

Case T-86/95

Compagnie Générale Maritime and Others

v

Commission of the European Communities

(Competition — Liner conferences — Intermodal transport — Regulation (EEC) No 4056/86 — Scope — Block exemption — Regulation (EEC) No 1017/68 — Individual exemption — Fine)

Judgment of the Court of First Instance (Third Chamber), 28 February 2002 II - 1022

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Relevant market — Delimitation — Criteria — Intermodal transport — Sub-market in services for the inland transport of sea containers and the market in maritime transport services in general*
(EC Treaty, Art. 85 (now Art. 81 EC))
2. *Competition — Agreements, decisions and concerted practices — Prejudicial to competition — Appreciable extent — Criteria — Market share*
(EC Treaty, Art. 85 (now Art. 81 EC))

3. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Criteria*
(EC Treaty, Art. 85(1) (now Art. 81(1) EC))
4. *Competition — Transport — Agreements, decisions and concerted practices — Effect on trade between Member States — Agreement between shipping lines relating to the conditions for the sale of inland transport services to shippers established in different Member States — Intermodal transport*
(EC Treaty, Art. 85(1) (now Art. 81(1) EC))
5. *Competition — Maritime transport — Regulation No 4056/86 — Scope — International maritime transport*
(Council Regulation No 4056/86, Art. 1, second para.)
6. *Competition — Maritime transport — Regulation No 4056/86 — Block exemption — Strict interpretation — Whether an agreement between shipping lines setting inland transport rates as part of intermodal transport is inapplicable*
(EC Treaty, Art. 85(1) and (3) (now Art. 81(1) and (3) EC); Council Regulation No 4056/86, Art. 3)
7. *Competition — Transport — Agreements, decisions and concerted practices — Determination of the applicable regulation — Criteria — Agreement between shipping lines setting inland transport rates as part of intermodal transport — Application of Regulation No 1017/68*
(Council Regulations Nos 1017/68 and 4056/86)
8. *Actions for annulment — Commission decision refusing to grant individual exemption — Complex economic appraisal — Judicial review — Limits — Agreement implemented over a long period*
(EC Treaty, Art. 85(3) (now Art. 81(3) EC), and Art. 173 (now, after amendment, Art. 230 EC))
9. *Competition — Community rules — Application pursuant to the national practices of the Member States or of certain non-member States — Whether lawful*
(EC Treaty, Art. 85 (now Art. 81 EC))

10. *Competition — Transport — Agreements, decisions and concerted practices — Prohibition — Exemption — Conditions — Economic benefits arising from the agreement — Assessment criteria — Agreement between shipping lines setting inland transport rates as part of intermodal transport*
(EC Treaty, Art. 85(3) (now Art. 81(3) EC); Council Regulation No 1017/68, Art. 5)
11. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Conditions — Cumulative nature*
(EC Treaty, Art. 85(3) (now Art. 81(3) EC))
12. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Conditions — Reservation of a fair share of the benefit to the users*
(EC Treaty, Art. 85(3) (now Art. 81(3) EC); Council Regulation No 1017/68, Art. 5)
13. *Competition — Agreements, decisions and concerted practices — Prohibition — Exemption — Obligation of the undertaking to establish the merits of its application*
(EC Treaty, Art. 85(3) (now Art. 81(3) EC))
14. *Competition — Maritime transport — Agreements, decisions and concerted practices — Prohibition — Exemption — Conditions — Restrictions on competition which are indispensable — No such restrictions — Agreement between shipping lines setting inland transport rates as part of intermodal transport — Justification derived from the objective of price stability for maritime transport — Whether unlawful*
(EC Treaty, Art. 85(3) (now Art. 81(3) EC); Council Regulation No 4056/86, Art. 3(e))
15. *Competition — Administrative procedure — Statement of objections — Necessary content — Observance of the rights of the defence*
(Commission Regulation No 1630/69, Art. 4)
16. *Competition — Administrative procedure — Observance of the rights of the defence — Right of the parties involved to express an opinion regarding the way in which their own arguments have been taken into account — No such right*
17. *Competition — Administrative procedure — Hearings — Absence of the counsel of one of the undertakings involved — Breach of rights of defence — No breach*

18. *Competition — Administrative procedure — Hearings — Hearing of certain persons — Persons not party to the proceedings — Commission's discretion (Commission Regulation No 1630/69, Arts 7(2) and 9(3))*
19. *Competition — Community rules — Infringements — Intentional commission — Meaning*
20. *Competition — Fines — Principle of equal treatment — Effect where another trader has not been penalised — Unlimited jurisdiction of the Court of First Instance*

1. The reason for defining the relevant market 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.

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. The degree of interchangeability between goods must be assessed in terms of their objective characteristics, as well as the structure of supply and demand on the market, and competitive conditions.

In that regard, the inland transport services for the on-carriage and off-carriage of containers as part of inter-modal transport constitute a related but distinct market from maritime transport services supplied in that context by the member shipping companies of a liner conference.

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.

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.

fact have substantially affected trade between Member States. It is sufficient to establish that the conduct is capable of having such an effect.

(see paras 116, 122, 128-129)

(see para. 145)

2. The fact that undertakings hold almost 40% of the relevant market is sufficient proof that the agreement which is the subject of a decision finding an infringement of the competition rules 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.

