

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
4 June 2003 *

In Case T-224/99,

The European Council of Transport Users ASBL, established in Brussels (Belgium),

The Freight Transport Association Ltd, established in Tunbridge Wells (United Kingdom),

Association des Utilisateurs de Transport de Fret (AUTF), established in Paris (France),

and

Industriförbundet, established in Stockholm (Sweden),

represented by M. Clough QC, with an address for service in Luxembourg,

applicants,

* Language of the case: English.

v

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

defendant,

supported by

Atlantic Container Line AB, established in Göteborg (Sweden),

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

Mediterranean Shipping Company SA, established in Geneva (Switzerland),

A.P. Møller-Mærsk Line, established in Copenhagen (Denmark),

Nippon Yusen Kaisha, established in Tokyo (Japan),

Orient Overseas Container Line (UK) Ltd, established in London (United Kingdom),

P & O Nedlloyd Container Line Ltd, established in London,

represented by J. Pheasant and M. Levitt, Solicitors, with an address for service in Luxembourg,

interveners,

APPLICATION for annulment of the decision of the Commission, communicated to the applicants by letter of 6 August 1999, not to raise serious doubts, within the meaning of Article 12 of Council Regulation (EEC) 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), concerning the revised version of the Trans-Atlantic Conference Agreement (TACA),

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

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: H. Jung,

makes the following

Order

Legal framework

1 Article 1 of Council Regulation (EEC) 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.’

2 According to Article 2 of Regulation No 1017/68:

‘Subject to the provisions of Article 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,

...’.

3 Article 5 of Regulation No 1017/68 is worded 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.'

4 Under Article 11(4) of Regulation No 1017/68, '[i]f 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.'

5 Under Article 12 of Regulation No 1017/68:

'1. Undertakings and associations of undertakings which seek application of Article 5 in respect of agreements, decisions and concerted practices falling within the provisions of Article 2 to which they are parties may submit applications to the Commission.

2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 10 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the *Official Journal of the European Communities* a summary of the application and invite all interested third parties to submit their comments to the Commission within thirty days. Such publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

3. Unless the Commission notifies applicants, within ninety days from the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 5, the agreement, decision or concerted practice shall be deemed exempt, in so far as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of three years from the date of publication in the *Official Journal of the European Communities*.

If the Commission finds, after expiry of the ninety-day time limit, but before expiry of the three-year period, that the conditions for applying Article 5 are not satisfied, it shall issue a decision declaring that the prohibition in Article 2 is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption from the provisions of Article 2.

4. If, within the ninety-day time limit, the Commission notifies applicants as referred to in the first subparagraph of paragraph 3, it shall examine whether the provisions of Article 2 and of Article 5 are satisfied.

If it finds that the provisions of Article 2 and of Article 5 are satisfied it shall issue a decision applying Article 5. The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.’

- 6 On 22 December 1986, the Council adopted 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 1986 L 378, p. 4).
- 7 Article 12 of Regulation No 4056/86 lays down an objections procedure similar to that provided for in Article 12 of Regulation No 1017/68. According to that provision, if the Commission does not inform the notifying parties, within 90 days from the date of such publication in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 81(3) EC, the agreement is to be deemed exempt from the prohibition for a maximum of three years under Regulation No 1017/68 (in respect of restrictions of competition in inland transport) and six years under Regulation No 4056/86 (in respect of restrictions of competition in maritime transport other than those covered by the block exemption in Article 3 of the regulation).

Facts

- 8 The Trans-Atlantic Conference Agreement (TACA) is an agreement between a number of shipping lines concerning the conduct of their business. It governs containerised liner shipping services in the direct trade between northern Europe (that part of Europe served by ports from Bayonne northwards) and the United States. The agreement provides among other things for the joint fixing by the TACA parties of rates for sea transport.

- 9 The version of the TACA in question in the present case was notified to the Commission, pursuant to Regulations Nos 1017/68 and 4056/86, on 29 January 1999. The agreement contains a clause stating that the participants are 'authorised' to agree that, where they provide maritime transport services pursuant to the conference tariff, they may not charge a price less than the direct out of pocket cost for inland transport provided in connection with the sea voyage (the 'not-below-cost rule', hereinafter 'the clause at issue').
- 10 On 6 May 1999, the Commission published a notice in the *Official Journal of the European Communities* pursuant to Article 12(2) of Regulation No 4056/86 and Article 12(2) of Regulation No 1017/68 inviting interested parties to submit their comments on the new agreement (OJ 1999 C 125, p. 6).
- 11 On 4 August 1999, the Commission informed the TACA parties that it entertained serious doubts as to the applicability of Article 81(3) EC to certain aspects of the agreement falling under Regulation No 4056/86. The Commission did not raise objections to any aspect of the agreement falling under Regulation No 1017/68. The result of that is that the TACA is deemed to be exempted, so far as concerns those aspects, for a period of three years running from 6 May 1999.
- 12 By letter of 6 August 1999, the Commission informed the applicants of that decision not to raise serious doubts, within the meaning of Article 12 of Regulation No 1017/68, and of the consequent exemption ('the contested decision').

- 13 On 14 November 2002, the Commission adopted Decision No 2003/68/EC relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/37.396/D2 — Revised TACA) (OJ 2003 L 26, p. 53). According to Recital 28 of that decision, the clause at issue has never been implemented by the Revised TACA parties.
- 14 Recital 18 of that decision states that, by letter dated 3 May 2002, the Revised TACA parties requested a renewal of the exemption for all aspects of the Revised TACA falling within the scope of Regulation No 1017/68.

