JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
8 October 1996 *

In Joined Cases T-24/93,

Compagnie Maritime Belge Transports SA

and

Compagnie Maritime Belge SA,

companies incorporated under Belgian law, established at Antwerp (Belgium), represented by Michel Waelbroeck and Denis Waelbroeck, of the Brussels Bar, and by Aurelio Pappalardo, of the Trapani Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 rue Mathias Hardt,

applicants,

v

Commission of the European Communities, represented, during the written procedure, by Bernd Langeheine and Richard Lyal and, at the hearing, by Richard Lyal, Paul Nemitz and Berend Jan Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

* Languages of the cases: German, English and Dutch.

defendant,

supported by

Grimaldi, a company incorporated under Italian law, established at Palermo (Italy),

and

Cobelfret, a company incorporated under Belgian law, established at Antwerp (Belgium),

represented by Mark Clough, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

interveners,

T-25/93,

Dafra-Lines A/S, a company incorporated under Danish law, established at Copenhagen, represented by Michel Waelbroeck and Denis Waelbroeck, of the Brussels Bar, and by Aurelio Pappalardo, of the Trapani Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented, during the written procedure, by Bernd Langeheine and Richard Lyal and, at the hearing, by Richard Lyal, Paul Nemitz and Berend Jan Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

T-26/93,

Deutsche Afrika-Linien GmbH&Co., a company incorporated under German law, established at Hamburg (Germany), represented by Michael Strobel, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented, during the written procedure, by Bernd Langeheine and Richard Lyal and, at the hearing, by Richard Lyal, Paul Nemitz and Berend Jan Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

and T-28/93,

Nedlloyd Lijnen BV, a company incorporated under Dutch law, established at Rotterdam (Netherlands), represented, during the written procedure, by Tom-R. Ottervanger, of the Rotterdam Bar, and, at the hearing, by Jacques Steenbergen, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 4 Rue de l'Avenir,

applicant,

v

Commission of the European Communities, represented, during the written procedure, by Bernd Langeheine and Richard Lyal and, at the hearing, by Richard Lyal, Paul Nemitz and Berend Jan Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (OJ 1993 L 34, p. 20),

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

composed of: C. P. Briët, President, P. Lindh, A. Potocki, R. M. Moura Ramos and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 26 March 1996,

gives the following

Judgment

Facts

1 Following complaints made to it on the basis of Article 10 of 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), the Commission opened an inquiry into the practices of the shipping conferences operating on routes between Europe and West Africa.

2 One of the complaints was made by the Association of Independent West African Shipping Interests ('AIWASI'), a group of independent Community shipping companies, that is to say, shipping companies not belonging to any shipping conference. Grimaldi and Cobelfret, independent shipping companies based at Palermo

and Antwerp respectively (jointly referred to hereinafter as 'G & C'), are founder members of AIWASI. In 1985 G & C started a joint service between northern Europe and Zaïre.

3 Associated Central West Africa Lines ('Cewal') is a shipping conference whose secretariat is in Antwerp. It is made up of shipping companies operating a regular liner service between the ports of Zaïre and Angola and those of the North Sea, with the exception of the United Kingdom.

4 Compagnie Maritime Belge SA ('CMB') is the holding company of the CMB group. The group's activities include shipowning and managing and operating shipping operations. On 7 May 1991 its liner and intermodal services were established as a separate legal entity, Compagnie Maritime Belge Transports SA ('CMBT'), with effect from 1 January 1991.

5 Dafra-Lines A/S is a member of Cewal. Dafra-Lines has been a member of the CMB group of companies since 1 January 1988.

6 Deutsche Afrika-Linien GmbH & Co. ('DAL') is a member of the Cewal conference. Until 1 April 1990 it was the sole shareholder in Woermann-Linie Afrikanische Schiffahrts-Gesellschaft mbH. At that date it transferred its shares to CMB, which, from 1 January 1991, merged the operations of the company with CMBT.

7 Nedlloyd Lijnen BV ('Nedlloyd') is also a member of Cewal.

8 At the conclusion of its inquiry, the Commission adopted Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (OJ 1993 L 34, p. 20; 'the Decision'). That decision finds that three shipping conferences infringed Article 85 and that the members of Cewal infringed Article 86, and consequently imposes a fine on some of them. The Decision may be summarized as follows.

Presentation of the Decision

The legal background to international maritime freight transport

9 For a given shipping route, the rules for the allocation of cargo transported by a shipping conference are governed by a code of conduct drawn up by the United Nations Conference for Trade and Development ('the UNCTAD Code') and, more particularly, by the '40: 40 : 20' rule. Under that rule, the national lines at each end of a given shipping route are each granted 40% of cargoes carried by the conference, whilst the remaining 20% are allocated to shipping companies of third countries that are members of the same conference.

10 Furthermore, the international maritime transport policy of the African States is harmonized within the Ministerial Conference of the States of West and Central Africa for Maritime Transport (CMEAOC), created in 1975. That conference has adopted various resolutions encouraging African States to give priority for their freight to national operators and to adopt systems to supervise the effective application of the 'trade allocation formula', as provided for in the UNCTAD Code.

11 On the maritime route between northern Europe and Zaïre the sharing of cargoes according to the UNCTAD Code's 40: 40: 20 rule is implemented by three types of measure:

— The participation of Compagnie Maritime Zaïroise ('CMZ') as a member of the Cewal conference;

— The adoption by the Zaïre authorities of a framework of rules established by Ordonnance-Loi No 67/272 of 23 June 1967 and the Bank of Zaïre's Circular No 139(IV) of 13 January 1972. That circular, which was adopted in connection with exchange controls, provided in particular that goods imported into the Republic of Zaïre from Belgian, German, Netherlands or Scandinavian ports or exported from the Republic of Zaïre to those ports should henceforward be carried in vessels of operators affiliated to Cewal. In addition, in order to oblige shipping companies to replace the deferred rebate system in freight contracts concluded with shippers, which was costly for the Zaïre monetary authorities, by an immediate rebate system, approved banks were no longer authorized to settle in foreign currencies the cost of sea transport which, because it had not complied with these rules, did not qualify for the immediate rebate appearing on the invoice.

After the publication of the circular in question, a system of immediate rebates was in fact included in contracts concluded by members of Cewal. Until 1985 the implementation of the system was ensured by a special clause in the foreign exchange documents attesting that the freight was transported by a vessel operated by Cewal ('Embarquement par navire Cewal'). By a circular of 26 December 1985 the Bank of Zaïre announced the abandonment of that system;

— The conclusion of an agreement between the [Zaïre] Office de Gestion du Fret Maritime ('Ogefrem') and Cewal, Article 1 of which provided that:

'Ogefrem, having regard to the legal rights conferred upon it, and the Cewal conference shall ensure that all goods to be shipped within the context of the field of action of the Cewal conference are entrusted to shipping companies which belong to that shipping conference.

Derogations may be granted with the express agreement of the two parties concerned.'

Despite the second paragraph of that provision, Ogefrem permitted a shipping operation which was not a member of the Cewal conference to participate in trade to and from Zaïre without Cewal's agreement; that company was G & C.

The infringements of Article 85(1) of the Treaty

12 At the material time, trade between ports in western and northern Europe and West Africa was distributed among three shipping conferences: Cewal, Continent West Africa Conference ('Cowac') and United Kingdom West Africa Lines Joint Service ('Ukwal'), with each conference operating a separate network of routes.

13 In its Decision the Commission found that trade was shared out in that way as a result of certain agreements concluded between the three conferences, the purpose of which was to prohibit companies belonging to one conference from operating as independent shipping companies in ports in the area of activity of one of the other two conferences. In order to operate on a line of another conference, a company had first to join that conference.

14 The Commission concluded that those agreements partitioned the market contrary to Article 85(1) of the Treaty and did not qualify for exemption either under Article 3 of Regulation No 4056/86 or under Article 85(3) of the Treaty.

The infringements of Article 86 of the Treaty

15 After defining the relevant market, the Commission found that there was a dominant position held collectively by the members of the Cewal conference. It held that three practices implemented by members of the conference with a view to eliminating its main competitor for the trade in question constituted abuses within the meaning of Article 86 of the Treaty, namely:

— participating in the implementation of the Ogefrem cooperation agreement and repeatedly asking through various means that it be strictly complied with;

— altering the conference's freight rates with respect to the rates in force so as to obtain rates identical to or lower than those charged by the main independent competitor for ships sailing on the same or similar dates (a practice known as 'fighting ships'). According to the Decision, the system as a whole culminated in Cewal members' suffering losses;

— drawing up loyalty contracts imposed to the extent of 100% (including goods sold free on board) going beyond the provisions of Article 5(2) of Regulation No 4056/86 and involving the specific use of 'blacklists' of disloyal shippers.

