the remainder, it should also be stressed that the Commission explained in the contested decision that in 1991 the inland transport services supplied by the FEFC member shipping companies represented approximately 1 015 208 TEU (20-foot equivalent unit) containers, or about 9 276 653 tonnes. Approximately 89% of those transports were carried wholly or in part within the Community (recital 33 of the contested decision). Furthermore, the contested decision points out that, on the routes between northern Europe and the Far East, inland transport operations represented 18.6% of the total cost of intermodal transport services, which, in 1992, amounted to some ECU 477 200 000 (recitals 34 and 35). It was in light of those factors that the Commission concluded, at recital 45 of the contested decision, that 'the restriction of competition between the members of the FEFC with regard to prices for the inland portion of a multimodal transport operation is likely to be appreciable because of the very large number of containers and the consequent costs involved (see [recitals] 33 to 37)'.

140 In those circumstances, it is clear that the applicants cannot claim that the Commission failed to determine whether the effect on competition of the agreement in question was appreciable.

141 As regards, secondly, the applicants' complaint that the contested decision does not correctly determine whether the agreement in question has an appreciable effect on competition because the question as to whether the effect of the agreement is appreciable falls to be assessed by reference to maritime transport supplied as part of intermodal transport, this must also be rejected in so far as it is based on an incorrect definition of the relevant market. Furthermore, it should be noted that if the definition of the relevant market advanced by the applicants was

appropriate the agreement in question would restrict competition to an even greater extent. The parties are agreed that in 1992 the members of the FEFC held a 58% share of the market as it was defined (recital 33 of the contested decision). It cannot be disputed that a price-fixing agreement in respect of services representing a significant part of the total cost of intermodal transport services, entered into by undertakings representing almost 60% of the relevant market, restricts competition to an appreciable extent within the meaning of Article 85(1) of the Treaty.

142 As regards, thirdly, the applicants' argument that the position of the parties to the agreement in question should be assessed on the market for comparable inland transport, this must also be rejected as being based on an erroneous definition of the relevant market, which does not involve all inland transport, but only inland transport services provided as part of intermodal transport on routes between northern Europe and the Far East.

143 It should also be noted that the effect on competition is appreciable not only if the market is limited to inland transport services supplied by member shipping companies of the FEFC alone, but also if it must include those supplied by independent shipping companies. It is apparent from recital 33 of the contested decision, which has not been challenged by the applicants, that in the first situation the member companies of the FEFC held 70% of the market, whilst in the second they held 38.5%.

144 Finally, the applicants' complaint that their rights of defence have been breached because the Commission assessed the effect of the contested agreement on competition for the first time in the contested decision will be considered separately under the fourth plea, relating to procedural defects, in which the applicants developed this complaint more fully.

The effect on trade between Member States

145 As regards the effect on trade between Member States, the Court would recall, first, that, according to settled case-law, for an agreement between undertakings to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective circumstances of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between the Member States (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, '*Woodpulp II*', paragraph 143). In particular, it is not necessary that the conduct in question should in fact have substantially affected trade between Member States. It is sufficient to establish that the conduct is capable of having such an effect (see, in the context of the application of Article 85 of the Treaty, *SPO*, cited above, paragraph 235).

146 Next, it is plain that the agreement in question is an agreement between shipping companies, several of which are established in various Member States, and concerns the conditions of sale of inland transport services to shippers also established in various Member States. Such an agreement is clearly capable of affecting trade between Member States within the meaning of Article 85(1) of the Treaty. Since the condition regarding the effect on trade between Member States is intended to determine the scope of Community law in relation to that of the laws of the Member States (Joined Cases 56/64 and 58/64 *Consten & Grundig* v *Commission* [1966] ECR 299; *SPO*, cited above, paragraph 227), it is indisputable that the agreement in question, laying down as it does conditions for the sale of inland transport services to a large number of shippers in the Community, falls within the scope of Community competition law. It must be stressed, in particular, in this context that fixing prices for the sale of inland transport services may affect, *inter alia*, the shipper's decision whether to entrust the inland haulage of their containers to members of the FEFC or to an inland carrier, thereby distorting competition on the market for inland transport services between member shipping companies of the FEFC and inland carriers present in various Member States.

147 In the same way, the Commission also correctly held at recitals 50 and 51 of the contested decision that fixing the price of inland transport can also influence competition between the ports of the various Member States. The very purpose of fixing those prices on the basis of a notional transport operation, as part of a system of 'port equalisation' between an inland point and the nearest of the ports served by any of the members of the FEFC, is to neutralise the economic advantage that may arise from the fact that the distance to a given port is shorter. It should be noted in that regard that the applicants have not denied that the application of the common tariff for inland transport has led to deflection of freight, claiming only that it is minor. Even if in the absence of an agreement by the FEFC fixing prices for inland transport services the shipping companies would still be responsible for the additional expense resulting from carriage to a more distant port — which is, incidentally, not established — that would not overcome the fact that the purpose or, at least, the effect of the practice of 'port equalisation' is to channel cargo to ports to which it would otherwise not have gone, and that this change in cargo flow is a consequence of the agreement fixing prices for inland transport. It should be added that the deflection of trade arising from collective pricing is, furthermore, different from that which would have existed had each company fixed an individual port equalisation on the basis of its own criteria.

148 Finally, although more indirectly, the agreement in question is, at the very least, capable of having an effect on trade between Member States in that as the price of inland transport services fixed by the FEFC represents part of the final sale price of the goods transported (see, to that effect, Case 136/86 *BNIC* [1987] ECR 4789, paragraph 18). The Commission was therefore entitled to state, at recital 54 of the contested decision, that the contested agreement, which has an effect on the cost of exporting to other countries, may encourage manufacturers in the Community to seek other markets, the cost of transport to which is lower, in particular, the domestic market of the manufacturer himself or of other Member States.

149 It follows that the applicants' complaints concerning the absence of an appreciable effect on intra-Community trade must be rejected.

Conclusion on the applicants' first plea

150 In light of the foregoing the applicants' first plea, breach of Article 85(1) of the Treaty, must be declared unfounded.

III — *The second plea: breach of Article 3 of Regulation No 4056/86*

A — *Arguments of the parties*

151 to 155 ...

The contested decision fails to take account of the fact that Regulations Nos 1017/68 and 4056/86 were intended to establish rules applicable to particular sectors of the economy

156 to 159 ...

The contested decision does not take account of the correct definition of the relevant markets on which the agreements produce their effects

160 and 161 ...

The contested decision is incompatible with what is stated in Regulation No 4056/86 regarding the scope of that regulation

162 to 209 ...

The contested decision is incompatible with the general principles of Community law for establishing the scope of Community legislation

210 to 215 ...

The contested decision is incompatible with the interpretation given to identical passages in regulations governing other transport sectors

216 to 221 ...

The contested decision gives rise to legal uncertainty and procedural inconsistency

222 to 224 ...

The contested decision is not consistent with the Council's reasoning in Regulation No 4056/86 concerning the grant of block exemption to liner conferences

225 ...

The contested decision fails to have regard to the distinctive characteristics of the transport sector

226 ...

The judgment in Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, cited by the Commission, is irrelevant to the present case

227 to 229 ...

B — *Findings of the Court*

230 The applicants claim in essence that the contested agreement qualifies for block exemption under Article 3 of Regulation No 4056/86 and that the Commission was wrong to have considered it in the light of Regulation No 1017/68.

231 Since the block exemption provided for by Article 3 of Regulation No 4056/86 can only apply to agreements falling within Regulation No 4056/86, it is first necessary to ascertain whether the price-fixing agreement concluded by the FEFC members for inland transport services provided in combination with other services as part of an intermodal transport operation falls within the scope of that regulation.

232 It should be borne in mind that Article 1 of Regulation No 4056/86, headed 'Subject-matter and scope of the Regulation', provides in paragraph 1 that '[t]his Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport services'. Therefore only agreements and abuses of a dominant position concerning 'maritime transport services' fall within Regulation No 4056/86.

233 In that respect it should be noted first that in the context of the first plea it has been established that the inland transport services in question constitute a service separate from maritime transport services.

234 Next, it is clear that the 'maritime transport services' ordinarily refers, precisely, to transport by sea. Contrary to the applicants' argument, there is nothing to warrant interpreting 'maritime transport services' as including inland transport, consisting of the on- or off-carriage of containers, provided in combination with other services as part of an intermodal transport operation.

235 Since the meaning of 'maritime transport services' is clear, it follows that if the Council had wanted to include within that term other services provided in

conjunction with maritime transport, such as the inland on- or off-carriage of cargo, it would have said so expressly, as indeed the American legislature has done.

236 Instead of providing for such an extension of the scope of Regulation No 4056/86 to inland transport, Article 1(2) thereof states, on the contrary, that '[i]t shall apply only to international maritime transport services from or to one or more Community ports, other than tramp vessel services'.

237 It is apparent therefore from the express wording of that article that the on- or off-carriage of cargo does not fall within the scope of Regulation No 4056/86, since that regulation refers only to port-to-port maritime transport services.

238 The applicants' interpretation in this context, to the effect that the sole purpose of that article is to indicate that Regulation No 4056/86 applies to 'international' categories of maritime transport services which, therefore, are carried out between Member States or between the Community and a third country, is plainly unfounded since it ignores the words 'from or to one or more ports'. Furthermore, the sixth recital in the preamble to Regulation No 4056/86, on which that interpretation is based, refers, again expressly, albeit in the specific context of the effect on trade between Member States, to maritime transport services 'from or to Community ports'. That recital therefore confirms that Regulation No 4056/86 does not apply to inland transport services consisting of the on- or off-carriage of cargo.

239 Indeed, it should be borne in mind that in *Centro Servizi Spediporto* the Court held, when asked whether Regulation No 4055/86 applies to the inland sections of an intermodal transport operation, that maritime transport services ceased on

arrival at the port or offshore installation and do not therefore extend to the road transport of cargo unloaded from the vessel.

240 The applicants are wrong to claim that the Court's conclusion in that judgment is not applicable to the present case. Since Regulation No 4055/86 forms part of the same group of measures, and was adopted on the same day as Regulation No 4056/86, it is inconceivable that the Council intended that the two regulations should have different scopes. If the Council had intended that Regulation No 4056/86 should have a wider scope than that of Regulation No 4055/86 it would at least have said so expressly, and would not have defined the scope of the two regulations by using the same expression, 'maritime transport services'. The fact that the two regulations have a different purpose is irrelevant for the purposes of interpreting the term 'maritime transport services'. Moreover, contrary to what the applicants maintain, Regulation No 4055/86 is not a measure to prevent third countries from refusing access to international maritime transport, but is intended, as is apparent from its very title, to ensure the freedom to provide maritime transport services between Member States and between Member States and third countries. Accordingly the argument that the Council intended its legislation to cover all liner conference activities applies as much to Regulation No 4055/86 as to Regulation No 4056/86. Finally, the applicants' argument that the Court's interpretation of Regulation No 4055/86 results from the particular fact that Article 1(4)(a) thereof defines 'maritime transport services' as being the carriage 'by sea between any port of a Member State and any port or offshore installation of another Member State' is likewise irrelevant, since Article 1(2) of Regulation No 4056/86 also defines 'maritime transport services' in practically identical terms as being those 'from or to one or more Community ports'.

241 It is thus apparent that the scope of Regulation No 4056/86 is limited to maritime transport services properly so called, that is, to transport by sea from port to port,

and does not cover the inland on- or off-carriage of cargo supplied in combination with other services as part of an intermodal transport operation.

242 Secondly, it is clear from the eleventh recital of Regulation No 4056/86 that the Council did not intend to extend the block exemption under Article 3 thereof to agreements relating to inland transport services, consisting of the on- or off-carriage of cargo provided in combination with other services as part of an intermodal transport operation. The eleventh recital provides that 'users must at all times be in a position to acquaint themselves with the rates and conditions of carriage applied by members of the conference, since in the case of inland transport organised by shippers, the latter continue to be subject to Regulation (EEC) No 1017/68'.