4. An agreement between shipping companies, several of which are established in various Member States, concerning the conditions of sale of inland transport services to shippers also established in various Member States, is clearly capable of affecting trade between Member States within the meaning of Article 85(1) of the Treaty (now Article 81(1) EC).

(see para. 138)

3. 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. In particular, it is not necessary that the conduct in question should in

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 a liner conference or to an inland carrier, thereby distorting competition on the market for inland transport services between member shipping companies of the conference and inland carriers present in various Member States.

In the same way, 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 liner conference, is to neutralise the economic advantage that may arise from the fact that the distance to a given port is shorter.

the inland on- or off-carriage of cargo supplied in combination with other services as part of an intermodal transport operation.

(see para. 241)

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 members of the liner conference represent part of the final sale price of the goods transported.

6. Having regard to the general principle laid down by Article 85(1) of the Treaty (now Article 81(1) EC) that agreements restricting competition are prohibited, provisions derogating therefrom in a regulation concerning exemption must, by their nature, be strictly interpreted. 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.

(see paras 146-148)

5. The scope of Regulation No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport is limited to maritime transport services properly so called, that is, to transport by sea 'from or to one or more Community ports' and does not cover

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.

No 4056/86 relating to maritime transport, even if entered into and performed by shipping companies as part of intermodal transport services.

It is thus clear both from the *travaux préparatoires* of Regulation No 4056/86 and the Council declaration of 17 December 1991 that the block exemption provided for by Article 3 of that regulation 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.

Such an agreement must be assessed in the light of the provisions of Regulation No 1017/68 applying rules of competition to transport by rail, road and inland waterway.

(see paras 260, 276)

(see paras 252, 254, 257)

7. 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 and should not be based solely on the sector in which the undertaking providing the service or product governed by the agreement operates.

An agreement fixing the price of inland transport services manifestly does not fall within the scope of Regulation

8. In an action for annulment pursuant to Article 173 of the Treaty (now, after amendment, Article 230 EC), 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 (now Article 81(3) EC), 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.

The fact that an agreement was openly implemented by its 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.

(see paras 339-340)

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.

9. 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. *A fortiori*, the practices of certain non-member States cannot dictate the application of Community law.

(see para. 343)

11. The four conditions for the grant of an exemption under Article 85(3) of the Treaty (now Article 81(3) EC) are concurrent, so that the non-fulfilment of any one of those conditions means that the exemption will be refused.

(see para. 341)

10. For the purposes of examining the merits of the Commission's findings as to the various requirements of Article 85(3) of the Treaty (now Article 81(3) EC) and Article 5 of Regulation No 1017/68, regard should

(see paras 349, 367)

12. The Commission was entitled to infer from the large number of complaints from users that the relevant agreement does not take fair account of their interests and therefore does not reserve a fair share of the benefit to users as required by Article 85(3) of the Treaty (now Article 81(3) EC) and by Article 5 of Regulation No 1017/68.

inland transport services as part of intermodal transport, entails restrictions of competition that are not only extremely serious, but are, above all, not indispensable for attaining the objective of stability of maritime transport rates, alleged by the lines party to the agreement.

(see paras 371, 374)

13. It is for the undertakings claiming an exemption under Article 85(3) of the Treaty (now Article 81(3) EC) to provide documentary evidence to establish the justification for an exemption. In particular, it is for those undertakings to show that the restrictions of competition arising from the agreement in question meet the objectives referred to by that provision and that those objectives could not be attained without the introduction of those restrictions.

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 companies concerned 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 arguments seeking to show that those measures are more restrictive than the contested agreement cannot 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 (now Article 81(3) EC). The Commission was therefore entitled to consider that the restrictions of competition in question are not indispensable given the existence of the measures laid down by Article 3 of Regulation No 4056/86.

(see paras 381, 384)

14. An agreement between the members of a liner conference fixing the rates of

(see paras 396-397)

15. 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. 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. The final decision of the Commission is not, however, necessarily required to be a replica of the statement of objections.

(see para. 442)

16. The fact that an argument put forward by the undertakings during the administrative procedure for infringement of the competition rules 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, where consideration of the argument does not alter the nature of

the complaints against it. The undertakings concerned had the opportunity to express their view on the Commission's position in the statement of objections and they could therefore expect that their own explanations would lead the Commission to alter its opinion.

(see para. 447)

17. 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 the counsel of one of the undertakings concerned could not attend one or other of the hearings arranged by the Commission cannot be considered to breach the rights of the defence of the undertaking concerned, still less of all the undertakings.

(see para. 466)

18. It is clear from Articles 7(2) and 9(3) of Regulation No 1630/69 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 is entitled to hear from third parties who had not previously lodged a complaint or written observations during the administrative procedure.
20. 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.

(see para. 468)

19. 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.

(see para. 479)

However, in the exercise of its unlimited jurisdiction, the Court of First Instance may consider that there is justification for not imposing a fine on shipping lines party to an agreement fixing inland transport rates as part of intermodal transport since, in another decision, which was adopted very shortly before the contested decision, the Commission did not impose a fine on the lines party to another agreement which also fixed the price of the inland part of intermodal transport, and also contained other serious infringements of the competition rules.

(see paras 487-488)