The operative part of the Decision and the sanctions imposed

16 The operative part of the Decision finds that Article 85(1) of the Treaty has been infringed (Article 1), as has Article 86 (Article 2). It orders the undertakings to bring the infringements to an end (Article 3) and to refrain from repeating the infringement referred to in Article 1 (Article 4). It recommends that the loyalty

agreements be amended so as to conform with Article 5(2) of Regulation No 4056/86 (Article 5). On the basis of Article 19(2) of that regulation it imposes the following fines in respect of the abuses of a dominant position referred to in Article 2 (Article 6):

— CMB: ECU 9.6 million;

— Dafra-Lines and Deutsche Afrika Linien-Woermann Linie: ECU 200 000 each;

— Nedlloyd Lijnen BV: ECU 100 000.

The fines were to be paid within three months of the date of notification of the Decision. Failing this, interest was automatically to be payable at an annual rate of 13.25% (Article 7).

Procedure

17 By application received at the Court Registry on 19 March 1993, CMB and CMBT brought an action, registered as Case T-24/93, which sought primarily to have the Decision annulled.

18 By separate document, received at the Court Registry on 13 April 1993, CMBT also made an application for interim measures seeking suspension of the operation of Articles 6 and 7 of the operative part of the Decision pending delivery of the judgment in the main proceedings in so far as those articles imposed a fine on CMB, and also of Article 3 of the Decision in so far as it required the Cewal conference and its members to terminate the cooperation agreement with Ogefrem.

19 By order of 13 May 1993 (Case T-24/93 R *CMBT* v *Commission* [1993] ECR II-543), the President of the Court of First Instance gave G & C leave to intervene in the interlocutory proceedings and dismissed the application for interim measures.

20 By order of 23 July 1993 (not published in the European Court Reports), the President of the Second Chamber of the Court gave G & C leave to intervene in the proceedings in support of the form of order sought by the defendant and granted in part the applicants' application for confidential treatment, as against G & C, of certain documents in the application and its annexes.

21 By order of 21 March 1994 (not published in the European Court Reports) the President of the Second Chamber of the Court granted in part the applicants' application for confidential treatment, as against G & C, of certain documents in the defence, reply and rejoinder, as well as in certain annexes thereto.

22 By order of 19 March 1996 (not published in the European Court Reports), the President of the Third Chamber (Extended Composition) of the Court rejected the applicants' application for confidential treatment, as against G & C, of certain extracts from the Commission's answers to written questions put by the Court and of certain annexes thereto.

23 By applications received at the Court Registry on 19 and 22 March 1993, Dafra-Lines, DAL and Nedlloyd each brought an action. The applications were registered as Cases T-25/93, T-26/93 and T-28/93 and seek principally the annulment of the Decision.

24 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, as measures of organization of procedure, it requested the parties to produce certain documents and to answer certain written questions.

25 Oral argument was heard from the parties at the public hearing on 26 March 1996, when they answered oral questions.

Forms of order sought

26 In Case T-24/93, the applicants claim that the Court should:

— annul the Decision in its entirety;

— alternatively:

  — annul or, at the very least, reduce the fine imposed on the applicants;

  — order the Commission to produce all documents detailing how the amount of the fine has been calculated;

— in any event, order the Commission to pay the costs.

The Commission claims that the Court should:

— dismiss the application;

— order the applicants to pay the costs, including the costs of the application for interim measures.

The interveners claim that the Court should:

— dismiss the application;

— order the applicants to pay the costs, including the costs of the application for interim measures, incurred by the Commission and the interveners.

27 In Case T-25/93, the applicant claims that the Court should:

— annul the Decision;

— alternatively:

  — annul or, at the very least, reduce the fine imposed;

  — order the Commission to produce all documents detailing how the amount of the fine has been calculated;

— in any event, order the Commission to pay the costs.

28 In Case T-26/93, the applicant claims that the Court should:

— annul the Decision;

— alternatively, annul or, at least, reduce the fine imposed on the applicant;

— order the Commission to pay the costs.

29 In Case T-28/93, the applicant claims that the Court should:

— annul the Decision wholly or in part;

— annul or, at least, reduce the fine imposed on the applicant;

— take such measures as it should deem appropriate;

— order the Commission to pay the costs.

30 In Cases T-25/93, T-26/93 and T-28/93, the defendant claims that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

31 After hearing the parties on the point at the hearing, the Court (Third Chamber, Extended Composition) decided to join the four cases for the purposes of the judgment.

The principal claims for the annulment of the Decision

32 The applicants rely on four pleas in support of their claims for the annulment of the Decision. First, in Case T-26/93, the applicant asserts a plea alleging procedural defects. Secondly, in Cases T-24/93, T-25/93 and T-28/93, the applicants maintain that the practices in question do not affect intra-Community trade and, in Cases T-24/93 and T-25/93, that the markets in question are not part of the common market. Thirdly, in Cases T-24/93, T-25/93 and T-26/93, the applicants deny that

the practices at issue have as their object or effect the distortion of competition within the meaning of Article 85(1) of the Treaty. Fourthly, in each of the cases, the applicants maintain that the practices in question do not constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty.

1. *The first plea, alleging procedural defects affecting the validity of the Decision*

Arguments of the parties

33 In Case T-26/93, the applicant, DAL, submits in the first place that it was not the addressee of the statement of objections of 14 August 1990, which was addressed to the company Woermann-Linie Afrikanische Schiffahrts-Gesellschaft mbH. At that date, that company had already been sold to CMB with effect from 1 April 1990 and DAL was no longer a member of Cewal. The objections set out by the Commission were addressed to the conference members listed in Annex A to the statement of objections, which did not include the applicant. Accordingly, the Decision was adopted in breach of the rights of the defence (Case 60/81 *IBM* v *Commission* [1981] ECR 2639). Secondly, Article 6 of the Decision imposed a fine on a non-existent company, Deutsche Afrika Linien-Woermann Linie. Where a decision imposes a fine on its addressees, as in this instance, they must be able to be clearly identified. In so far as it does not specify whether it is intended to apply to DAL and/or to Woermann-Linie Afrikanische Schiffahrts-Gesellschaft mbH, the Decision is vitiated by a procedural flaw.

34 The Commission first points out that the applicant was initially the sole shareholder in Woermann-Linie Afrikanische Schiffahrts-Gesellschaft mbH and that, as from 1 April 1990, it transferred its shares to CMB. As regards the addressee of the statement of objections, the Commission maintains that, as appears from Annex K 7 to the application, the applicant was indeed notified of the objections and replied thereto, with the result that there can be no question of any breach of

the rights of the defence. As regards the addressee of the Decision, the Commission submits that the applicant must have known that the Decision related to its responsibility for the conduct of Woermann-Linie, of which the applicant — which operated in West and Central Africa only under the name Woermann-Linie — was, at the material time, the sole shareholder. Accordingly, the Commission considers that the applicant is wrong to maintain that the objections were addressed to an undertaking other than the addressee of the Decision.

Findings of the Court

35 The Court finds in the first place that until 1 April 1990 the applicant, DAL, was the sole shareholder in Woermann-Linie Afrikanische Schiffahrts-Gesellschaft mbH. As is clear from Annex K 7 to the application, the applicant itself replied to the statement of objections, of which it does not deny it was apprised. In addition, as the applicant itself stated in the opening part of that reply, it responded to the statement of objections drawn up in the name of Woermann-Linie, since the facts complained of dated from before the sale of its subsidiary. In those circumstances, the Court considers that the first limb of the plea, alleging breach of the rights of the defence, must be rejected.

36 Secondly, the Court finds that, in accordance with Annex I to the Decision, the company 'Deutsche Afrika Linien-Woermann Linie' was the addressee of the Decision. It is not disputed that that name does not in itself correspond to that of any company existing in law. However, as has been mentioned, the applicant cannot claim that it did not understand that the statement of objections was intended for it as the parent company of Woermann-Linie at the material time. Consequently, the Court considers that the form of words used in Annex I to the Decision and Article 6 thereof, consisting of joining and contracting the names of the parent company and its subsidiary, clearly indicated to the applicant that the Decision was addressed to it and a fine imposed on it on account of the conduct of its former subsidiary, of which it was the sole shareholder until 1 April 1990 and under whose name it operated in West and Central Africa.