243 Contrary to what the applicants maintain, the fact that the English version of Regulation No 4056/86 uses the term 'shippers' (chargeurs) rather than 'shipping lines' (transporteurs maritimes) is irrelevant as that has clearly arisen only from a translating error. Not only do all of the other language versions refer, like the French, to 'maritime carriers', but the phrase as it appears in the English version scarcely makes sense and there is no reason why it should appear in a regulation concerning maritime transport.

244 Similarly, the applicants' alternative allegation, that if the eleventh recital did indeed refer to 'maritime carriers' and not 'shippers' it would simply mean that agreements concluded between the shipping companies and the inland carriers are subject to Regulation No 1017/68, must clearly be rejected. First, the eleventh recital as interpreted by the applicants would have no meaning as the fact that the shipping companies agree on the purchase price for inland services has no connection with the need for users, at all times, 'to be in a position to acquaint

themselves with rates and conditions of carriage applied by members of the conference'. Secondly, since the exemption laid down by Article 3 of Regulation No 4056/86 for the 'fixing of rates and conditions of carriage' can only refer to the fixing of the sale price for maritime transport services, and not the negotiation of the purchase price for another type of transport, it was pointless to provide that maritime carriers cannot agree the purchase price of inland transport.

245 Thirdly, it should be borne in mind that the definition of 'liner conference' in Article 1(3)(b) of Regulation No 4056/86 refers to vessel-operating carriers which 'operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services'. Similarly, the exemption provided for by Article 3 of Regulation No 4056/85 concerns, according to the heading thereof, 'agreements between carriers concerning the operation of scheduled maritime transport services'.

246 The services in question, for the inland transport of containers supplied as part of an intermodal transport operation, do not constitute 'scheduled services' within the meaning of those provisions. By contrast with maritime transport services, such services are provided on a fixed route and according to a regular timetable. It follows that an agreement fixing the prices of inland transport services cannot qualify for block exemption under Article 3 of Regulation No 4056/86.

247 Fourthly, it should be borne in mind that Article 3 of Regulation No 4056/86, which lists the legitimate objectives of liner conference agreements qualifying for block exemption, does not refer to agreements governing inland transport activities, consisting of the on- or off-carriage of cargo, carried out in combination with other services as part of an intermodal transport operation, but on the contrary refers only to specifically maritime activities such as, for

example, the coordination of shipping timetables, sailing dates or dates of calls, the determination of the frequency of sailings or calls, and the coordination or allocation of sailings or calls among members of the conference. Similarly, the heading of Article 3 refers solely to maritime transport services.

248 It should be noted, fifthly, that during the legislative procedure resulting in the adoption of Regulation No 4056/86, both the Parliament and the Economic and Social Committee proposed an amendment providing that the exemption would also apply to inland transport services, consisting in the on- or off-carriage of cargo, provided in combination with other services as part of an intermodal transport operation. That proposal was not taken up by the Council. The applicants' argument to the effect that the Council did not consider it worthwhile to adopt those proposals on the ground that the inland portion of the intermodal transport operation was already included in the maritime transport services cannot be accepted. First, it requires that a much wider meaning be attached to 'maritime transport services' than is generally the case. The fact that both the Parliament and the Economic and Social Committee, when called upon to give their opinion on the proposal for a regulation, found it necessary to add that the exemption also covered agreements relating to inland transport services, consisting of the on- or off-carriage of cargo, provided with other services as part of an intermodal transport operation, shows beyond a doubt that the inland sections cannot be considered to be covered by the expression 'maritime transport services'. Secondly, given the proposals from the Parliament and the Economic and Social Committee, legal certainty dictates that if the Council had intended to extend the scope of the block exemption to cover agreements relating to the inland part of intermodal transport, it would have said so expressly.

249 Sixthly, that block exemption under Article 3 of Regulation No 4056/86 cannot apply to the contested agreement is also apparent from a Council declaration of 17 December 1991, cited by the applicants themselves, in which the Council states that it will examine whether agreements on the terms and conditions of inland transport as part of intermodal transport should be made the subject of a block exemption. That declaration, made five years after the adoption of Regulation No 4056/86, also confirms that, even if the Council was aware of the

problem of intermodal transport and even inclined, in appropriate cases, to grant block exemption for agreements relating to the on- or off-carriage of cargo provided with other services as part of an intermodal transport operation, it clearly considered that those agreements were not covered by the block exemption provided for by Article 3 of Regulation No 4056/86.

250 Seventhly, the Commission expressly stated, on page 5 of its Explanatory Memorandum accompanying the 1981 proposal for a regulation, that it had taken account *inter alia* of the fact that the regulation in question should only apply to a single mode of transport.

251 Eighthly, the general rules of interpretation also indicate that the exemption provided for by Article 3 of Regulation No 4056/86 cannot apply to agreements fixing the price of inland transport services provided as part of intermodal transport services.

252 It is settled case-law that having regard to the general principle laid down by Article 85(1) of the Treaty that agreements restricting competition are prohibited, provisions derogating therefrom in a regulation concerning exemption must, by their nature, be strictly interpreted (Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 37; Opinion of Advocate General Van Gerven in Case C-234/89 *Delimitis* [1991] ECR I-935). This must also apply to the provisions of Regulation No 4056/86 exempting certain agreements from the prohibition laid down in Article 85(1) of the Treaty, since Article 3 of the regulation constitutes a block exemption within the meaning of Article 85(3) of the Treaty (Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 48).

253 In those circumstances, it does not assist the parties to argue that the very purpose of a liner conference has been recognised to be beneficial, which, incidentally, the Commission does not deny. Whilst this is capable of justifying the exemptions granted by Regulation No 4056/86, it cannot signify that every restriction of competition brought about by the liner conferences falls outside the general prohibition laid down by Article 85(1) of the Treaty (*Compagnie maritime belge*, paragraph 50).

254 Moreover, having regard to the wholly exceptional nature of the block exemption provided for by Article 3 of Regulation No 4056/86, in that it provides for exemption for an unlimited period for horizontal agreements fixing prices for maritime transport services, there is still less reason to extend the benefit of that block exemption to agreements fixing the price of inland transport concluded between the members of a liner conference.

255 The applicants' complaint that the Commission's interpretation is at odds with the rationale of the block exemption because most conferences lay down an intermodal tariff must therefore be rejected. That interpretation does not, incidentally, undermine the power granted to liner conferences by Article 3 of Regulation No 4056/86 to fix prices for maritime transport services.

256 The complaint that the contested decision overlooked the distinctive characteristics of the transport sector in general must also be rejected. The applicants themselves stress that the various regulations in the matter of transport were adopted by the Council on the basis of the specific characteristics of each mode of transport: sea, land or air. Since the agreement in question relates to inland transport services, consisting of on- or off-carriage provided with other services as part of an intermodal transport operation and not to maritime transport

services, there is no reason to grant it the benefit of the exceptional concessions accorded to maritime transport agreements.

257 It is thus clear both from the wording of the provisions setting out the scope of Regulation No 4056/86 or the agreements covered by the exemption laid down by Article 3 of Regulation No 4056/86, and from the *travaux préparatoires* of Regulation No 4056/86 and the Council declaration of December 1991, as well as from the general rules of interpretation, that the block exemption provided for by Article 3 thereof in favour of certain agreements between members of liner conferences cannot apply to an agreement fixing the price of inland transport services, consisting of the on- or off-carriage of cargo, provided with other services as part of an intermodal transport operation concluded between the members of a liner conference.

258 Moreover, it is plain that none of the other arguments advanced by the applicants undermines that conclusion.

259 First, the applicants' argument that the agreement in question falls within Regulation No 4056/86 because the FEFC members are undertakings in the maritime transport sector is unfounded.

260 For the purposes of determining which regulation applies to a particular agreement, that agreement must be considered in light of the provisions setting out the scope of the various regulations concerned. That decision should not be based solely on the sector in which the undertaking providing the service or product governed by the agreement operates. In the present case, it is clear from Article 1(2) of Regulation No 4056/86 that the regulation does not cover all agreements concluded by shipping companies but only those relating to 'international maritime transport from or to one or more Community ports'. Accordingly, an agreement fixing the price of inland transport services manifestly

does not fall within the scope of Regulation No 4056/86, even if entered into and performed by shipping companies as part of intermodal transport services. It should be pointed out in this context that in Case C-264/95 P *Commission* v *UIC* [1997] ECR I-1287, paragraph 42, the Court held that the application of Regulation No 1017/68 depends on the nature of the agreements in question and not on the prior identification of the market on which those agreements produce their effects. Accordingly, the applicants' argument that in the field of transport the various competition regulations apply to specific sectors of the economy must be rejected, since the applicable regulations must be determined by reference to the contested agreement, and not by reference to the undertaking providing the product or service. A single agreement cannot be subject to different competition regulations depending on which undertaking concluded the agreement.

261 In any event, even if, as the applicants claim, the applicable regulation depended upon the definition of the market, the contested agreement would not fall within Regulation No 4056/86. As appears from the discussion of the first plea, the inland transport services in question must be considered to be separate from those of maritime transport, and not as a single integrated product of intermodal transport for the reason that, *inter alia*, inland and maritime transport services can be bought and sold separately from and by different economic operators. The applicants' comparison with shoe-laces in this context is clearly irrelevant since, although it is true that laces may be sold separately from shoes, the shoes cannot be sold or used without their laces and the two products constitute a single product. By contrast, the inland transport services offered by FEFC members are merely a service complementing their maritime transport services in respect of which transport users are entitled, under Regulation No 4056/86, to approach the undertakings of their choice, since the shippers may themselves also undertake the on- or off-carriage of cargo. Accordingly, even when sold in combination with a maritime transport service as part of an intermodal transport operation, the inland transport services of the on- or off-carriage of cargo nevertheless remain a service separate from the maritime transport service. Contrary to the applicants' claim, the relevant market in the present case is not, therefore, that of maritime transport services, but that of inland transport services provided by members of the FEFC as part of intermodal transport.

262 It should also be added that, even if intermodal transport were regarded as a single composite product constituting its own market, the applicants' alternative argument to the effect that the ancillary activities necessarily provided as an integral part of an intermodal transport service must be treated as part of that single service does not in any case imply that the agreement in question is covered by the block exemption provided for by Article 3 of Regulation No 4056/86. Since the provisions regarding block exemption are to be interpreted restrictively, the fact that intermodal transport constitutes a single composite service would, on the contrary, give rise to doubts as to whether the block exemption could still apply in respect of the fixing of prices for intermodal transport services, including the maritime part.

263 The applicants' argument would, moreover, give rise to discrimination.

264 Unlike shipping companies, road hauliers or railway companies could enter into agreements on the price of the inland transport services that they provide to shippers. It is possible, moreover, that allowing liner conferences to fix prices for inland transport collectively might enable them to extend the power that they hold in the maritime transport market to the inland transport market, to the detriment of inland carriers. Thus, whilst leaving the intermodal transport tariff unchanged, they could, for example, increase the price for the maritime part of the transport and decrease, to the same extent, that for the inland part, so that the shippers would in practice have no option but to buy inland transport from the shipping companies.

265 Allowing shipping companies to fix collectively the price of maritime transport services and inland transport services consisting of the on- or off-carriage of cargo, provided with other services as part of an intermodal transport operation,

would also result in discrimination against some forwarding agents who are genuine non-vessel-operating intermodal transport operators and provide the same services as the shipping lines. Those forwarding agents offer intermodal transport services but, unlike shipping companies, they do not operate any vessels themselves but instead charter space from the shipowners. As stated in recital 23 of the contested decision, which is not challenged by the applicants, the competition between those forwarding agents and the maritime carriers providing the scheduled services had increased strongly to the point of becoming one of the distinguishing characteristics of the sector in question.