Procedure

- 15 On 7 October 1999, the applicants lodged an application for the annulment of the contested decision pursuant to Article 230 EC.
- 16 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs incurred by them;

— take any measures of preliminary enquiry that the Court may consider necessary.

17 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicants to pay the costs.

18 By order of 4 December 2000, the President of the Third Chamber of the Court of First Instance allowed the intervention of Atlantic Container Line AB, Hapag-Lloyd AG, Mediterranean Shipping Company SA, A.P. Møller-Mærsk Line, Nippon Yusen Kaisha, Orient Overseas Container Line (UK) Ltd and P & O Nedlloyd Container Line Ltd in support of the form of order sought by the Commission.

- 19 In the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the Court of First Instance, the Court invited the parties by letter of 13 February 2003 to state their views in writing on the question whether there is any need to give a decision in the present case. The parties complied with that request within the prescribed period.

Law

Arguments of the parties

- 20 The applicants claim, first of all, that there can be no doubt whatever that the contested decision concerning the clause at issue constitutes a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position.
- 21 Next, they state that while by definition an exemption granted by the Commission must produce binding legal effects such as to affect the interest of an applicant which is a customer of the beneficiary of the exemption, the Court may be right to suggest, in its question, that the TACA parties have rendered the

exemption meaningless because the clause at issue, which was exempted for a period of three years, has never been implemented by them. They add that, if the Revised TACA parties have chosen not to benefit in any way from the Commission's decision, which remains in force unless annulled by the Court, it may be that those parties have now rendered the contested decision without purpose and that the present case should not proceed to judgment.

- 22 Finally, the applicants state that if the Court were to decide not to proceed to judgment, it would be appropriate to order the interveners to pay the costs.
- 23 The Commission contends that, while it is true that the exemption has expired, it is not clear that the present case is rendered devoid of object.
- 24 It observes that the fact that the TACA parties have not implemented the clause at issue does not mean that the exemption did not produce any legal effects. It points out that the exemption had the legal effect of authorising the conduct in question and the fact that the exemption did not produce any practical effects is a different matter.
- 25 The Commission acknowledges that if the TACA parties wish to maintain the possibility of applying the clause at issue, they must obtain a further exemption. It states that the TACA parties have requested a renewal of the exemption by letter of 3 May 2002, that it must decide whether to grant it and that it cannot be ruled out that, in the absence of new factual elements, it would take the same approach as in 1999.

- 26 The Commission further observes that the applicants could possibly challenge the new exemption and that both its own and the applicant's pleadings could in that case be substantially identical to those submitted in the present case. In those circumstances, the Commission questions whether it is desirable to put the parties to the expense of fresh proceedings.
- 27 The interveners state that, in the interests of procedural economy, they do not object to the discontinuance of the case, subject to payment of their costs by the applicants.

Findings of the Court

- 28 The present action seeks the annulment of the contested decision by which the Commission decided not to raise serious doubts with regard to the provisions of the revised TACA agreement falling under Regulation No 1017/68.
- 29 First of all, it should be observed that it is settled case-law that only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 230 EC for a declaration that it is void (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9, and Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, paragraph 62).
- 30 It is therefore necessary to consider whether the contested decision produces binding legal effects.

31 As the Commission rightly states in its reply to the Court's written question, the effect of the contested decision was to authorise the parties to implement the clause at issue. To that extent, it was such as to produce binding legal effects.

32 However, it is apparent from the contested decision that the clause at issue was exempt only for a period of three years running from 6 May 1999.

33 Moreover, it is clear from Decision 2003/68 that the clause at issue has never been implemented by the Revised TACA parties.

34 It follows that the present action now concerns the validity of a clause which not only was exempted only for a period which expired on 5 May 2002 but which, moreover, was not implemented by the Revised TACA parties.

35 It should be pointed out that if the Revised TACA parties decided to implement the clause at issue after 5 May 2002, they would have to submit a fresh request for exemption, which they did by the letter of 3 May 2002. The Commission must, therefore, take a new exemption decision, following a fresh analysis of the competition conditions, which will not necessarily be based on the same considerations as those on which the contested decision was based. The applicants will then be in a position to challenge that new decision.

- ³⁶ Furthermore, the reasons which led the Commission to exempt the clause at issue are devoid of any binding legal effect and cannot, therefore, as such be the subject of an action (see, to that effect, Joined Cases T-125/97 and T-127/97 *Coca-Cola v Commission* [2000] ECR II-1733, paragraphs 77 to 92).
- ³⁷ Finally, the Commission's observation that it could find it necessary to adopt a new decision resulting in an identical dispute and that it would therefore be undesirable to put the parties to additional expense is irrelevant. It is sufficient to state that it relies on purely hypothetical considerations. In any event, that observation is not such as to demonstrate that the contested decision produces binding legal effects.
- ³⁸ It is clear from the foregoing that the action has become devoid of purpose. There is therefore no need to adjudicate.

Costs

- ³⁹ Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment the costs are to be in the Court's discretion.

40 In the circumstances of this case, the Court considers that neither the applicants' request that the interveners should be ordered to pay the costs nor that of the interveners that the applicants should pay their costs can be upheld but that the parties must be ordered to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. There is no need to adjudicate on the action.
2. The parties shall bear their own costs.

Luxembourg, 4 June 2003.

H. Jung

Registrar

K. Lenaerts

President