37 Consequently, the first plea must be rejected.

2. The second plea alleging that there was no infringement of Article 85(1) of the Treaty

Arguments of the parties

38 First, the applicants point out that the very objective of shipping conferences is to rationalize maritime transport services, as is acknowledged by the document *Progress towards a common transport policy — Maritime Transport* [COM (85) 90 final, paragraph 62 et seq.] and the eighth recital in the preamble to Regulation No 4056/86. Accordingly, the advantages afforded by shipping conferences justify accepting certain restrictions of competition in compensation for the benefit which users derive from the system. Article 3 of Regulation No 4056/86, moreover, exempts the practice complained of by the Commission.

39 Secondly, the applicants submit that in practice the system opted for by shipping conferences preserves competition between their members, in so far as it leaves the possibility of joining another conference intact and hence of operating on the trade in question as a member of that conference. Indeed, contrary to the Commission's statement in point 37 of the Decision, the procedure for a member of one conference to join another conference is neither long nor uncertain, as witness the fact that, of the 45 members of one of the three conferences in question, 27 belong to at least two of them. In addition, the reason why G & C were unable to join Cewal, which the Commission wrongly accuses of being a 'closed' conference, was simply their refusal to fill out the membership questionnaire.

40 In the reply, the applicants question the validity of the evidence on which the Decision is based. They claim that the statement in point 38 of the Decision to the effect that agreements between members of the conferences prohibit their members from operating as independent shipping companies in the areas of activity of each of the other two conferences is incorrect.

41 The Commission argues in response to the first limb of the plea that, whilst, according to Regulation No 4056/86, the advantage afforded by shipping conferences justifies certain restrictions of competition, the exemption granted by Article 3 of the Regulation does not cover all the activities of shipping conferences, in particular non-competition agreements of the type at issue here. Moreover, the regulation expressly provides for the existence of independent shipping companies in the eighth recital in its preamble.

42 The Commission's objection to the second limb of the plea is that it is not open to the applicants to contest for the first time in the reply the existence of any commitment not to compete as between the three conferences.

43 As to the substance, the applicants' claim that there is no agreement between the shipping conferences is contradicted both by Cewal's reply to the statement of objections and by a number of other documents provided by Cewal. All those documents refer to commitments on the part of members of one conference not to get involved in trade carried out by the other two conferences, which continued in being after Regulation No 4056/86 entered into force.

44 In addition, in the Commission's view, the only question is whether there were anti-competitive agreements between shipping conferences. That some of the trade may have been taken by independent shipping companies is, as a result, irrelevant. Likewise, the claim that competition between the three conferences was preserved by the freedom of members of one conference to join another is irrelevant, since the purpose of the agreements in question is to restrict competition. As for the closed nature of the conference, it considers that this is not in any way an objection.

45 The interveners have not submitted observations on this point.

Findings of the Court

46 The Court first observes that the agreements between conferences, under which members of one conference have to refrain from acting as independent shipping companies in the area of activity of another conference party to the relevant agreement, are expressly mentioned in the telex message from the President of Cewal to Cowac of 6 October 1989 and in the minutes of the Zaïre Pool Committee of 19 September 1989. Besides, Cewal expressly admitted the existence of such agreements in its reply to the statement of objections. Consequently, the plea alleging that there were no agreements between conferences must be rejected and there is no need to rule on whether it is a new plea within the meaning of the Rules of Procedure.

47 Next, the applicants' argument seeks to deny that such agreements are capable of constituting an infringement of Article 85 of the Treaty.

48 In this respect the Court first recalls that, having regard to the general principle of the prohibition of agreements restricting competition in Article 85(1) of the Treaty, provisions derogating therefrom in an exempting regulation must, by their nature, be strictly interpreted (Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 37). This must also apply to the provisions of Regulation No 4056/86 which exempt 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.

49 Accordingly, the Court takes the view that the applicants cannot validly claim that the practices in question qualify for exemption under Article 3(c) of Regulation No 4056/86, relating to the coordination or allocation of sailings or calls 'among members of the conference', since what is at issue in this case is allocation agreements as between conferences. What is more, the exemption under Article 3 applies to agreements which have as their primary objective the joint fixing of rates, which is not the case here.

50 Moreover, it does not assist the parties to argue that the actual aim of a shipping conference has been recognized to be beneficial, which the Commission does not deny. Whilst this is capable of justifying the exemptions granted by the regulation, it cannot signify that every impairment of competition brought about by shipping conferences falls outside the prohibition in principle laid down by Article 85(1) of the Treaty.

51 The Court considers that the remainder of the applicants' arguments are irrelevant. Thus, the reasons for which G & C were unable to join Cewal are immaterial, since the impairment of competition at issue consists in the existence of agreements between conferences. Likewise, the fact that the conditions for membership of a conference are neither long nor uncertain is irrelevant, since the very purpose of the agreements is to debar members of one conference from working a route belonging to another conference as an independent operator.

52 Consequently, the plea alleging that Article 85 of the Treaty has not been infringed must be rejected.

3. *The third plea, alleging that Article 86 of the Treaty has not been infringed*

The first limb of the plea, alleging that members of Cewal did not hold a collective dominant position

The collective nature of the position of Cewal's members on the market

— Arguments of the parties

53 The applicants submit that Article 86 of the Treaty prohibits the abuse, by one or more undertakings, of a dominant position, but not the fact that one or more undertakings occupy a dominant position, be it individual or collective. This

means that the concept of abuse of a collective dominant position could be applicable only in the exceptional situation where undertakings collectively abuse their individual dominant positions; otherwise Article 85 of the Treaty would be denied effectiveness.

54 In the applicants' view, in Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro and Others* v *Commission* [1992] ECR II-1403 the Court held only that it was possible in principle to have a collective dominant position. That judgment, paragraph 358 of which referred to liner conferences, cannot be interpreted as meaning that members of a shipping conference are, *ex hypothesi*, in a collective dominant position. Contrary to the rule set forth by the Court in paragraph 360 of *Società Italiana Vetro*, the Commission simply 'recycled' the facts allegedly constituting an infringement of Article 85 which were exempted under Regulation No 4056/86 to find that they amounted to an infringement of Article 86. By finding that there was a common rate amongst Cewal members, the Commission has not proved, as it did in Decision 92/262/EEC of 1 April 1992 relating to a proceeding pursuant to Articles 85 and 86 of the EEC Treaty (IV.32.450: French-West African Shipowners' committees) (OJ 1992 L 134, p. 1, point 53 et seq.), that there was a collective dominant position.

55 According to the Commission, which refers in particular to the *Società Italiana Vetro* case (paragraphs 358 and 359), it is no longer possible to deny the existence of jointly held dominant positions. In that judgment, the Court referred moreover to liner conferences as an example of groups of undertakings which might be in such a position. According to the Court's judgment, a dominant position may be held by two or more independent economic entities, united by such close economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators in the same market. Lastly, the Commission argues that the concept of a collective dominant position does not render redundant Article 85 of the Treaty, which applies to horizontal cartels which, for want of sufficiently strong economic links between their members, do not give rise to a collective dominant position on their part. Article 85 prohibits certain forms of collusive conduct, whilst Article 86 applies to unilateral conduct. In this case, the shipping

conferences operated to a large degree as one and the same entity vis-à-vis their customers and competitors. Moreover, the applicants have never denied that such close economic links resulted from the conference agreement.

56 The Commission also denies that the application of Article 85 of the Treaty rules out the application of Article 86. In its view, the two articles may be applied cumulatively, provided that the requirements of both of them are met (Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309, paragraph 21). For this reason the Commission considers that it cannot be accused of 'recycling' facts constituting an infringement of Article 85 of the Treaty in order to subject them to Article 86. On the one hand, the existence of a block exemption does not in law preclude the possible application of Article 86 where the undertaking concerned has a dominant position on the relevant market (*Tetra Pak* v *Commission*, paragraph 25); moreover, Article 8(2) of Regulation No 4056/86 expressly provides for such a possibility. On the other hand, the abuses committed by Cewal were not covered by the block exemption granted by Regulation No 4056/86. The Commission further contends, contrary to what the applicants maintain, that there is no case-law which would justify ruling out the application of Article 86 of the Treaty to a situation resulting from collusion.

57 Furthermore, there can be no question of 'recycling' within the meaning of the *Società Italiana Vetro* case, since here the Commission has sufficiently established that each of the requirements of Article 86 is met.