266 Secondly, the various arguments based on the wording of Regulation No 4056/86 must be rejected. Either they are based on the erroneous premiss, already rejected (at paragraphs 120 to 129 above), that inland transport services consisting of the on- or off-carriage of cargo provided with other services as part of an intermodal transport operation constitute maritime transport services, or they are irrelevant, or they distort the meaning of the text.

267 The arguments based on Article 5 of Regulation No 4056/86 are irrelevant because that article merely sets out the obligations attached to the exemption provided for in Article 3, and cannot, by definition, widen the scope of that exemption. Furthermore, contrary to what the applicants maintain, paragraphs (3) and (4) of Article 5 of Regulation No 4056/86, even if they refer to inland transport, do not support the conclusion that that regulation governs such transport. In the first place, Article 5(3) refers only to the need to prevent members of a conference from exploiting their power on the market for maritime transport services by requiring shippers to purchase from them other services, such as inland transport services. It should be observed that in any event that provision, the purpose of which is thus to prevent shipping companies from tying inland transport to their maritime transport service, confirms that maritime and inland transport services are two separate services forming separate markets.

268 In the second place, Article 5(4) does not state that the regulation applies to inland transport but, in relation to situations in which there is a single price for a transport service which includes an inland part, provides that the shipping companies' tariffs must state the services covered by the freight charge in proportion to the maritime part and the inland part of the transport. The tariffs mentioned in that article do not refer to the conference tariff, but to the terms offered by the various shipping companies. The article provides that those tariffs may be consulted at the offices of the shipping companies and their agents, and not in the conference's offices. It is clear that the shipping companies may offer intermodal transport services and, in that context, the shippers must be in a position to know what proportion of the prices represents inland transport and maritime transport respectively.

269 Contrary to the applicants' submission, Article 4 of Regulation No 4056/86, which provides that to qualify for exemption an agreement cannot fix different terms and conditions according to the country of origin or destination, or the port of loading or unloading, does not prove that the regulation applies to inland transport, but simply transposes the principle set out in Article 79(1) of the Treaty (now, after amendment, Article 75(1) EC) that discrimination is prohibited. Even in the absence of intermodal transport, the shipping companies could apply different conditions to the transport of cargo from different Member States and thus ensure the transit of cargo via one port rather than another.

270 Thirdly, as regards the applicants' assertion that in 1984 some Member States intimated, in the context of legislative reform in a third country, that it would be desirable for that country also to enable member shipping companies of liner conferences collectively to fix the prices of inland transport services provided in combination with maritime transport services, that does not justify the conclusion that the Council necessarily decided, three years later, that it should adopt a Community regulation to that effect. Furthermore, it should be stressed,

first, that this was the opinion of only one group of Member States and, second, the Member States who appeared to favour the grant of an exemption may have changed their view, which could be explained by the fact that, at the time, there was no Community regulation laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport. In any event, the opinion expressed at one time by certain Member States cannot take precedence over the wording of Regulation No 4056/86 and, in particular, Article 1 thereof, which provides, in perfectly clear terms, that that regulation applies to maritime transport services.

271 Moreover, the American legislation on which the applicants rely clearly also shows that the words 'maritime transport services' cannot be interpreted as extending to inland transport supplied as part of intermodal transport. As the Commission rightly pointed out, the Shipping Act adopted in 1984 in the United States of America to enable maritime carriers to 'discuss, fix or regulate transportation rates, including through rates' took care to state expressly that it also exempts from the anti-trust laws agreements on the inland part of intermodal transport. That example confirms, therefore, that an exemption from the competition rules allowing the members of a liner conference to fix the price of maritime transport cannot be interpreted as also implicitly granting an exemption for agreements fixing the price of inland transport services provided as part of intermodal transport.

272 Fourthly, contrary to the applicants' assertion, the fact that Regulation No 4056/86 applies only to maritime transport whereas Regulation No 1017/68 applies to inland transport does not give rise to legal uncertainty and procedural inconsistencies.

273 Fifthly, contrary to what the applicants maintain, the effect of interpreting Regulation No 4056/86 as not applying to the inland part of intermodal

transport is not such as to deprive the block exemption laid down by Article 3 of all practical effect. In the first place, the members of liner conferences may, in accordance with Article 3 of Regulation No 4056/86, collectively fix the prices of maritime transport services, and, where appropriate, also enter into agreements for other purposes referred to in Article 3. In the second place, it is clear that each member of the conference may offer and sell intermodal transport services, subject only to the condition that whilst the price of the maritime part may be fixed by the conference, the price of the inland part must, by contrast, be fixed individually by each company. Hence, the Commission's interpretation in no way limits the scope of the block exemption for maritime transport properly so called, or the option available to the member shipping companies of conferences to provide intermodal transport services. It should also be noted in this respect that the parties accept that numerous independent shipping companies, as well as forwarding agents, offer intermodal transport services equivalent to those provided by FEFC members without, however, fixing the price of inland transport in common with other shipping companies or forwarding agents.

274 Sixthly, as regards the applicants' allegation that the Commission's interpretation of Regulation No 4056/86 is contrary to the general opinion of the Member States, it is sufficient to state that it must be rejected because the applicants have adduced no supporting evidence. The Commission claimed that, in its opinion on the draft of the contested decision, the Consultative Committee, composed of representatives of the transport and competition authorities of the Member States, was unanimously in favour of the Commission's conclusions as to the market definition, the application of Article 85(1) of the Treaty and the determination of the scope of Regulation No 4056/86. However, as the Commission did not produce that opinion, its argument cannot be upheld (Case T-144/99 *Institut des mandataires agréés* v *Commission* [2001] ECR II-1087, paragraph 133). It should further be observed, since the applicants claim that the interpretation of Regulation No 4056/86 advanced by the Commission is contrary to the general opinion of the Member States, that no Member State intervened in these proceedings in support of the applicants' contention that the inland part of intermodal transport falls within the scope of Regulation No 4056/86. On the contrary, it is apparent from the judgment delivered today

in Case T-18/97 that the French Republic intervened in that case claiming, *inter alia*, that an agreement fixing the price of the inland part of intermodal transport, of the same type as that in issue in the present case, falls within Regulation No 1017/68 and not Regulation No 4056/86.

275 Seventhly, the applicants' argument that the agreement in question must qualify for block exemption on the ground that the services it covers are supplied in combination with maritime transport services covered by the exemption would lead ultimately to the conclusion that any service provided by shipping companies in conjunction with maritime transport services must qualify for block exemption. The applicants refrained from advancing such an argument, however, and submitted that, in fact, they considered that ancillary activities, which are necessarily supplied as an integral part of the intermodal transport service, must be treated as part of that single service. Without it being necessary in the present action to rule on the merits of that argument, it is sufficient to state that it cannot, in any event, result in the agreement for inland transport services in question qualifying for block exemption under Article 3 of Regulation No 4056/86, since, as was found in connection with the first plea, those services are separate from maritime transport services.

276 Finally, the Commission was clearly entitled to consider the agreement in question in light of the provisions of Regulation No 1017/68. There is no dispute that the agreement in question is a price-fixing agreement concluded between the FEFC members for inland transport services offered to shippers as part of intermodal transport. Those inland transport services supplied in combination with other services as part of an intermodal transport operation must, as stated above (see paragraphs 120 to 129), be considered from the point of view of competition as complementary, but nevertheless separate maritime transport services. The agreement in question is indeed therefore intended to fix the price and conditions of transport in respect of inland transport within the meaning of Article 1 of Regulation No 1017/68 and therefore falls within that regulation.

277 It follows from the foregoing that the second plea, breach of Article 3 of Regulation No 4056/86, must be rejected in its entirety.

IV — *The third plea: breach of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68*

A — *Arguments of the parties*

278 Before proceeding to an analysis of certain conditions for the grant of individual exemption, the applicants advanced some general observations on the Commission's reasoning and on certain aspects of intermodal transport.

General observations

279 and 280 ...

— The competition practices of other competent authorities and legal systems

281 to 285 ...

— The effect on price stability of the joint fixing of intermodal transport rates by liner conferences

286 to 302 ...

— The role of the conferences as pioneers in the development of intermodal transport services

303 to 304 ...

Requirements for the application of Article 85(3) of the Treaty

— First requirement: economic advantages of the agreement

305 to 315 ...

— Second requirement: allowing users a fair share of the benefits

316 to 319 ...

— Third requirement: indispensability of the restrictions of competition

320 to 338 ...

B — *Findings of the Court*

General observations

339 It should first be noted that it is settled case-law that, in an action for annulment pursuant to Article 173 of the Treaty, the review undertaken by the Court of the complex economic appraisals made by the Commission when it exercises the power of discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, must be limited to verifying whether the rules of procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 109, *SPO*, cited above, paragraph 288, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 190). It is not for the Court of First Instance to substitute its assessment for that of the Commission, or to rule on pleas, complaints or arguments which, even if they were well founded, would not lead to the annulment of the contested decision.

340 It should be observed in this respect that, contrary to the applicants' submission, the fact that the agreement in question was openly implemented by the FEFC members over a long period cannot alter the Court's power of judicial review; nor is it specifically relevant to the determination of whether the agreement meets the conditions required for the grant of individual exemption. At the very most it might, in an appropriate case, be taken into consideration in considering whether the sanction imposed was justified and proportionate.

341 Second, as regards the applicants' argument that several legislatures and competition authorities in third countries have allowed liner conferences to fix

the prices for inland transport services as part of intermodal transport, it is apparent from the file that whilst that is so, it does not seem, to say the least, to be as widespread as the applicants and interveners claim. Thus, far from constituting a unanimous recognition of that pricing practice, the OECD report referred to by the JSA states on the contrary that whilst the United States, Canada, and Australia allow liner conferences to fix the prices for inland transport, Japan and the European Community do not. In any event, it should be borne in mind that national practices, even if common to all the Member States, cannot be allowed to prevail in the application of the competition rules set out in the Treaty (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 40). *A fortiori*, therefore, the practices of certain non-member States cannot dictate the application of Community law. It follows that the fact alleged by the applicants that certain non-member States allow the members of a liner conference collectively to fix the price of inland transport services could not, by itself, justify the annulment of the contested decision. At the most, the alleged practices might in an appropriate case be taken into account in assessing the merits of the Commission's findings in the context of examining the various requirements imposed by Article 5 of Regulation No 1017/68 for the grant of individual exemption.

342 Third, the applicants claim that the Commission's approach was wholly flawed inasmuch as it was confined to analysing separately the advantages flowing from the agreement in question for inland and maritime transport, and thus failed to take account of the advantages flowing from the agreement for intermodal transport services, even though those services were widely recognised, in particular by the Commission itself, as conferring considerable advantages on the shippers.

343 For the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68, regard should naturally be had to the advantages arising from the agreement in question, not only for the relevant market, namely that for inland

transport services provided as part of intermodal transport, but also, in appropriate cases, for every other market on which the agreement in question might have beneficial effects, and even, in a more general sense, for any service the quality or efficiency of which might be improved by the existence of that agreement. Both Article 5 of Regulation No 1017/68 and Article 85(3) of the Treaty envisage exemption in favour of, amongst others, agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market.

344 In the present case, as the Commission rightly stated at recital 94 of the contested decision, a distinction has to be made between the merits of intermodal transport generally, the necessity of the conference inland price fixing for the provision of intermodal transport services, and the necessity of conference inland price fixing for the preservation of the conference system.