58 The interveners argue that there is no possibility in this case that the facts establishing the existence of a collective dominant position, as found by the Decision, were 'recycled' within the meaning of the judgment in *Società Italiana Vetro*.

— Findings of the Court

59 The Court considers that the applicants' arguments involve two submissions: first, mistake of law in that issue was taken with the members' collective position on the market and, secondly, an insufficient statement of reasons.

60 As regards, in the first place, the alleged mistake of law to the effect that the concept of a collective dominant position refers only to collective abuse by undertakings each of which are in a dominant position, it is settled case-law — contrary to the applicants' claims — that Article 86 is capable of applying to situations in which several undertakings together hold a dominant position on the relevant market (*Società Italiana Vetro*, paragraph 358; Case C-393/92 *Almelo* [1994] ECR I-1477, paragraph 42; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraphs 32 and 33, and Joined Cases C-140/94, C-141/94 and C-142/94 *DIP and Others* [1995] ECR I-3257, paragraphs 25 and 26). Furthermore, whilst it is clear that merely occupying a dominant position cannot constitute an infringement of Article 86 of the Treaty, that argument has no bearing on this case, since the Commission penalized abuses of the dominant position and not the dominant position itself.

61 Turning, in the second place, to the alleged insufficient statement of reasons, the Court points out *in limine* that the statement of reasons of a decision adversely affecting a person must be such as to enable the person concerned to identify the matters which justify the measure adopted so that he can if necessary defend his rights and verify whether or not the decision is well founded, and to enable the Community judicature to exercise its power of review (Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30).

62 It should be stressed that the Court of Justice has held that, in order for such a collective dominant position to exist, the undertakings in question must be linked in such a way that they adopt the same conduct on the market (*DIP and Others*, paragraph 26).

63 In the Decision under review, the Commission expressly referred to Regulation No 4056/86. Article 1(3)(b) of that regulation defines a 'liner conference' as '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'. The Court considers that the applicants, which rely on several occasions on Regulation No 4056/86, do not deny that Cewal is a liner conference within the meaning of that provision.

64 The Court further points out that Article 8 of Regulation No 4056/86 states that Article 86 of the Treaty is still potentially applicable. As a result of the close relations which shipping companies maintain with each other within a liner conference, they are capable together of implementing in common on the relevant market practices such as to constitute unilateral conduct. Such conduct may involve infringement of Article 86 if the other requirements for the application of that provision are also met.

65 In this case, the Court finds, in view of the evidence set out in the contested decision, that the shipping companies formed a common entity, the Cewal shipping conference. It appears from the Decision that that structure formed a framework for a number of committees to which conference members belonged, such as the Zaïre Pool Committee and the Special Fighting Committee mentioned on many occasions in the Decision, in particular in points 26, 29, 31 and 32, and the Zaïre Action Committee referred to in point 74. In addition, as emerges from Article 1 of Regulation No 4056/86, by virtue of its nature that common structure is intended to define and apply uniform freight rates and other common conditions of carriage, which the Commission expressly finds to exist in point 61. Consequently, Cewal presents itself on the market as one and the same entity. Lastly, the Court observes, without its being necessary to consider at this stage how to categorize them, that the practices described in the Decision of which Cewal members stand accused reveal an intention to adopt together the same conduct on the market in order to react unilaterally to a change, deemed to be a threat, in the competitive situation on the market on which they operate. Those practices, which are described in precise terms in the Decision, constituted aspects of an overall strategy which Cewal members pooled their forces in order to implement.

66 Consequently, the Court considers, in the light of the Decision taken as a whole, that the Commission has sufficiently shown that it was necessary to assess the position of Cewal members on the relevant market collectively.

67 Lastly, it should be stressed that in the judgment in *Società Italiana Vetro* the Court held, at paragraph 360, that, for the purposes of establishing an infringement of Article 86 of the Treaty, it is not sufficient to 'recycle' the facts constituting an infringement of Article 85, deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market; that by virtue of that fact alone they hold a collective dominant position, and that their unlawful behaviour constitutes an abuse of that collective dominant position. In this case, contrary to what the applicants maintain, this cannot apply. The Commission has sufficiently proved that, quite apart from the agreements concluded between the shipping companies creating the Cewal conference, which are not contested, there were links between the companies such that they adopted uniform conduct on the market. In those circumstances, the Commission was fully entitled to consider that Article 86 could apply, subject only to the other requirements laid down by that provision being met.

68 In view of all those factors, the first limb of the plea must be rejected.

The dominant nature of Cewal members' position

— Arguments of the parties

69 In the applicants' view, a dominant position cannot be deduced merely from the existence of high market shares (Case 22/76 *United Brands* v *Commission* [1978] ECR 207 and Case C-62/86 *Akzo* v *Commission* [1991] ECR I-3359, paragraph 60). In this instance, however, the Commission based itself only on the market share held by Cewal. In any event, the fact that Cewal has an exclusive right in respect of maritime transport between Zaïre and ports in northern Europe, which is imposed by unilateral, sovereign act of the Zaïre authorities, constitutes an exceptional circumstance which may deprive the market shares of their possibly determinative nature (*Akzo* v *Commission*, paragraph 60). Moreover, the Commission did not take sufficient account of the fact that the commercial policy of Cewal and its members was largely dictated by the Zaïre authorities.

70 The applicants submit that, in the light of the case-law of the Court of Justice (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461), successful retention of a dominant position is an essential factor in determining whether a dominant position exists. Consequently the fact that, despite reducing their freight rates in order to cope with competition from G & C, Cewal members have lost market share — their market share amounting to only 64% — is sufficient to establish that there is no dominant position.

71 In the reply, the applicants claim that the Commission fictitiously increased Cewal's market share by ignoring transport to and from French ports, even though it considered that those routes constituted valid alternatives to the routes operated by Cewal members. They also aver that Cewal and G & C operated largely on separate markets, namely containers and conventional shipments and shipments of 'rolling stock', respectively.

72 The defendant argues that the pleas relating to the definition of the market are new and therefore inadmissible. It further maintains that, during the period covered by the Decision, Cewal's market share was approaching 90% and not, as the applicants now submit, without, moreover, specifying the origin of the figure, 64%. In principle, a high market share is in itself sufficient evidence of a dominant position, save in exceptional circumstances (*Hoffmann-La Roche* v *Commission*, paragraph 41). What is more, in point 59 of the Decision, the Commission mentioned relevant factors, other than market share, indicative of the existence of a dominant position. It points out that the applicants have not adduced any evidence capable of rebutting the presumption resulting from their market share. Lastly, the Commission denies that Cewal's price reductions and the loss of a certain amount of market share mean that it does not have a dominant position: dominant position cannot be synonymous with 'unassailable position'.

73 The interveners state that, irrespective as to how market shares are calculated, the market share of conference members is over 90%, with the result that in any event it occupies a dominant position.

— Findings of the Court

74 The Court finds *in limine* that the plea raised for the first time in the reply alleging that the relevant market was badly defined is a new plea within the meaning of Article 48(2) of the Rules of Procedure. As such, in the absence of any indications that that plea is based on matters of law or of fact which came to light in the course of the procedure, it is inadmissible. In these circumstances, it should be considered that the definition of the market employed in the Decision is correct.

75 In addition, as regards the alleged contradictory grounds — which the Court is entitled to take up of its own motion — in so far as the Commission allegedly considered routes to and from French ports to be a valid alternative yet, at the same time, did not take them into account when calculating market shares, suffice it to say that in point 54 of its Decision the Commission clearly indicated why it was unnecessary to include shipping lines from or to French ports in the market. In those circumstances, the Commission correctly took members' share of the relevant market as it had previously defined it. Accordingly, there can be no question of conflicting grounds.

76 As for the determination of the dominant position properly so-called, it should be recalled that it has been consistently held that a dominant position may be the outcome of a number of factors which, considered separately, would not necessarily be determinative. However, in the absence of exceptional circumstances, extremely large market shares are in themselves evidence of the existence of a dominant position (*Akzo* v *Commission*, paragraph 60, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 92, and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 109).

77 In this case, the parties do not deny that in 1988 and 1989, the period which was essentially taken into account for the purpose of fixing the fines, Cewal's market share exceeded 90%. The figure of 64% put forward by the applicants, which the Commission contests, relates to 1992 alone, since, according to figures produced by the applicants, their market shares in 1990 and 1991 were in excess of 80% and

70% respectively. It follows that, throughout the period concerned, Cewal's market shares remained high, despite their steady erosion. The Court considers that, whilst retention of market share may show that a dominant position has been retained (*Hoffmann-La Roche* v *Commission*, paragraph 44), a decline in market shares which are still very large cannot in itself constitute proof of the absence of a dominant position.

78 In addition, the Court finds that, contrary to the applicants' assertions, the Commission did not base its analysis solely on Cewal's market share. It is clear from point 59 of the Decision that other factors were taken into account, namely the significant difference between Cewal's market share and that of its principal competitor, the benefits derived from the contract with Ogefrem giving Cewal exclusivity, the large size of its network, its capacities and the frequency of its services and, lastly, the experience acquired by Cewal over several decades on the market concerned.

79 In light of those factors, the Court considers that the Commission was entitled to conclude that there was a dominant position.

80 For the rest, it should be pointed out that the applicants' argument based on Cewal's having an exclusive right as a result of the agreement with Ogefrem does not alter the finding that there was a dominant position. The origin of the applicants' market share cannot preclude the situation being characterized as a dominant position. On the contrary, the Court considers that the existence of an exclusive right is a factor which the Commission could usefully have taken into account in finding that there was a dominant position.

81 Likewise, since, according to settled case-law, the concept of a dominant position is an objective one, the alleged influence of the Zaïre authorities on Cewal's commercial policy or that of its members, assuming it proven, cannot affect the finding that there actually was a dominant position. The argument is therefore irrelevant.

82 In view all those factors, the first limb of the plea must be rejected in its entirety.

Second limb of the plea, alleging absence of abuse

The Cewal-Ogefrem agreement

— Arguments of the parties

83 In the reply, the applicants claim that, in breach of the rights of the defence, the Commission adopted different positions in the statement of objections, which referred to obtaining an exclusive right conferred by a sovereign act of the Zaïre authorities, and in the Decision, which accuses Cewal simply of having participated in the implementation of the agreement. Moreover, in paragraph 33 of the order in *CMBT* v *Commission*, the President of the Court of First Instance found that Article 3 of the operative part of the Decision did not order its addressees to terminate the cooperation agreement with Ogefrem.

84 As to the substance, in the first limb of their argument the applicants submit that Ogefrem is not an undertaking within the meaning of Articles 85 and 86 of the Treaty. Those articles are therefore not applicable to it (Case 30/87 *Bodson* v *Pompe Funèbres des Régions Libérées* [1988] ECR 2479, paragraph 18).

85 In the second limb of their argument, the applicants assert that the infringement of which they are accused cannot constitute a breach of Article 86 of the Treaty.

86 First, they submit that the cooperation agreement between Cewal and Ogefrem is not the outcome of pressure from Cewal, but was imposed upon it by the Zaïre authorities, in their interest. The agreement is in fact a concession agreement, by which Ogefrem, in accordance with the legal prerogatives conferred upon it by the

Zaïre authorities, grants an exclusive right to Cewal. The contractual provisions of the agreement concern only subsidiary rights. Article 86 of the Treaty does not preclude an undertaking enjoying a lawful exclusivity from taking steps to ensure that that exclusivity is respected.

87 The applicants add that the exclusivity granted to Cewal by Ogefrem is also a direct consequence of the 1981 bilateral agreement between Zaïre and Belgium, which entered into force in 1983. Article 3(3) of that agreement requires all cargoes in trade between Belgium and Zaïre to be shared out according to the 40: 40: 20 rule. It is therefore surprising that the Commission is objecting under Article 86 of the Treaty to an agreement provided for by an international commitment, the conclusion of which induced the Commission to initiate proceedings under Article 169 of the Treaty.

88 The applicants further submit that mere inducement of government action cannot constitute an abuse within the meaning of Article 86 of the Treaty. In that regard, they refer to United States case-law, in particular the 'Act of State' doctrine, according to which an undertaking cannot be condemned for having induced a government to adopt an act even if such act restricts competition (judgment of the US Supreme Court in *American Banana* v *United Fruit*, 213 US, 347-358, 53 L ed 826, 1909), and the 'Noerr-Pennington' doctrine, according to which transmitting information to government authorities with a view to influencing their conduct is not affected by anti-trust laws (judgments of the US Supreme Court in *Eastern Railroad Presidents Conference* v *Noerr Motor Freight Inc.*, 365 US 127, 5 L ed 2d 464, 1961, and in *United Mine Workers* v *Pennington*, 381 US 657, 14 L ed 2d, 1965). According to the applicants, Community law and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, on freedom of expression, are perfectly compatible with those principles. This is not contradicted by the OECD resolution adopted in 1987, to which the Decision refers, since that resolution is not binding. Lastly, by virtue of the principle of international comity, courts in one State should refrain from judging acts of another State carried out in its own territory.

89 In the third limb of their argument, the applicants maintain that the Decision does not establish that the members of the conference took part in devising or implementing the agreement. In this regard, they point out that the cooperation agreement between Cewal and Ogefrem concluded on 18 December 1985 antedated the decision of the Bank of Zaïre of 26 December 1985 suspending the obligation previously imposed to prove that the freight was transported by a ship operated by Cewal. The Commission could not therefore consider that the agreement was concluded in order to restore the protection which had been lost as a result of the decision of the Bank of Zaïre. In addition, when, in 1983, Zaïre decided to set up Ogefrem, Cewal already handled a significant portion of the market and hence the grant of exclusivity over the trade was not perceived as enhancing Cewal's position.

90 The applicants stress that the reason why they asked Ogefrem to comply with the terms of the agreement was first, that, contrary to the second paragraph of Article 1 of the agreement concluded with Cewal, Ogefrem had granted rights to an independent shipping operation without first consulting the conference and, secondly, that Cewal had suffered discrimination at the hands of Ogefrem to the advantage of G & C.

91 In the fourth limb of their argument, the applicants submit that, in the event of a conflict between the legislation of a third country and a provision of Community law, the Commission ought to have followed the procedure provided for in Article 7(2)(c)(i) and Article 9 of Regulation No 4056/86. By failing to do so, the Commission was guilty of a misuse of power.

92 In the fifth limb of their argument, the applicants maintain that, pursuant to the commitments given by the Commission in paragraph 63 of the document *Progress towards a common transport policy — Maritime Transport*, cited above, no fine could be imposed on the conference or its members without first withdrawing the block exemption enjoyed by liner conferences, as the Commission in fact admitted in the statement of objections. In so far as it ultimately fined the applicants without first withdrawing the exemption, the Commission infringed the principle of protection of legitimate expectation.

93 The defendant states that the Decision is confined to examining and finding against Cewal's conduct and cannot be regarded as a means of obtaining from African States what could not be gained by diplomatic means, namely free access to cargoes for all shipping companies, whether or not they belong to a conference.

94 It considers that the applicants' argument is based entirely on the contention, which it maintains is incorrect, that the agreement with Ogefrem was imposed on the undertakings by the Zaïre State. The Commission takes the view that, far from being an act of State or a State concession, which would have required legislation providing for an exclusive right and an administrative procedure for the grant of that right, the agreement between Cewal and Ogefrem constitutes a cooperation agreement freely negotiated between those parties. In its view, the content of the agreement, the negotiations preceding its conclusion and, lastly, the amendments made to the initial version following the negotiations, suffice to show that it was not a State concession.

95 To infer from the bilateral agreement between Zaïre and Belgium, under which all cargoes are to be shared according to the 40: 20: 20 rule, that the agreement at issue is a Zaïre 'act of State' is based, in the defendant's view, on a logical flaw, since the allocation of all cargoes, not just conference cargoes, in no way implies any exclusivity for the conference. The Commission further points out that the bilateral agreement entered into force on 13 April 1987, after the agreement with Ogefrem was concluded, and hence cannot serve as legal justification for it.

96 As regards the implementation of the agreement at issue, the Commission considers that the applicants do not deny that they made every effort to ensure application of the exclusivity clause. In the absence of a State concession, Cewal's efforts may be described only as an abuse of a dominant position, especially since they were not limited to seeking equal treatment by the Zaïre State of Cewal and G & C, but were directly aimed at eliminating G & C from the trade.

97 The defendant argues that the applicants' references to justified soliciting of government measures, based on rulings to be found in United States case-law, are irrelevant, since they are based once again on the hypothesis that the contract at issue is in the nature of a State concession.