345 It should be stated at the outset, however, that, as the Commission rightly pointed out at recital 95 of the contested decision, the advantages of intermodal transport in general are not at all in dispute. Further, the arguments based on those advantages are irrelevant since the contested decision relates exclusively to the legality, under the competition rules, not of intermodal transport as such but of an agreement collectively fixing the price of inland transport services provided as part of intermodal transport. It is not therefore a question of examining whether intermodal transport services have beneficial effects, which is not in doubt, but rather of determining whether the collective fixing of prices, by FEFC members, for inland transport services provided as part of intermodal transport services has the beneficial effects required by Article 85(3) of the Treaty in that, *inter alia*, that collective price-fixing improves inland, maritime or intermodal transport services. The applicants' arguments seeking to prove the benefits of intermodal transport as such are therefore irrelevant.

346 The applicants claim that the contested agreement gives rise to the beneficial effects necessary for the grant of individual exemption on the ground that it is necessary to ensure the supply of regular intermodal transport services. On their argument, if there were no collective fixing of prices for inland transport, the FEFC members might supply inland transport services to shippers at prices below purchase cost, discounting from the conference maritime transport tariff, which would thereby lose its stabilising effect. This would give rise to instability on the maritime market and make it impossible for the shipping companies to make the investment necessary to ensure and develop reliable and effective intermodal transport services.

347 That argument clearly effectively relates only to the problem of potential instability in the market for maritime transport services arising from discounting from the inland transport tariff. It must therefore be examined as part of the analysis of the effects of the contested agreement on the market for services for maritime transport.

348 It is in that context that it is now necessary to consider whether the Commission correctly assessed the benefits of the contested agreement in light of the requirements for exemption laid down by Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68.

349 According to settled case-law, the four conditions for the grant of an exemption under Article 85(3) of the Treaty are concurrent (see, *inter alia*, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 and *CB and Europay*, cited above, paragraph 110), so that the non-fulfilment of any one of those conditions means that the exemption will be refused (*SPO*, cited above, paragraph 267, upheld on appeal by the order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraphs 34 to 37).

350 In the present case, it is apparent from recital 140 of the contested decision that the Commission did not examine the fourth condition concerning the elimination of competition. Therefore, only the first three conditions need be examined.

First requirement: improving the quality of transport services, promoting continuity and stability on markets subject to considerable temporal fluctuation, increasing the productivity of undertakings or promoting technical or economic progress

351 It should be noted that the Commission draws a distinction in the contested decision between the advantages of intermodal transport in general on the one hand and the role of the collective fixing of prices by FEFC members in improving the quality of transport services on the other. The Commission takes the view that the assessment of the applicability of Article 5 of Regulation No 1017/68 relates to the second factor.

352 First, as regards improving the quality of transport services, the Commission concludes that it has not been established that the charging of a collectively agreed price for the provision of inland transport services contributes to improving the quality of those services (recital 101 of the contested decision) or that of maritime transport services provided by the conference members (recital 103 of the contested decision).

353 Secondly, as regards the question whether the contested agreement contributes on the market to promoting greater continuity and stability in meeting transport needs, the Commission considers that FEFC members have adduced no evidence that the market in which inland transport services are provided by the maritime carriers is one in which supply and demand are subject to considerable temporal

fluctuation. Even if it were so, it has not been shown that the collective fixing of prices for inland transport by FEFC members contributes to continuity and stability in that market (recital 105 of the contested decision).

354 Thirdly, as regards the increase in productivity, the Commission concludes that it has not been shown that the collective fixing of prices for inland transport by the conference has led, or is likely to lead, to an increase in productivity of the undertakings concerned (recital 106 of the contested decision), since the fixing of prices by the FEFC has no direct bearing on the services provided or the way in which they are provided (recital 107 of the contested decision). At recital 108 of the contested decision, moreover, the Commission states that it has not been shown that the contested agreement contributes to increasing the productivity of the FEFC members with regard to the maritime transport services they provide.

355 Fourthly, regarding the promotion of technical progress, the Commission concludes at recital 109 of the contested decision that the FEFC members have not furnished sufficient evidence to show that the fixing of prices for inland transport services provided by maritime carriers satisfies that condition. The Commission states on that point that the applicants' argument that the contested agreement permits the FEFC members to invest in those elements of an integrated transport service can be made for any price-fixing agreement (recitals 110 and 111 of the contested agreement). According to the Commission, the collective fixing of prices under the contested agreement, instead of encouraging the introduction of new technology, may discourage new investment by reducing the competitive advantages which normally accrue to those undertakings which exploited their investments more successfully (recital 111 of the contested decision).

356 The applicants complain that the Commission based its finding as to the lack of improvement in the quality of services on the fact that most of the shipping companies supplying intermodal transport services buy inland transport services from inland transport companies at the market price.

357 It should be noted in this respect that the Commission states in the contested decision that 'the members of the FEFC do not, on the whole, undertake the inland carriage themselves but subcontract this task to inland carriers' (recital 101). Moreover, at recital 102 of the contested decision, the Commission points out that 'although the price for carrier haulage is established within the forum of the FEFC, the individual members negotiate with inland carriers on an individual basis', so that '[i]mprovements to the quality of the service in response to demand from shippers are not brought about by the price-fixing activities of the conference but by negotiations between individual shippers and individual lines'.

358 The Commission's reasoning in that respect is clearly not vitiated by any manifest error of assessment. It is not the case that the capacity to fix a common price for a service that the shipping companies buy in at different prices may contribute to the rationalisation of the inland part of their activities by more effective control of containers.

359 That conclusion is not undermined by the argument that the Commission failed to take account of the fact that the direct costs of inland transport represent only a small proportion of the total costs of inland transport services. The applicants have adduced no evidence to the effect that the fixing of prices by the conference contributes to an improvement in the quality of inland transport services, even if the greater part of the inland costs are in respect of the shipping companies' own activities and not of services bought in by them. Regardless of the proportion represented by the direct costs of inland transport, it suffices to point out that in any case the applicants have not shown how the collective fixing of rates renders intermodal transport services, and, in particular, the management of empty containers, more efficient.

360 As to whether the contested agreement promotes greater continuity and stability in satisfying transport needs on markets subject to considerable temporal fluctuation, the Commission notes at recital 105 of the contested decision that

'[n]o evidence has been supplied by the members of the FEFC to show that the market in which [inland transport] services are supplied is a market where supply and demand are subject to considerable temporal fluctuation'. The Commission rightly noted on that point that the reasons advanced by the applicants to show price instability in the context of intermodal transport services and the need to fix prices for the inland part of intermodal transport collectively are the same as those which were put forward to explain the instability of prices for maritime transport, and are peculiar to that type of transport.

361 By contrast, as the Commission pointed out at recital 30 of the contested decision, the conditions in which inland transport is carried out are very different from those for maritime transport. The price of inland transport is, as a general rule, the same for all cargo, regardless of its content or intrinsic value, and is fixed according to the cost of the service. Moreover, those costs are fixed per container. As the Commission pointed out in its written submissions to the Court, referring to the report of Messrs Gilman and Graham lodged by the applicants, there is no incentive therefore to sell free space at any price.

362 In light of those factors, the Commission cannot be said to have made a manifest error of assessment on that point. Indeed the FEFC members have not adduced any evidence to show that the inland transport market is one where supply and demand are subject to considerable temporal fluctuation. Finally, and in any event, even if that were the case, the applicants have not shown how the collective pricing of inland transport services would contribute to the continuity and stability of the relevant market.

363 As regards the increase in productivity of undertakings, the Commission again points out, at recital 107 of the contested decision, that the members of the FEFC do not themselves generally engage in the supply of inland transport. It states in this context that 'price fixing by the FEFC has no direct bearing on the services

they provide or the way in which they are provided, since they sell their services to members of the FEFC at prevailing market rates and not at the conference set price'. It concludes that the price-fixing agreement for inland transport 'does not therefore directly affect any service that the [shipping companies] actually provide themselves'.

364 It has already been found above, in examining the contested agreement's effect on the quality of services, that that assessment is not vitiated by any manifest error. The same conclusion also applies in the context of the examination of the effect of that agreement on the productivity of the undertakings concerned, it being noted that the applicants have not in any case adduced evidence that the agreement fixing the price of inland transport results in increased productivity on their part.

365 As regards the question whether the contested agreement promotes technical or economic progress, the Commission states at recital 109 of the contested decision that no evidence has been furnished by the members of the FEFC to show that price fixing for inland transport services contributes to the attainment of that objective. As the Commission rightly pointed out at recital 110 of its decision, the applicants' argument that the contested agreement permits them to invest in elements of an integrated transport service could be made for any price-fixing agreement. In fact, as the Commission pointed out at recital 111 of the contested decision, it appears more likely that the restriction of competition resulting from the price-fixing agreement, instead of stimulating the introduction of new technology, will discourage new investment by reducing the competitive advantages which would otherwise accrue to those companies which exploited their investments more successfully.

366 In those circumstances, the applicants have adduced no evidence that the agreement fixing prices for inland transport services promotes technical or economic progress.

367 Lastly, as regards the effects of the agreement in promoting stability on the market for maritime transport services, it is apparent that the Commission confined itself, in recital 104 of the contested decision, to referring to the assessment made at recitals 123 to 137 of that decision concerning the indispensable nature of the restrictions. The Commission thus considered that even if the first requirement were met, an exemption could not be granted because the restrictions of competition are not, in any case, indispensable for attaining the objective sought by the agreement. Given the cumulative nature of the four requirements under Article 85(3) (*SPO*, cited above, paragraph 227), that fact is not such as to affect the legality of the contested decision in so far as it establishes, to the requisite legal standard, that the restrictions arising from that agreement are not indispensable or that another requirement of Article 85(3) is not met.

Second requirement: allowing users a fair share of the benefits

368 In the contested decision, the Commission concludes at recital 115 that the agreement in question does not take adequate account of the interests of shippers and other transport users. It simply serves to ensure that prices are maintained at levels higher than they would otherwise be. The Commission points out in that context that the fixing of prices by the conference for inland transport services prevents the more efficient companies from passing on cost savings (recital 116). Next, the Commission claims that it has taken account of complaints made by bodies representing the interests of the users of inland transport services who have expressed concern about distortion of competition in that sector (recital 117). Finally, the Commission observes that in practice reserving a fair share of the benefits of door-to-door transport for users would be more easily achieved in the absence of any price-fixing agreement such as the one concluded by the FEFC members (recital 118).

369 The applicants claim, first, that the Commission did not arrive at its own conclusion on the question, as it should have done, but stated that it had taken account of various complaints made by users.

370 That argument cannot be upheld. Quite apart from the fact that the Commission is perfectly entitled to take account of the complaints of users in assessing whether the agreement in question takes account of their interests, it is apparent from the text of the contested decision, and more particularly from the terms of recitals 115 and 116 cited above, that the Commission did indeed carry out its own analysis of the question. Thus, in recital 115 of the contested decision, the Commission states that '[the price-fixing agreement] simply serves to ensure that prices are maintained at levels higher than they would otherwise be'. Furthermore, at recital 116, the Commission considers that '[w]here individual carriers are able to reduce their costs by organising their container fleets more efficiently than other carriers, conference price fixing for carrier haulage services prevents the more efficient lines from passing on cost savings'.

371 In any event the Commission was entitled to infer from the large number of complaints from users that the contested agreement did not take fair account of their interests.

372 Second, the applicants criticise the Commission for concluding, at recital 118 of the contested decision, that 'the reservation of a fair share of the benefit to [users] implies the maintenance of a high level of competition in the supply of inland transport services to shippers'. Since the FEFC's intermodal transport activities represent only 38% of the total maritime traffic between the Far East and Europe, they conclude that there was a sufficiently high level of competition.

373 It should be pointed out in this context that a price-fixing agreement constitutes a very serious restriction of competition. By that type of agreement, the applicants

are in fact able to maintain prices at a higher level than would otherwise have been the case. Furthermore, it is clear that the applicants' argument seeks in reality only to minimise the impact of the contested agreement on competition, without in any way endeavouring to establish that the agreement takes account of the interests of the users. It is therefore irrelevant in the present context.