98 In the Commission's view, the plea alleging infringement of the rights of the defence, which was raised for the first time in the reply, is inadmissible and, in any event, unfounded. The alleged divergence between the statement of objections and the Decision arises only from a misreading of the statement of objections. Moreover, the applicants cannot complain that the Decision finds them guilty of only part of the allegations made against them in the statement of objections, because the complaints relating to facts prior to 1 July 1987, such as the conclusion of the cooperation agreement, were not pursued. What is more, the Decision need not necessarily be a replica of the statement of objections (Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 14).

99 As regards the argument that it is not clear from the Decision to what extent the agreement itself is illegal, it appears unambiguously from the Decision that it only takes issue with facts dating from after 1 July 1987, the date when Regulation No 4056/86 entered into force, with the result that no action was taken against the conclusion of the agreement, which had taken place before that date.

100 The interveners submit that, contrary to the applicants' claims, the grant of shipping rights to G & C did not reflect discrimination between Cewal and G & C to the advantage of the latter, and that they complied with all the rules laid down by Ogefrem. In that regard, they state that, in common with the members of the Cewal conference, they are required to pay a deposit, to abide by the administrative rules and to pay a fine imposed by Ogefrem if they do not do so; and also to

pay commission at a rate apparently higher than that required of members of Cewal.

101 The interveners also contend that the cooperation agreement concluded between Ogefrem and Cewal converted a *de facto* monopoly into contractual exclusivity giving Cewal market power which it exercised in order to remove them from the market. In the absence of the cooperation agreement, Cewal would have concluded a contract of adhesion with Ogefrem of the same type as that concluded by G & C without any right to the exclusivity which enabled it to pressurize Ogefrem in order to secure observance of its contractual monopoly.

— Findings of the Court

102 The Court first observes that what is at issue in this case is abuse of a dominant position occupied by the members of Cewal. In order to determine whether Article 86 of the Treaty is applicable, the only question to be taken into account is whether the members of the conference are undertakings within the meaning of Article 86, which the applicants do not contest, and not whether Ogefrem so qualifies.

103 The Court further considers that, since the only matter in issue is unilateral conduct on the part of Cewal, the application of Article 86 of the Treaty does not turn on the exact nature of the agreement between itself and Ogefrem. Indeed, even assuming that the agreement is a concession, as the applicants claim, and that Cewal is therefore a concession holder, that would not be enough to exclude the conduct as constituting an abuse on its part (*Bodson* v *Pompe Funèbres des Régions Libérées*, paragraph 30).

104 In this case, the Court finds that, whereas the first paragraph of Article 1 of the cooperation agreement concluded between Cewal and Ogefrem provides for exclusivity for the benefit of members of Cewal in respect of all cargoes to be carried

within the field of activity of the conference, the second paragraph of that article makes express provision for possible derogations, subject to the two parties' agreement. It should be borne in mind in the first place that the Commission took the view that it could not bring proceedings against the actual conclusion of the agreement, since that occurred before Regulation No 4056/86 entered into force. In so far as the only matter at issue is the implementation of the cooperation agreement, the Court considers that the second paragraph of Article 1 of the agreement is sufficient to rule out any conflict of international law. Assuming that the agreement between Cewal and Ogefrem is a State concession and can, as such, be equated with an administrative provision of a third country within the meaning of Article 9 of Regulation No 4056/86; because Article 7 of that regulation covering cartels is not applicable in this case, it must be held that the agreement embodied a means of opening up to competition which could have altered its implementation so as to satisfy the requirements of Article 86 of the Treaty. Consequently, the conflict between the Treaty and the agreement did not follow inevitably from the structure of the agreement, which was capable of being affected by the parties in order to make it compatible with effective competition.

105 It appears from this finding that the Decision rightly sets out to analyse Cewal's attitude in implementing the agreement. Ogefrem unilaterally granted approval to an independent shipping operation, in principle to the extent of 2% of aggregate Zaïre trade, although its share subsequently increased. In view of this, the members of Cewal made approaches to Ogefrem in order to have G & C removed from the market. It is clear from the many documents to which the Commission refers in the Decision that the members of Cewal reminded Ogefrem of its obligations and envisaged in particular reestablishing the exclusive system of deferred rebates unless Ogefrem changed its attitude. The Court observes that, although the applicants challenge the meaning to be attached to those approaches and their characterization as an abusive practice, they do not deny that they took place. It further appears from the minutes of the meeting of the Special Fighting Committee of 18 May 1989 that those approaches formed part of a strategy designed to remove the independent shipping operation G & C.

106 In order to assess that attitude it should be borne in mind that it has been consistently held that Article 86 of the Treaty imposes on an undertaking in a dominant position, irrespective of the reasons for which it has such a dominant position, a special responsibility not to allow its conduct to impair genuine undistorted

competition on the common market (Case T-83/91 *Tetra Pak* v *Commission*, paragraph 114). Thus Article 86 covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened (ibid.).

107 Whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen this dominant position and thereby abuse it (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 69).

108 The Court considers that an undertaking in a dominant position which enjoys an exclusive right with an entitlement to agree to waive that right is under a duty to make reasonable use of the right of veto conferred on it by the agreement in respect of third parties' access to the market. In this case, regard being had to the factual evidence described above, the members of Cewal did not do so.

109 In those circumstances, the Court considers that the Commission was entitled to take the view that, by actively participating in the implementation of the agreement with Ogefrem and repeatedly asking that it be strictly complied with as part of a plan designed to remove the only independent shipping operation for which Ogefrem had authorized access to the market, the members of Cewal infringed Article 86 of the Treaty.

110 The applicants' argument that encouraging a government to take action is incapable of constituting an abuse is irrelevant, since no charge of such a practice has been made in this case.

111 In addition, the applicants cannot rely on any legitimate expectation based on paragraph 63 of the aforementioned document *Progress towards a common transport policy — Maritime Transport*, since that paragraph is concerned only with the relationship between block exemption and individual exemption and has no bearing on the possibility of finding an abuse within the meaning of Article 86 of the Treaty and of imposing a fine on that account.

112 The Court further observes that the applicants cannot effectively claim that the exclusivity granted to them by the agreement with Ogefrem is provided for in the bilateral agreement between Belgium and Zaïre, since the bilateral agreement did not enter into force until 13 April 1987, that is to say, several months after the agreement between Cewal and Ogefrem was concluded. In addition, Article 3(3) of the bilateral agreement, on which the applicants rely, is concerned with the regime applied by the contracting parties to ships operated by their respective national shipping companies and not by any given liner conference.

113 Lastly, the Court finds that the plea alleging infringement of the rights of the defence, which was first raised in the reply, is a new plea within the meaning of Article 48(2) of the Rules of Procedure. In the absence of any indication that that plea is based on matters of law or of fact which came to light in the course of the procedure, it must be declared inadmissible. In any event, it should be recalled that, according to settled case-law, the decision is not necessarily required to be a replica of the statement of objections (Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 59). The fact that the statement of objections intended to take issue both with the obtaining of the exclusive right and with Cewal's repeated approaches with a view to its implementation, while the Decision took issue solely with the latter, cannot affect the applicants' rights of defence.

114 In those circumstances, the applicants' arguments relating to the cooperation agreement concluded between Cewal and Ogefrem must be rejected.

Use of fighting ships

— Arguments of the parties

115 The applicants' arguments essentially make two points. In the first place, the applicants contest the very notion of fighting ships; in the second place, they submit that the practice with which they are charged is not capable of constituting an abuse of a dominant position within the meaning of Article 86 of the Treaty.

116 In the first limb of their argument, concerning the concept of fighting ships, the applicants observe that in the defence the Commission had indicated that none of the facts going to constitute the infringement is in fact material, even though the facts are invoked in the Decision, and that the practice of fighting ships differed from that of predatory prices. The defendant no longer accuses the applicants of anything more than their having deviated from their normal rates in a deliberate attempt to eliminate a competitor. If the Decision had to be read as being based on that new definition, there would be an infringement of the rights of the defence in that the parties would have been condemned for a practice of which they were not accused in the statement of objections. In addition, the Commission is not entitled to supplement the statement of reasons of the Decision in the defence, thereby showing that Article 190 of the Treaty has also been infringed.

117 In the second limb of its argument, on the categorization of the practice employed in this case, the applicants point out that the fact that the members of Cewal themselves used the terminology relating to fighting ships in various minutes cited by the Commission does not relieve the Commission of the obligation to examine whether the conditions for the application of Article 86 are actually satisfied.

118 First, as regards sailing dates, since in point 74 of the Decision the Commission finds that Cewal neither altered its timetables nor placed a vessel on berth to sail in competition with G & C, one of the conditions for finding the alleged practice is manifestly not met.

119 Secondly, the applicants maintain that they merely matched G & C's rates without ever trying — save in the case of rates for the delivery of passenger cars — to offer prices lower than those of the independent shipping operation. In order to deal with Ogefrem's discrimination against Cewal in favour of G & C, the initiation of a price war by the independent shipping operation and pressure from customers seeking rates similar to G & C's, Cewal was obliged to react in order to adapt to a new competitive situation. Such conduct does not constitute an abuse (*BPB Industries and British Gypsum* v *Commission*, paragraph 69).

120 The applicants argue that, by basing itself simply on the 'multilateral' character of the fixing of freight rates in order to find a violation of Article 86, the Commission merely 'recycled' facts which might have justified the application of Article 85(1) of the Treaty, but qualified for exemption under Article 1(3)(b) and Article 4 of Regulation No 4056/86. The applicants therefore maintain that any change in prices in order to match those of a competitor is exempted.

121 Thirdly, the applicants argue that the Commission established only a reduction in profit margins and not that the members of the conference suffered losses, although this is a characteristic feature of an exclusionary pricing policy prohibited by Article 86 of the Treaty (*Akzo* v *Commission*, paragraphs 71 and 72). Similarly, the Commission has not shown that Cewal had a 'war chest' enabling it to undertake a predatory pricing campaign.

122 In reality, according to the applicants, who refer to national case-law and academic writings, the evidence cited by the Commission is not relevant. In particular, the concept of fighting ships assumes that members of the conference sustained 'losses'. It should therefore be equated with practising predatory prices and differs from merely matching rates to those of a competitor in order to compete with it on fair terms.

123 Fourthly, the applicants consider that the other practices taken issue with in the Decision cannot constitute an abuse. Since maritime transport timetables are published in the press, the Fighting Committee cannot be reproached with informing members of the conference of the sailing dates of G & C ships. Likewise, since Regulation No 4056/86 authorizes the fixing of conference freight rates by common agreement, the Decision could not find against the fixing of fighting rates by common agreement. As to the fact that the fighting rates were fixed by reference to those of the independent shipping operation, that is inherent to normal competitive pricing. Lastly, the fact that the differences between the normal rates and the fighting rates were borne by members of Cewal is a normal consequence of the pooling of risks exempted by Regulation No 4056/86.

124 Fifthly, the applicants argue that since, at any given time, all shippers were treated in the same way, the Commission wrongly accused them in point 83 of the Decision of discriminatory pricing within the meaning of Article 86(c) of the Treaty, which complaint was not, moreover, set out in the statement of objections.

125 Lastly, the applicants assert that, in determining that the practice in question constituted an abuse, the Commission failed to take account of a number of crucial factors.

126 Thus, the fact that during the period in question G & C's market share increased from 2% to 25% was ignored by the Commission. Under Article 86 of the Treaty the lack of effect of a practice on the market is sufficient to preclude objections to it (*Hoffmann-La Roche* v *Commission*, paragraph 91).

127 In addition, the Commission had no regard to the fact that G & C's activities increased in breach of the monopoly legally granted to Cewal. In those circumstances, the approaches made by the members of the conference in order to safeguard that monopoly cannot be described as an abuse.

128 Lastly, the Commission failed to take account of the fact that the maritime transport sector is subject, in competition law, to more flexible, exceptional rules. Accordingly, the Commission has accepted that the coordination of rates as between liner conferences and independent shipping companies may be exempted [Commission notice pursuant to Article 23(3) of Council Regulation (EEC) No 4056/86 and Article 26(3) of Council Regulation (EEC) No 1017/68 concerning case Nos IV/32.380 and IV/32.772 — Eurocorde Agreements (OJ 1990 C 162, p. 13)]. Article 86 of the Treaty does not apply to the practices in question as long as block exemption has not been withdrawn, and the reference to Case T-51/89 *Tetra Pak* v *Commission* is irrelevant in this case. Furthermore, where an undertaking benefits from an exemption or has received a 'comfort letter', no fine can be imposed without prior withdrawal of the exemption [Commission decision of 23 December 1922 relating to a proceeding pursuant to Article 85 of the EEC Treaty against Schöller Lebensmittel GmbH & Co. KG — Cases IV/31.533 and IV/34.072 (OJ 1993 L 183, p. 1, points 148 to 151)].

129 The Commission denies that there is any difference between the definition of fighting ships in the statement of objections and the Decision, on the one hand, and in the defence, on the other. It contends in particular that, contrary to the applicants' claims, the Decision does not refer to the practice of predatory pricing.

130 As to the substance, the Commission submits that the essential question is not terminological. All that matters is whether the conduct of members of Cewal constituted normal and legitimate competition (*Hoffmann-La Roche* v *Commission*, paragraph 91; Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 70; *Akzo* v *Commission*, paragraphs 69 and 70). In this case, the practice of fighting ships constituted an abuse in that it aimed, by means other than those of normal competition, to eliminate Cewal's only competitor, G & C.

131 The Commission contends that the criteria mentioned by the applicants are not essential elements of the practice known as fighting ships or of conduct constituting an abuse within the meaning of Article 86 of the Treaty.

132 Thus, it makes no difference whether Cewal had to change the departure schedules for its members' ships. Since Cewal's sailings served the route concerned on a very frequent basis whereas G & C's vessels only sailed every 35 or 36 days, Cewal could readily designate as fighting ships vessels which had already been scheduled.

133 Likewise, it is not essential for the rates charged to be lower than those of G & C. It is enough for them to be equal to or lower than those of the competitor whose elimination is sought. The Commission adds that the applicants cannot rely on any exemption under Regulation No 4056/86, since the conference's selective rate reductions were intended to remove its sole competitor from the market.

134 Lastly, it was not essential either for actual financial losses to have been made. Unlike in the case of predatory pricing practices, it is enough for there to have been losses of income, which occurred in this instance, as witness various minutes of meetings of the Special Fighting Committee and the Zaïre Pool Committee and a telex message from Woermann-Linie of 19 May 1988.

135 As for the alleged absence of effect of the practice, the Commission submits that the relevant criterion for the application of Article 86 of the Treaty is the exclusionary conduct pursued by an undertaking. It is irrelevant whether that conduct actually did or did not have a restrictive effect on competition. In this case, moreover, such an effect cannot be ruled out. In this regard, it is significant that the increase in G & C's market shares — which at the material date were around 5% to 6% — occurred after the practices in question were terminated.

136 The Commission contends that neither Cewal's defence of its monopoly — which the Commission denies was lawful —, nor the alleged existence of acts of unfair competition on the part of G & C, nor the exemption granted by Regulation No 4056/86 can justify recourse to abusive practices.

137 The interveners claim that the conference admits that it carried on the fighting ships practice condemned by the Commission and that it cannot justify that practice in terms of the new competitive situation resulting from G & C's entry into the market. They confirm that the criteria employed by the Commission are well founded and observe that it is clear from the documents referred to in the Decision and from Cewal's reply to the statement of objections that those criteria are met in this case.

— Findings of the Court

138 In the first limb of their argument, relating to the concept of fighting ships, the applicants raise two pleas, one alleging infringement of the rights of the defence, the other infringement of Article 190 of the Treaty. The applicants' reasoning is based on the allegation that, in its defence, the Commission altered the definition of the practice with which they are charged in the Decision.

139 The Court observes that, in points 73 and 74 of the Decision, the Commission identified three factors constituting the practice of fighting ships used by members of Cewal to drive out its competitor G & C, namely: designating as fighting ships those Cewal vessels whose sailing dates were closest to the sailings of G & C ships without altering its scheduled timetables; jointly fixing fighting rates different from the rates normally charged by Cewal members so that they were the same or lower than G & C's advertised prices; and the resulting decrease in earnings, which was borne by Cewal's members. It is stated in point 80 of the Decision that this practice differs from predatory pricing. The applicants complain that the Commission stated in the defence, first, that it was unnecessary for a fighting ship to have been specially placed on berth, that the prices should undercut the competitor's and that the operation should result in actual losses and, secondly, that the practice in question was different from that of predatory pricing.

140 The Court finds that those aspects do not introduce a new definition of the practice of fighting ships by comparison with the Decision, but are fully consistent therewith. Since the premiss underlying the applicants' reasoning is without foundation, both pleas raised against the concept of fighting ships must be rejected.