374 It follows that the Commission did not make a manifest error of assessment in finding that the contested agreement does not reserve a fair share of the benefits to users.

Third requirement: indispensability of the restrictions of competition

375 As regards the assessment of the indispensability of the restrictions in question, the Commission considered, at recitals 119 to 139 of the contested decision, whether the restrictions of competition arising from the agreement in question are indispensable for the supply of intermodal services on the one hand, and for the maintenance of the system of price-fixing for maritime transport by liner conferences on the other.

376 As regards the first part, the Commission concludes at recital 121 of the contested decision that the collective fixing of the price of inland transport services is not essential to the supply of those services. It points out in this respect in particular that 'the members of the FEFC do not, for the most part, provide inland transport services themselves' and '[n]or does the FEFC undertake any inland transport activities other than providing the forum for fixing the prices of [inland transport]' (recital 120 of the contested decision). Furthermore, it claims that 'many independent carriers and freight forwarders offer equivalent or similar services outside the framework of the FEFC, or any other conference, and without fixing prices in common with any other line for the provision of [inland transport]' (recital 121 of the contested decision).

377 As regards the second part, the Commission concludes, essentially, that 'it has not been shown that price fixing for [inland transport] is indispensable for the preservation of the stabilising role of conferences' (recital 131). The Commission points out in particular in that context that Article 3 of Regulation No 4056/86 sets out alternative measures which can be adopted to ensure the stability of conference maritime transport tariffs, namely the allocation of cargo or revenue among members. Furthermore, the Commission points out at recital 135 of the contested decision that 'certain activities are undertaken not on the basis of an agreed conference price, but on the much less restrictive basis of an agreement not to charge below cost'.

378 In those circumstances the Commission rejects the applicants' argument, relying in part on the report of Messrs Gilman and Graham, that the stabilising role of liner conferences would be compromised if they did not fix the price of inland transport, since its members would be tempted to undermine the price for maritime transport fixed by the conference by adjusting the prices charged for the inland part of the transport. It considers in this context that 'the fact that the cartelisation of part of the activities of the shipping companies is held to be compatible with the competition rules cannot by itself justify the exemption of all activities carried out by those undertakings'.

379 In their written observations, the applicants confine themselves to reaffirming that price stability resulting from the regulation of conference tariffs, helps and encourages shipping companies to undertake greater investment.

380 That complaint clearly refers to the second part of the Commission's analysis as to the indispensability of the restrictions in question for maintaining the stability of the prices for maritime transport services set by the conferences. It follows that the applicants do not dispute the Commission's analysis as to whether the restrictions resulting from the contested agreement are indispensable for the

supply of intermodal transport services. The Commission was entitled in that respect to infer from the fact that most of the FEFC members do not themselves supply inland transport services, that the FEFC does not carry out any inland transport activity other than to provide a forum for collectively fixing prices and that many independent carriers and forwarding agents offer similar services without collectively fixing prices, that the collective fixing of prices for inland transport is not indispensable to the supply of those services.

381 It should be noted in respect of the applicants' complaints concerning the second part of the Commission's analysis that it is for the applicants, under Article 85(3) of the Treaty, to show that the restrictions of competition in question meet the objectives referred to by that provision and that those objectives could not be attained without the introduction of those restrictions.

382 In the present case, the applicants claim, in effect, that there would be a serious destabilisation of the prices of maritime transport services if there were no conference intermodal transport tariff, resulting in the paralysis of conference operations. They consider in particular that, without such a tariff, the companies could easily undercut maritime transport tariffs by absorbing all or part of the cost of inland transport.

383 However, it is clear that at recital 136 of the contested decision the Commission recognised that, without collective price-fixing, the FEFC members may charge the shippers prices below their purchase costs for inland transport services, discounting from the price of maritime transport fixed by the conference. The Commission adds that that practice in fact poses a greater risk to the stability afforded by the FEFC than do other types of discount given on the FEFC's maritime transport tariffs and competition from other shipping companies which are not members of that conference.

384 In the following recital of the contested decision, the Commission nevertheless declares that it has not been established that measures less restrictive of competition would not be sufficient to attain the objective of general stability. The applicants cannot object that the Commission has not actually shown that less restrictive measures existed. It is settled case-law that it is for the undertakings claiming an exemption under Article 85(3) of the Treaty to provide evidence to establish the justification for an exemption. In those circumstances the Commission cannot be criticised for not having proposed other solutions or for not having indicated what it would consider as justifying the grant of an exemption (see *VBVB and VBBB*, cited above, paragraph 52).

385 In any event it is clear that the Commission indicated two types of alternative measure.

386 First, at recital 137 of the contested decision the Commission points out, as has already been set out above, that measures which might be taken to ensure the stability of the conference maritime tariff are listed in Article 3 of Regulation No 4056/86 and include the allocation of cargo or revenue amongst the members of a conference.

387 Second, it is apparent from the contested decision that the Commission already stressed at recital 135 that certain activities could be undertaken on the basis of an agreement not to charge below cost price for inland transport services. The Commission develops its reasoning on the point in a footnote to recital 139 of the contested decision. In that note the Commission points out that in its report to the Council concerning maritime transport, it stated that it would be prepared to consider granting individual exemptions to conference agreements including a provision stipulating that the inland transport tariffs may not be less than cost, thus largely avoiding any risk of destabilising the conferences through cross-subsidisation between the inland and maritime parts.

388 The applicants have adduced no evidence to challenge the Commission's conclusions on that point. In particular, they have not shown how the alternative measures proposed by the Commission were not less restrictive than the price-fixing agreement in question or the reasons why those measures were not attainable.

389 First, it should be noted that the applicants cannot take advantage of the fact that they might fail to fulfil the obligations arising from the agreement fixing prices for maritime transport services to justify the grant of another exemption in favour of an agreement fixing prices for inland transport services. The simple fact that compliance with the agreement fixing prices for maritime transport deprives an agreement fixing inland prices of all practical effect suffices to prove that the latter agreement is not indispensable.

390 It follows that all of the applicants' arguments seeking to show that the restrictions of competition in question are indispensable because of the instability that might arise from their own breach of the agreement fixing prices for maritime transport must be rejected.

391 That is so, in particular, of the argument that intermodal transport is currently the most sought-after service by shippers, so that competition for that type of transport allegedly risks undermining the maritime transport tariff. It should further be noted that that fact only highlights the seriousness of the restrictions of competition arising from the agreement in question.

392 Second, it is appropriate to stress the seriousness of the restrictions of competition generated by the agreement in question.

393 First, a price-fixing agreement is a very serious restriction of competition. The effect of the contested agreement is to extend that type of restriction, which is exceptionally permitted on the market for maritime transport services, to the market for inland transport services.

394 Second, collective price-fixing for inland transport risks giving to conference members the power to extend the significant position they hold on the market for maritime transport services to that for inland transport services. In particular, the FEFC member companies may, as a result of the contested agreement, damage competition on the market for inland transport services by absorbing the cost of the discounts they grant on that market through their maritime transport tariffs.

395 In that context, the applicants' argument that there is no alternative measure less restrictive than the contested agreement is hardly convincing, given the highly restrictive nature of the latter.

396 It is apparent from these considerations that the contested agreement entails restrictions of competition that are not only extremely serious, but are, above all, not indispensable for attaining the objective of stability alleged by the applicants.

397 That the restrictions are not indispensable is also apparent from the applicants' arguments, in which the fundamental ground invoked in support of the alleged need for the contested agreement is solely the need to maintain price stability for maritime transport. As the Commission points out at recital 137 of the contested decision, Regulation No 4056/86 provides for measures, covered by the block exemption, which may be adopted to ensure the stability of maritime transport services. Consequently, it is for the applicants to make use, as a matter of priority, of the options provided for by the Community rules, in particular that in

Article 3(e) of Regulation No 4056/86. The applicants' arguments seeking to show that those measures are more restrictive than the contested agreement cannot therefore succeed. If a measure is exempted by a Council regulation, it is irrelevant to ask whether it is more or less restrictive for the purposes of Article 85(3) of the Treaty. The Commission was therefore entitled to find that the restrictions of competition in question were not indispensable given the existence of the measures laid down by Article 3 of Regulation No 4056/86.

398 Moreover, the Commission identified, at recital 135 and in the footnote to recital 139 of the contested decision, another measure less restrictive than the contested agreement to attain the alleged objective of stability, namely a provision included in an agreement stipulating that inland transport services may not be charged at less than cost.

399 Such a provision is undeniably a less restrictive measure than the contested agreement. Indeed the applicants do not dispute that fact, but claim that the Commission has not shown that that measure is attainable. Besides the fact that the Commission is not required to propose other solutions or indicate what it would regard as qualifying for the exemption (*VBVB and VBBB*, cited above, paragraph 52), it suffices to point out that the rule prohibiting selling inland transport services at a loss was proposed by the interim report of the Carsberg Group within which the shipping companies were represented. Furthermore, it can be seen that the shipping companies notified an agreement incorporating such a prohibition to the Commission.

400 It should be noted first that that clause prohibiting selling at a loss encourages companies to reduce their inland transport costs in such a way as to be competitive in the entire intermodal transport operation. Such a system enables maritime transport companies to compete on the basis of the specific quality of the inland transport service as part of an intermodal transport operation.

Furthermore, the clause eliminates the possibility of implicitly granting discounts on the conference maritime transport tariff due to the absorption of part of the inland transport costs and, consequently, contributes to the stability of maritime transport.

401 It is apparent from the foregoing that the Commission was entitled to find that the agreement contained restrictions of competition that were not indispensable. In any event the applicants have not shown that the Commission made a manifest error of assessment in that respect.

402 It follows that the plea of breach of Article 85(3) of the Treaty and of Article 5 of Regulation No 1017/68 must be rejected.

V — *The fourth plea: procedural defects in the administrative procedure*

A — *Breach of the conciliation procedure laid down by the Code of Conduct*

Arguments of the parties

403 to 404 ...

Findings of the Court

405 As the Commission rightly pointed out, as stated above during the discussion of the second plea, since the present case does not involve the application of Regulation No 4056/86, that institution was not required to apply the consultation and conciliation procedures provided for by Regulation No 4056/86. The applicants' complaint must therefore be rejected.

B — *Breach of the Agreement on the European Economic Area*

Arguments of the parties

406 to 407 ...

Findings of the Court

408 It suffices to state that the relevant provisions of the EEA Agreement and of Protocols 23 and 24 and Annex XIV thereto were not applicable to the administrative procedure resulting in the contested decision. Those provisions entered into force on 1 January 1994, at which date the procedural stages requiring cooperation between the Commission and the EFTA Surveillance Authority, namely the hearing of the undertakings and the consultation of the Advisory Committee, had already taken place (Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 259).

C — *Denial of procedural safeguards because of the incorrect choice of the applicable procedural regulation*

Arguments of the parties

409 to 411 ...

Findings of the Court

412 Since it has been found during the examination of the second plea that the applicable regulation in the present case was Regulation No 1017/68, the complaint that the Commission did not consult the Advisory Committee provided for by Regulation No 4056/86 must be rejected. For the sake of completeness, it should be pointed out that the Commission claimed, without being contradicted on the point by the applicants, that, in practice, the governments of the Member States send the representatives of their choice, according to the issues involved in the case under consideration and that, in the present case, the representatives of the Member States making up the committee consulted in the present case were perfectly familiar with the maritime transport industry, so that there is no reason to suppose that the outcome would have been any different had the committee been the one envisaged by the applicants.

413 Moreover, it should be noted in the present case that, in terms of procedural safeguards, the applicants derived an advantage from the application of Regulation No 1017/68. First, the Commission was required, by Article 5 of Regulation No 1017/68, to apply Article 85(3) of the Treaty even though the agreement was not notified. Second, the application of Regulation No 1017/68 entailed the application of the procedure laid down by Article 17 thereof, whilst

the rights of the Member States thereunder to intervene are not provided for under Regulation No 4056/86. It follows that the applicants have not been deprived of any procedural safeguards laid down by the applicable procedural regulation in this case and that, therefore, the complaint must be rejected.

D — *Breach of the obligation to state reasons*

Arguments of the parties

414 to 422 ...

Findings of the Court

423 It is settled case-law that the purpose of the obligation to give reasons for an individual decision is to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged and to enable the Community judicature to review the legality of the decision; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, in particular, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

424 As regards, first, the inadequacy of the statement of reasons in respect of the definition of the relevant market and the appreciable effect of the contested

agreement on competition, it suffices to point out that the Commission described the essential characteristics of the relevant market to the required legal standard in recitals 7 to 37 of the contested decision and, in the same way, defined the relevant market, in particular in recitals 10 and 42 of the contested decision. Similarly, the Commission set out to the required legal standard, in particular in recitals 34 to 37 of that decision, the factors on which it based its assessment as to the appreciable effect of the contested agreement on competition. Accordingly, the applicants' complaints based on the inadequacy of the statement of reasons on those issues must be rejected.

425 Secondly, as regards the applicants' complaint based on the inadequacy of the statement of reasons at recitals 51 to 54 of the contested decision with regard to the effect on trade between Member States, it is apparent from the discussion of the first plea that at recitals 46 to 55 of the contested decision the Commission described to the required legal standard the extent to which the contested agreement is capable of affecting trade between Member States. As for the allegation that the Commission's argument is unfounded in that the effect of the tariff for inland transport services on intra-Community trade is purely hypothetical and is not based on any qualitative or quantitative analysis, it suffices to state that that allegation seeks in effect to challenge the merits of the Commission's assessment of that question and that it is therefore irrelevant to the issue of whether the Commission has complied with its obligation to state reasons (see, to that effect, *Limburgse Vinyl Maatschappij*, cited above, paragraph 389). In any event, the merits of the Commission's conclusions, as upheld in the course of examining the first plea, on the effect on trade between Member States appears, to the sufficient legal standard, from the findings at recitals 47 to 50 and 52 and 53 of the contested decision.

426 Thirdly, as regards the allegation that the statement of reasons is inadequate because of the Commission's failure to respond in the contested decision to the applicants' claims concerning the practice of other competent authorities on competition matters, and other legislatures, it should be borne in mind that it is settled case-law that although, pursuant to Article 190 of the Treaty, the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, in particular, *Remia*, cited above, paragraphs 26 and 44). At most the Commission is under an obligation, with

regard to Article 190 of the Treaty, to reply specifically only to the applicants' primary allegations made in the course of the administrative procedure.

427 In the present case it is clear that the applicants have confined themselves to setting out generally, as part of their submissions on paragraph 11 of the statement of objections on the description of the relevant market for services, the legal status of liner conferences, including their intermodal inland transport services, in certain Member States and third countries, in particular the United Kingdom, Australia, and the United States and, in the latter case, by essentially reproducing the relevant sections of the report of Messrs Gilman and Graham (pp. 78 to 85). It is apparent from the reply to the statement of objections that the applicants have not based any argument of fact or of law on those general observations, apart from, at most, certain occasional and limited references to the law of the United States of America as part of their submissions on the Commission's analysis of the conditions for the grant of individual exemption. In those circumstances the Commission was manifestly under no obligation whatsoever to reply to the applicants' statements in their reply to the statement of objections with regard to the practices of various national jurisdictions. It is significant in that respect that the applicants did not consider it necessary in the application to advance a ground of annulment based on the inadequacy of the statement of reasons in the contested decision on that point.

428 In that context, the applicants' reference in the reply to the judgment in *Publishers' Association*, cited above, is irrelevant. In that judgment, the decisions of the national court in question had been presented by the applicant, in the terms of that judgment, 'as essential evidence of the alleged benefits' (paragraph 40), so that in those circumstances the Court concluded that the Commission should have considered the arguments put forward by the applicant on the basis of the decisions of that court (paragraph 41). Moreover, unlike *Publishers' Association*, in which the national court in question had ruled on the same agreement as that considered by the Commission, and which concerns the same geographical

market, the national precedents relied on by the applicants in the present case clearly do not concern the agreement or the market in question in the contested decision since according to Article 1 of the operative part of the decision it concerns only the FEFC members' common tariff for inland transport services supplied (as part of intermodal transport) within the European Community.

429 Consequently, the Commission cannot be criticised for providing an inadequate statement of reasons with regard to consideration of the practices of national authorities and courts.

430 Fourthly, as regards the inadequacy of the statement of reasons in respect of the failure to apply the consultation and conciliation procedures under the Code of Conduct, it should be pointed out that at recitals 56 to 59 of the contested decision, the Commission clearly set out the reasons why Regulation No 4056/86 did not apply to the contested agreement. It follows, as was explained during the discussion of the second plea and of the first complaint under the fourth plea, that the procedures laid down by the Code of Conduct, to which Regulation No 4056/86, refers, also do not apply. Therefore, the contested decision is not vitiated by an inadequate statement of reasons on that point.

431 Fifthly, as regards the ECSA's argument that the Commission gave an inadequate statement of reasons as to the indispensability of the restrictions of competition in question, it should be borne in mind that according to settled case-law, the Commission is not required to propose other solutions or state what it would consider as justifying the grant of exemption (see *VBVB and VBBB*, cited above, paragraph 52, and *SPO*, cited above, paragraph 262). Furthermore, it is apparent from recitals 135 to 137 and the footnote to recital 139 of the contested decision that the Commission has set out means less restrictive of competition which could be considered by the parties. It should be noted in this respect that it is for the Commission alone, pursuant to its obligation to state reasons, to mention the facts, law and considerations which have led it to adopt a decision rejecting the application for exemption and the applicants cannot require the Commission to

discuss all the matters of fact and law which may have been raised during the administrative procedure (see, in particular, *Remia*, cited above, paragraphs 26 and 44). It is apparent in the present case from recitals 135 and 137 of the contested decision that the Commission did provide a statement of reasons to the required legal standard for its conclusion that the collective fixing of the tariff for inland transport services was not indispensable for ensuring the stability of the tariff for maritime transport services. Finally, and in any case, to the extent that the applicants' complaint seeks to challenge the merits of the Commission's conclusion on that point, it is irrelevant in the present context of an alleged breach of the Commission's obligation to state reasons.

432 Sixthly, and lastly, as regards the JSA's argument that the failure to refer to the EEA Agreement means that the statement of reasons is inadequate, it suffices to recall that it has been found, in the examination of the second complaint of the fourth plea, that in the present case the Commission was under no obligation whatsoever to consult the institutions provided for by the EEA Agreement prior to the adoption of the contested decision. Consequently, it is not vitiated by an inadequate statement of reasons in that respect.

433 It follows from the foregoing that the applicants' complaint concerning the inadequacy of the statement of reasons must be declared unfounded in its entirety.

E — *Breach of the rights of the defence in respect of the content of the contested decision and the statement of objections*

Arguments of the parties

434 to 441 ...

Findings of the Court

442 In examining the complaint of breach of the rights of the defence it should be noted at the outset that according to settled case-law, the statement of objections must be couched in terms that, even if succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (see, *inter alia*, Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63; Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 83; and Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 42). Furthermore it is settled case-law that that obligation is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the notice of complaints and only takes into consideration facts on which the persons concerned have had the opportunity of making known their views (see, *inter alia*, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 26 and 94). The final decision of the Commission is not, however, necessarily required to be a replica of the statement of objections (see Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201, paragraph 113; *Musique diffusion française*, cited above, paragraph 14; *ACF Chemiefarma*, cited above, paragraph 91). It is in light of those principles that the present complaint of breach of the applicants' rights of defence falls to be assessed.

443 As regards, first, the argument that the Commission furnished no evidence in support of paragraph 72 of the statement of objections, which paragraph emphasised, in connection with the discussion of the first requirement for exemption concerning technical or economic progress, that the instability arising from individual tariffs for inland transport did not appear to be any greater than that caused by the secret discounts given by the FEFC, it should be noted that that paragraph of the statement of objections was not incorporated in the contested decision, whether in the discussion of that requirement for exemption or

anywhere else in that decision. In those circumstances the Commission's failure to set out the evidence on which paragraph 72 of the statement of objections was based cannot be regarded as a breach of the applicants' rights of defence. The most that can be said in this respect is that in recitals 132 to 134 of the contested decision the Commission refers, for the purposes of examining the third requirement for exemption, concerning the indispensability of the restriction of competition in question, to the inevitable instability in liner conferences arising from the fact that, as with all agreements, members are capable of 'cheating', that is of granting secret discounts. It is not disputed, however, that that factor already appears at paragraph 71 of the statement of objections, and so the applicants' rights of defence have not been breached.

444 As to the remainder, the applicants submit in effect that their rights of defence were infringed because the contested decision contains new allegations which do not appear in the statement of objections with regard to the appreciable nature of the restriction of competition, the effect on trade between Member States and the requirements for the grant of individual exemption under Article 5 of Regulation No 1017/68, in particular the second requirement concerning the fair consideration of the interests of users and the third requirement as to the indispensability of the restriction of competition in question.

445 That argument must be rejected.

446 As regards, first, the applicants' allegations as to the appreciable effect on competition and the effect on trade between Member States, it is manifest from an analysis of the statement of objections that, in compliance with the

requirements of the case-law cited above, the Commission sets out clearly there the essential factors it has taken into account.

447 In addressing, first, the question of the appreciable nature of the restriction of competition contained in the contested agreement, it suffices to state that, contrary to the applicants' allegations, the Commission sets out at paragraphs 18 to 20 and 23 of the statement of objections the factors it relied on at that stage of the administrative procedure to emphasise the economic importance of the inland transport services organised as part of intermodal transport. Moreover, whilst it is true that on the specific question of the economic importance of inland transport (as opposed to maritime transport properly so called) the contested decision does not reproduce the statement of objections exactly, it is sufficient that it was precisely in order to address the criticisms formulated in the applicants' reply of 31 March 1993 to the statement of objections (pp. 114 to 119) that, on 20 July 1993, the Commission requested information on that subject from the principal members of the FEFC and amended the analysis in issue in the contested decision as a result of the information supplied. In those circumstances, it cannot be disputed that the applicants were in a position to make duly known, during the administrative procedure, their views as to the Commission's assessment of the appreciable effect of the restriction of competition. In that regard, the fact that an argument put forward by the applicants during the administrative procedure was taken into account without their having been given the opportunity to give their views thereon before the adoption of the final decision is not sufficient to constitute a breach of their rights of defence, especially where consideration of the argument does not alter the nature of the complaints against it (see, to that effect, Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraphs 34 and 36, and *CB and Europay*, cited above, paragraphs 49 to 52). Indeed the applicants had the opportunity to express their view on the assessment of the appreciable character of the restriction of competition in question contained in the statement of objections and they could therefore expect that their own explanations would lead the Commission to alter its opinion (*Irish Sugar*, cited above, paragraph 34; Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 437 and 438). In any event, the economic data in recital 33 of the contested decision clearly suffice to show that the restriction of competition in question was appreciable. Those data

already appear in full at paragraph 23 of the statement of objections. The applicants' complaint that they were not in a position to comment on the accuracy of the data supplied by its members and used in the contested decision must therefore be rejected.

448 Next, as regards the effect on trade between Member States, it should first be noted that, contrary to the applicants' allegations, the Commission expressly describes at paragraphs 40 to 42 of the statement of objections the effect of the contested agreement on competition between ports in the Member States and the effect, in that context, of the system of 'port equalisation'. Those paragraphs in the statement of objections were explained and repeated at recitals 50 and 51 of the contested decision. The applicants' complaint on that point must therefore be rejected. By contrast, as regards the effect on competition between shipowners operating in several Member States and on exchanges of goods and services between Member States and on ancillary services, the applicants rightly point out that those factors, which appear at recitals 49 and 52 to 55 of the contested decision, do not appear in the statement of objections. However, contrary to the applicants' allegations, that is certainly not sufficient to entail a breach of their rights of defence. The Commission is perfectly entitled, on the results of the administrative procedure, to revise and supplement its arguments both of fact and of law in support of the complaints (*ACF Chemiefarma*, cited above, paragraph 92). That is precisely the purport of recitals 49 and 52 to 55 of the contested decision. In any event, paragraphs 40 to 42 of the statement of objections are to be regarded as containing a clear statement of the essential factors relied on by the Commission at that stage of the administrative procedure as regards the effect of the contested agreement on intra-Community trade. Moreover, it is apparent from the applicants' reply to the statement of objections (pp. 142 to 151) that they were in a position to put forward their view on the Commission's assessment of that point. In those circumstances the applicants' submission that the Commission breached their rights of defence in its assessment of the effect on intra-Community trade is unfounded.

449 As regards, secondly, the applicants' allegations concerning the assessment in the statement of objections of the second and third requirements for the grant of individual exemption, it should first be noted that the Commission's obligation to

inform an undertaking of the objections raised against it, and to deal in its decisions only with those objections, is essentially concerned with the statement of the reasons which would lead it to apply Article 85(1) of the Treaty, either by ordering that an infringement be terminated or by imposing a fine upon the undertakings, or by refusing to give the latter negative clearance or the benefit of paragraph (3) of the same provision (Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 13). In the present case it is apparent from the statement of objections that the Commission clearly sets out there the complaints it upheld against the applicants at that stage of the administrative procedure (see, *inter alia*, recitals 27 to 32, 36 and 42).

450 As regards the requirement for grant of individual exemption concerning the taking into account of the interests of users, it cannot be denied that the Commission indicated clearly in the statement of objections the reasons for which it considered at that stage of the procedure that the contested agreement did not fulfil that condition. In particular, the Commission refers in the statement of objections to the complaints of bodies representing the interests of users of inland transport services provided by the FEFC members (paragraphs 74 and 75) and the need to maintain competition between the different suppliers of inland transport services to shippers (paragraphs 76 and 78). In the contested decision those reasons are explained at recitals 117 and 118 respectively. It is therefore incorrect to claim, as the applicants do, that the statement of objections does not refer to the complaints of bodies representing the interests of users in support of the refusal to grant an individual exemption. It should, moreover, be noted that the applicants had the opportunity during the administrative procedure to reply specifically in their supplementary reply of 12 May 1993 to the statement of objections and to the complaints of the German Shippers' Council and of the French Shippers' Council. Finally, and in any event, contrary to the applicants' allegations, the reference in recital 117 of the contested decision to the complaints of shippers and forwarding agents does not charge the applicants with new complaints over and above those contained in the statement of objections. The purpose of recital 117 of the contested decision is solely to provide reasons for the Commission's findings in respect of the second requirement for the grant of an exemption regarding fair consideration of the interests of users. The Commission was in any event entitled to infer from the existence of a high number of user complaints, amongst other factors, that the contested agreement did not take fair account of the interests of those users.

451 As for the fact, pointed out by the Commission at recital 115 of the contested decision, that the agreement simply serves to ensure that prices are maintained at levels higher than they would otherwise be, it should be stated, as the Commission rightly does in the defence, that it is the applicants themselves who claim that their agreement is necessary to avoid competition the effect of which would be to lower prices and thereby destabilise liner conferences. The applicants cannot therefore seriously maintain that recital 115 of the contested decision contains a new allegation by the Commission on which they were not able to make known their view.

452 Next, as regards recital 116 of the contested decision, in which the Commission states that the contested agreement prevents the member shipping companies of the FEFC from passing on cost savings resulting from the more efficient organisation of their container fleet, the Commission rightly let it be known that this was a revised version, taking account of the applicants' submissions, of paragraph 59 of the statement of objections, in which it is stated that the FEFC members have no incentive to improve inland transport services provided for shippers. In their reply to the statement of objections (p. 176, paragraph 2), the applicants themselves pointed out that the most efficient carriers are able to increase their profitability as a result of the contested agreement. It should be remembered in this regard that the Commission is perfectly entitled, in light of the results of the administrative procedure, to revise and supplement its arguments both of fact and of law in support of the complaints made (*Irish Sugar*, cited above, paragraph 34; *ACF Chemiefarma*, cited above, paragraph 92; *Suiker Unie*, cited above, paragraphs 437 and 438). Finally, and in any case, it is clear that recital 116 of the contested decision is not central to the Commission's reasoning since it based its finding that fair account had not been taken of the interests of users on other grounds (see, to that effect, *ACF Chemiefarma*, cited above, paragraph 86). It should be borne in mind in that context that, since the relevant requirements are cumulative, the Commission may at any time up to the final adoption of the decision, state that any of the requirements is lacking (*SPO*, cited above, paragraph 267, and *CB and Europay*, cited above, paragraph 110). In light of those considerations it is apparent therefore that the Commission has

not infringed the applicants' rights of defence in respect of the second requirement for the grant of an individual exemption.

453 As regards the indispensability of the restriction of competition in question, the applicants submit that recital 137 of the contested decision contains a new argument whereby the Commission states that it has not been established that measures less restrictive of competition would not have sufficient impact to ensure the general stability of liner conferences, such as, *inter alia*, the measures listed in Article 3 of Regulation No 4056/86, and in particular the allocation of cargo or revenue between conference members. That argument must be rejected. At paragraph 86 of the statement of objections the Commission expressly states that in order to restrict internal competition on maritime tariffs the FEFC members could adopt the measures permitted by Article 3(e) of Regulation No 4056/86 in favour of liner conferences. Under that provision, agreements between members of liner conferences to share cargo or revenue are exempt from the prohibition in Article 85(1) of the Treaty. The applicants are therefore wrong to claim that recital 137 of the contested decision contains a wholly new argument not contained in the statement of objections. It should, further, be stressed that contrary to the applicants' allegations, the Commission was not required to clarify further in the statement of objections the content of the less restrictive measures that the members of the FEFC might contemplate, since the statement refers expressly to a provision in a regulation concerning exemption, namely Article 3(e) of Regulation No 4056/86, which itself describes the content of those measures. As for the applicants' allegation that the statement of objections contains no reference to the possibility of relying on a rule prohibiting charging at below cost price, it is clear that, besides being out of time because it was raised for the first time in the reply, that allegation is also unfounded since the possibility of relying on the rule in question as a measure less restrictive of competition was discussed in the Carsberg group of experts, under the direction of the Commission, which was composed of representatives of the shippers and shipping companies, including some of the applicants. For those reasons, the applicants' complaint that their rights of defence were infringed in respect of the third requirement for the grant of individual exemption must also be regarded as unfounded.

454 Consequently, for all of the above reasons, the plea of breach of the rights of the defence must be rejected as wholly unfounded.

F — *Irregularities in the hearing*

Arguments of the parties

455 to 462 ...

Findings of the Court

463 As regards, first, the applicants' allegation concerning the time-limit imposed on them by the Commission to prepare for the hearing in the present case, it should be noted at the outset that pursuant to Article 7(1) of Regulation No 1630/69, which was in force at the material time, the Commission must afford persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment. Under Article 8(1) of the same regulation, the Commission must summon the persons to be heard to attend on such date as it shall appoint.

464 It is not in dispute in the present case that the applicants had the opportunity to put forward their views orally on the complaints made against them in the

statement of objections of 18 December 1992 during the hearings on 6, 7, 12 and 13 July 1993, a little over six months later. The applicants were formally summoned to attend those hearings by the Commission's letter of 16 June 1993, three weeks before the date of the first hearing. Clearly such a time-limit, which expired about three months after the first reply to the statement of objections was lodged on 31 March 1993, and about a month after the supplementary reply of 12 May 1993, is not such as to infringe the applicants' rights of defence. It should be borne in mind that under Article 7(1) of Regulation No 1630/69, which was in force at the material time, the purpose of the hearing is essentially to enable the parties who are the subject of an infringement procedure under Regulation No 1017/68 to develop orally the arguments they have set out in their written response to the statement of objections. Moreover, whilst it is true that the issues raised in the present case are somewhat complex, the applicants had ample time to consider them in detail since the Commission opened the administrative procedure in June 1989, following the complaint lodged by the German shippers, and the proceedings continued for almost six years thereafter, during which time the applicants had the opportunity, on numerous occasions, to put forward all of the points which could be taken into account.

465 Furthermore, in assessing whether the applicants were given sufficient time to prepare for the hearing, it should again be pointed out that the Commission claims, without being contradicted by the applicants, that it informed the applicants' counsel on 26 March 1993 that steps were about to be taken to fix the date for the hearing, and that the hearing officer informed the same counsel on 7 April 1993 that the hearing was provisionally set for 21 June 1993, which enabled the applicants' counsel to provide the Commission on 15 April 1993 with a list of likely participants at the hearing. It follows that the applicants were informed that a hearing would be held in the present case in April 1993, two months before the date initially set for that hearing. Furthermore, since the hearing did not finally take place on 21 June 1993 as initially planned, but commenced on 6 July 1993, the applicants enjoyed an extra two weeks to prepare for the hearing. The Commission informed the applicants of the fresh

date for the hearing on 2 June 1993. In those circumstances, it is apparent that the applicants had the necessary time to prepare adequately their oral defence at the hearing arranged by the Commission. Their claim that their rights of the defence were breached in that respect cannot therefore succeed.

466 Secondly, as regards the applicants' claim that certain persons could not attend the hearings, in particular counsel for Hapag-Lloyd and Professor Yarrow, an economics expert, it should be observed that whilst the Commission may not prevent an undertaking from being represented by a lawyer or other independent counsel of its choice, it cannot be criticised, in the context of infringement proceedings involving 14 separate undertakings, for not having taken account when arranging the hearing of the practical needs of each undertaking. It is primarily the responsibility of those undertakings to take the measures appropriate to ensure the best defence of their interests. Accordingly, the mere fact that Hapag-Lloyd's counsel or Professor Yarrow could not attend one or other of the hearings arranged by the Commission in the present case cannot be considered to breach the rights of the defence of the applicants concerned, still less of all the applicants. In any event, it is not in dispute that Hapag-Lloyd was represented by six people at the hearings in question, whilst Professor Yarrow attended three of the four days of hearings arranged by the Commission. Furthermore, the applicants have adduced no evidence to show that, in the circumstances, the Commission, in not hearing the persons concerned, unduly restricted the inquiry into the matter and thus limited the applicants' opportunity to provide explanations of the various aspects of the problems raised by the Commission's objections (see, to that effect, *VBVB and VBBB*, cited above, paragraph 18).

467 In those circumstances, the applicants' complaint that the rights of the defence at the hearing were infringed must be rejected as unfounded.

468 Thirdly, as regards the complaint that the Commission allowed third parties to attend the hearing who were not complainants, it must be emphasised that

Article 7(2) of Regulation No 1630/69, which was in force at the material time, gave the Commission the power to give any person the opportunity to express their point of view orally, even if he did not lodge a complaint under Article 10 of Regulation No 1017/68 on the basis of which the infringement procedure might be initiated or written observations under Article 5 of Regulation No 1630/69 concerning complaints against undertakings which are the subject of the infringement procedure. In addition Article 9(3) of Regulation No 1630/69 provides that the Commission may hear the persons in question separately or in the presence of other persons summoned to attend. It is clear from those provisions that the Commission enjoys a reasonable margin of discretion to decide how expedient it may be to hear persons whose evidence may be relevant to the inquiry, so that in this case the Commission was entitled to hear from third parties who had not previously lodged a complaint or written observations during the administrative procedure (see, by analogy, *VBVB and VBBB*, cited above, paragraph 18).

469 Moreover, contrary to the applicants' allegations, the participation of third parties at a hearing under Article 7(2) of Regulation No 1630/69 is not subject to the filing of written observations for the hearing in reply to which the applicants are entitled to lodge further written observations. According to the case-law (see, in particular, *Mo och Domsjö*, cited above, paragraph 63), the applicants' rights of the defence are protected if they are able to give their view on the subject of the conduct complained of in the statement of objections. The case-law indicates furthermore that that requirement is observed if the decision does not allege that the undertakings concerned have committed infringements other than those referred to in the statement of objections and only takes consideration of facts on which those concerned have had the opportunity of making known their views (see, in particular, *ACF Chemiefarma*, cited above, paragraph 94). The applicants have not alleged that the contested decision is based on information supplied by third parties on which they have not had the opportunity of making known their views. Lastly, in this respect, it should also be stated, as regards the reference to

Article 9 of Regulation No 4260/88 on notification, complaints and applications and the hearings provided for in Regulation No 4056/86, that not only does that article not have the scope attributed to it by the applicants but it is irrelevant because, as became apparent in the discussion of the second plea, Regulation No 4056/86 does not apply in the present case. The applicants' complaint on that point is therefore unfounded.

470 Similarly, the applicants cannot complain that the Commission did not forward to them observations made by one of the complainants on information sent by the applicants to the Commission. It has not been shown that the contested decision is based on observations on which the applicants did not have the opportunity of making known their views. In any case, even if there had been a breach of the rights of the defence, for the plea to succeed it must also be shown that in the absence of such irregularity the outcome of the procedure might have been different (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 47, and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 48). The applicants have clearly not shown that to be the case. Furthermore, regarding the Commission's failure to send the shippers' comments on the applicants' reply to the Commission's allegations relating to discounts to the applicants, it suffices to point out that, as already stated in the discussion of the applicants' complaints under the present plea concerning the content of the contested decision as compared with the statement of objections, the contested decision does not uphold those allegations, so that the failure to pass on the shippers' observations on that matter cannot affect the applicants' rights of defence.

471 It follows from the foregoing that the applicants' complaint that the rights of the defence in respect of the hearing were breached must be rejected in its entirety.

VI — *Fifth plea: breach of the rules on fines*

A — *Arguments of the parties*

472 The applicants point out that, with the exception of Wilh. Wilhelmsen Ltd, they have all received fines under the contested decision (recital 143 et seq.) pursuant to Article 22(2) of Regulation No 1017/68.

473 They maintain, principally, that the Commission should have considered the intermodal transport service supplied by the member shipping companies of the FEFC in the light of Regulation No 4056/86 and had no right to levy fines under a regulation wrongly applied.

474 In the alternative, if the Court of First Instance finds that Regulation No 1017/68 was applicable in the present case, the applicants take the view that the imposition of fines under Article 22(2) of that regulation is inappropriate. That that provision makes the imposition of a fine subject to the infringement in question having been committed 'intentionally or negligently', which they deny. First, the FEFC was open and frank with the Commission throughout the proceedings and cooperated with its investigation. Next, the applicants did not believe it appropriate for them to notify the contested agreement under Regulation No 4056/86, as in their view the measures adopted by them fell within the block exemption for conferences contained in Article 3 of that

regulation. Finally, even if Regulation No 1017/68 were the applicable regulation in this case, the fines imposed are inappropriate as the Commission, although aware of the existence of intermodal services since 1968, did not investigate the inland part of those services for over two decades.

475 The Commission should at least have adopted a more lenient approach since this was the first decision to be taken in a particular sector, and they refer to Commission Decision 87/1/EEC of 2 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.128 — Fatty Acids) (OJ 1987 L 3, p. 17)), and to Commission Decision 92/212 EEC of 25 March 1992.

476 In conclusion, the applicants ask the Court of First Instance to annul the Commission's decision to impose fines, even though those fines are symbolic, or to reduce them.

477 The Commission observes that the 'intention' required by Article 22(2) of Regulation No 1017/68 (which is similar to Article 15(2) of Regulation No 17) simply means an intention to restrict competition, not an intention to break the law (see, for example, Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261). The express purpose of the contested agreement fixing the prices of inland transport services was indeed the restriction of competition. The Commission took into account mitigating circumstances such as the fact that this was the first decision applying Regulation No 1017/68 to a liner conference and therefore decided to impose a fine of a token amount (recital 158 of the contested decision). There is therefore no ground for annulling the articles in the contested decision relating to the fines imposed on the applicants.

B — *Findings of the Court*

478 As regards the applicants' first complaint, that the Commission was not entitled to impose fines under Article 22(2) of Regulation No 1017/68 because the intermodal transport service provided by the members of the FEFC falls within Regulation No 4056/86, it suffices to recall that it is apparent from the second plea that the contested agreement falls within the scope of Regulation No 1017/68 and not Regulation No 4056/86.

479 The argument that the provisions of the contested decision relating to the fines should be annulled on the ground that the infringement was not carried out intentionally or negligently must also be rejected. According to the case-law, it is not necessary for an undertaking to have been aware that it was infringing the rules of competition laid down in the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object the restriction of competition (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117). It cannot be denied that the object of the contested agreement, which is a horizontal agreement fixing prices for inland transport, is clearly to restrict competition.

480 The Commission stated in recitals 158 and 159 of the contested decision that, given the existence of mitigating circumstances, the level of fines should be fixed at a symbolic level to make clear the existence of the infringement and the need for future compliance with the competition rules by the undertakings in question and by other undertakings which may be engaged in equivalent practices.

481 It should first be noted that since the FEFC tariff was a matter of public knowledge, and therefore known to those primarily affected, namely the shippers, the contested agreement, even though it is a horizontal price agreement,

cannot in any way be equated with a secret cartel. The Commission and the various authorities in the Member States were also fully aware of the contested agreement given that they referred to it particularly during the procedure for the adoption of Regulation No 4056/86 and during the reform of the Shipping Act in 1984.

482 It should be made clear, secondly, that, as stated in recital 41 of the contested decision, the FEFC extended its price-fixing powers in the maritime transport sector to inland transport services when containers first began to be used, that is to say, in about 1971. Conference price-fixing for inland transport services as laid down by the contested agreement has existed therefore since the introduction of intermodal transport services. Further, that type of transport, the advantages of which are, incidentally, universally acknowledged, was primarily created and developed by liner conferences.

483 Thirdly, as the Commission admitted at recital 158 of the contested decision, it took some time for that institution to define its views on the subject and these were not widely known until the submission of its report to the Council on the application of the Community's competition rules to maritime transport in June 1994, referred to in recital 156 of the contested decision. It follows in particular that the complaints set out in recitals 153 and 149 of the contested decision, to the effect that 'the infringement has been taking place in a general manner since 1971 and certainly since the submission of the DSVK's complaint to the Commission in April 1989', and the fact that 'in spite of repeated preliminary advice from the Commission (including a letter from the Member of the Commission then responsible for competition policy to the chairman of the FEFC in June 1990) that the practices in question fell within the scope of Article 85(1) and did not benefit from any exemption pursuant to Article 85(3), the parties have maintained them in full force and effect', cannot be upheld.

484 Fourthly, it cannot be contested that, whilst it involves a very serious and classic type of infringement of the competition rules, namely a horizontal price-fixing

agreement, the legal treatment that should be reserved for this type of agreement, particularly because of its close links with maritime transport which is the subject of a wholly specific and exceptional set of rules, was not at all straightforward and, in particular, raised complex questions of both an economic and a legal nature.

485 Fifthly, numerous factors led the applicants to believe that the contested agreement was lawful. Besides the long-standing and public nature of the contested agreement, it should be stressed particularly that in a joint declaration annexed to the minutes of the Council meeting at which Regulation No 4056/86 was adopted, the Commission itself stated as follows: 'multimodal sea/land transport operations are subject to the rules of competition adopted for land transport and to those laid down for sea transport. In practice, non-application of Article 85(1) [of the EEC Treaty] will be the rule as regards the organisation and execution of successive or supplementary multimodal... transport operations and the fixing or application of inclusive rates for such transport operations, since both Article 2 of Regulation No 4056/86 and Article 3 of Regulation No 1017/68 state that the prohibition laid down by Article 85(1) of the Treaty shall not apply to such practices'. Whilst there is no need in the context of the present plea to rule on the meaning and precise scope of that declaration, it suffices to point out that it at least gave rise to doubts on the part of the applicants and led them to believe that their agreement was not unlawful.

486 It should also be pointed out that in 1983, as part of the reform of the Shipping Act, six Member States addressed a memorandum to the United States in support of the proposal authorising liner conferences to fix the price of intermodal transport including inland transport, stating that they did not regulate the freedom of liner conferences to adopt common prices for intermodal transport for European destinations and that that practice did not result in any problems or abuses but, on the contrary, encouraged the development and use of containers and intermodal transport as part of European external trade to the advantage of exporters.

487 Sixthly, it should be noted that in its Decision 94/980, the Commission did not impose a fine on the companies who were party to that agreement, whereas not only did the contested agreement also provide for the fixing of prices for the inland part of intermodal transport, but also contained other serious infringements of the competition rules. It is true that the fact that the Commission has not imposed a fine on the perpetrator of a breach of the competition rules cannot in itself prevent a fine from being imposed on the perpetrator of a similar infringement. The principle of equality of treatment cannot be invoked where there is illegality. Nevertheless, that decision, which was adopted very shortly before the contested decision, shows that the Commission itself considered that, having regard to all the circumstances, the agreement in question did not necessarily require that a fine be imposed on the undertakings party to that agreement. It should be added that before the contested decision the Commission had not imposed a fine on any shipping company or liner conference for fixing the price of the inland part of intermodal transport, whilst, according to the information supplied by the applicants and not challenged by the Commission, virtually all conferences enter into agreements fixing such prices.

488 In light of all of those circumstances, the Court of First Instance considers, in the exercise of its unlimited jurisdiction, that there is justification for not imposing a fine in the present case. Consequently, Article 5 of the contested decision must be annulled in so far as it imposes a fine of ECU 10 000 on each of the applicants.

Costs

489 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or that each party bears its own costs. As the action has been successful only to a very limited extent, the Court considers it fair, having

regard to the circumstances of the case, to order the applicants to bear their own costs and to pay four fifths of the costs incurred by the Commission and to order the Commission to bear one fifth of its own costs.

490 As regards the ECSA and the JSA, interveners, the Court considers it fair, having regard to Article 87(4) of the Rules of Procedure of the Court of First Instance, to order them to bear their own costs and to pay those of the Commission attributable to their interventions. As regards the ECTU, intervener, the Court considers it fair, having regard to Article 87(4) of the Rules of Procedure of the Court of First Instance, to order them to bear one fifth of their own costs, and for the applicants to pay four fifths of the ECTU's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. **Annuls Article 5 of Commission Decision 94/985/EC of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/33.218 — Far Eastern Freight Conference) in so far as it imposes a fine on the applicants;**

2. Dismisses the remainder of the action;

3. Orders the applicants to bear their own costs and to pay four fifths of those incurred by the Commission and four fifths of those incurred by the ECTU, including those relating to the application for interim measures;

4. Orders the Commission to bear one fifth of its own costs, including those relating to the application for interim measures;

5. Orders the ECSA and the JSA to bear their own costs and the costs of the Commission relating to their interventions;

6. Orders the ECTU to bear one fifth of its own costs, including those relating to the application for interim measures.

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 28 February 2002.

H. Jung

Registrar

M. Jaeger

President

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