141 As for the second limb of the applicants' argument, concerning the categorization of the practice in question having regard to Article 86 of the Treaty, the Court finds in the first place that, in fact, the applicants do not contest that the three criteria constituting the test for the practice of fighting ships, as adopted by the Commission, were satisfied. They maintain that the Commission has failed to establish that ships were specially placed on berth as fighting ships but adduce no evidence to show that they did not use as fighting ships vessels which had already been scheduled, although that constitutes the first criterion adopted. They accuse the Commission of not having established that their prices were lower than those of G & C, but have not shown that their prices were not equal to or lower than those of their competitor, which constitutes the second criterion. On the contrary, they admit that they aligned their prices on those of G & C and, in one specific case, charged lower prices. Lastly, they accuse the Commission of having failed to establish that losses were made, which would have shown that predatory pricing was practised, but have adduced no evidence capable of showing that they did not sustain losses of earnings, although that is the third criterion used by the Decision. In contrast, they admit having reduced their earnings.

142 Consequently, the facts going to make up the infringement, as set out in the Decision, must be regarded as having been established.

143 In reality, the applicants' argument seeks to show that the practice, as so defined, does not constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty.

144 In the first place, they assert to that end that the practice of which the Commission accuses them does not correspond with the definition which, in their view, is generally employed when the practice in question is penalized as anti-competitive. That argument cannot be accepted. The Court considers that it is not necessary to decide whether or not the definition employed by the Commission corresponds with other definitions put forward by the applicants. The only question is whether the practice as the Commission defined it in its decision, without being contradicted by the citations of learned writings and legislation embodied in the Decision, constitutes an abuse of a dominant position within the meaning of Article 86 of the Treaty.

145 Secondly, the applicants maintain that the Commission has failed to prove that they exceeded what is normal in competition in implementing the practice complained of.

146 As has already been pointed out, it has been consistently held that whilst the fact that an undertaking is in a dominant position cannot deprive it of entitlement to protect its own commercial interests if they are attacked; and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its real purpose is to strengthen this dominant position and thereby abuse it (in particular, *BPB Industries and British Gypsum* v *Commission*, paragraph 69).

147 In this regard, the Court considers, having regard in particular to the minutes of the Special Fighting Committee cited in the footnote to point 32 on page 2 of the Decision, and especially the minutes of 18 May 1989, which refer to 'getting rid' of the independent shipping operation, that the Commission has established to a sufficient legal standard that that practice was carried out with a view to removing Cewal's only competitor on the relevant market. In addition, the Court considers that whilst the mere name given to the practice used by the members of Cewal is not sufficient to characterize it as an infringement of Article 86, the Commission was entitled to regard the use by professionals in the international maritime transport sector of a well-known description in that sector of activity and the establishment of a Special Fighting Committee within the conference as disclosing an intention to implement a practice designed to affect the operation of competition.

148 Since the purpose of the practice was to remove their only competitor, the Court considers that the applicants cannot effectively argue that they merely reacted to an infringement by G & C of the monopoly legally granted to Cewal, compensated for discrimination which they suffered at the hands of Ogefrem, entered into a price war started by the competitor or even responded to expectations of their customers. Even assuming them to be proven, those circumstances could not render the response put into effect by the members of Cewal reasonable and proportionate.

149 Thirdly, the applicants rely on the increase in G & C's market share in order to maintain that the practice complained of had no effect and hence that there was no abuse of a dominant position. The Court however considers that, where one or more undertakings in a dominant position actually implement a practice whose aim is to remove a competitor, the fact that the result sought is not achieved is not enough to avoid the practice being characterized as an abuse of a dominant position within the meaning of Article 86 of the Treaty. Besides, contrary to the applicants' assertions, the fact that G & C's market share increased does not mean that the practice was without any effect, given that, if the practice had not been implemented, G & C's share might have increased more significantly.

150 Fourthly, the applicants maintain that, in point 83 of the Decision, the Commission accused the members of Cewal of imposing on shippers dissimilar conditions for equivalent transactions contrary to Article 86(c). In so doing, the Commission allegedly infringed the applicants' rights of defence and committed a manifest error of assessment. The Court observes in this regard that, whilst point 83 of the Decision admittedly did make that allegation, it is not repeated in the operative part of the Decision and does not constitute necessary support therefor. Consequently, if the pleas and arguments put forward in this connection by the applicants were well founded, this would not result in the annulment — not even the partial annulment — of any component of the operative part of the Decision (Case T-138/89 *Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken* v *Commission* [1992] ECR II-2181, paragraph 31). In the absence of any interest on the applicants' part in pursuing this point, the Court considers that there is no need to consider those pleas.

151 Fifthly, the applicants argue that the Commission wrongly categorized certain practices as abuses, namely the fact that the Fighting Committee informed members of Cewal of sailings scheduled by the independent shipping operation and that fighting rates were fixed by common agreement in the light of the rates offered by G & C. This argument is manifestly unfounded. The Court finds that the Commission in no wise considered those 'other practices' in themselves to be abuses within the meaning of Article 86, but identified them as factual evidence, which moreover the applicants do not dispute, on the basis of which it established in particular that the three criteria constituting the practice at issue were satisfied.

152 Lastly, the applicants base a number of arguments on the fact that the maritime transport sector is subject to derogating rules in the field of competition law. The Court finds first that the Eurocorde and Schöller Lebensmittel cases, relied on by the applicants, related to the application of Article 85 of the Treaty and therefore have no bearing on the categorization of the fighting ships practice as an infringement of Article 86 of the Treaty. Secondly, the argument that Article 86 is inapplicable so long as the exemption granted by Regulation No 4056/86 has not been withdrawn is based on the assertion that that exemption applies to both Article 85 and Article 86. In that regard, it is sufficient to point out that, in view of the wording of Article 86 of the Treaty, no exemption may be granted in respect of an abuse of a dominant position (Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803, paragraph 32) and that, in view of the principles governing the hierarchy of legislation, the grant of an exemption by means of a measure of secondary legislation cannot derogate from a provision of the Treaty, in this case Article 86 (Case T-51/89 *Tetra Pak* v *Commission*, paragraph 25). Consequently, the applicants' argument is manifestly unfounded. Thirdly, the argument based more specifically on Article 1(3)(b) and Article 4 of Regulation No 4056/86, according to which, in the applicants' view, the change in prices to match those of the competition is exempted, is irrelevant, since such a change does not constitute the abusive practice of which they are accused.

153 In the light of all those factors, the Court considers that the Commission was lawfully entitled to conclude that the practice of fighting ships, as defined in the Decision, constituted an abuse of a dominant position within the meaning of Article 86 of the Treaty.

The loyalty contracts

— Arguments of the parties

154 The applicants denounce in general terms the lack of clarity of the Decision, and maintain that this in itself justifies its annulment. The Commission's position implies that the same facts are capable of justifying the application of Articles 85 and 86 of the Treaty. However, infringement of Article 85 warrants only a recommendation, whereas infringement of Article 86 gives rise to liability to pay a fine.

155 In the first limb of their argument, the applicants submit that the Commission is not entitled to declare that the loyalty contracts concluded by Cewal infringe Article 86 of the Treaty and impose a fine on that account without withdrawing the benefit of block exemption. In that regard, the fact that the members of Cewal occupy a collective dominant position is not in itself sufficient reason for declaring that the contracts are in the nature of an abuse.

156 In the first place, such an interpretation would deprive Regulation No 4056/86 of its effectiveness. If, as the Commission seems to consider, liner conferences are to be regarded as the example 'par excellence' of agreements establishing a collective dominant position and if loyalty contracts constitute an abuse of such a position justifying the imposition of a fine, a regulation simply granting exemption under Article 85(3) of the Treaty would serve no purpose.

157 Secondly, Regulation No 4056/86 sought to exempt loyalty contracts under both Article 85 and Article 86. That regulation, which was adopted by the Council, lays down, according to its very wording, rules for the application of Articles 85 and 86 of the Treaty to international maritime transport. To that extent it differs from Regulation (EEC) No 2349/84 (OJ 1984 L 219, p. 15), which was at issue in Case T-51/89 *Tetra Pak* v *Commission*. That regulation, adopted by the Commission, was concerned only with the application of Article 85(3) of the Treaty.

158 Thirdly, the applicants claim that the exemption must be withdrawn before the conduct to which it relates may be regarded as being prohibited by Article 86 of the Treaty. In their view, Article 8(2) of Regulation No 4056/86 implicity indicates that the exemption granted by Articles 3 and 6 of the regulation covers both infringements of Article 85 and infringements of Article 86 of the Treaty. So long as conduct is covered by the exemption, it cannot give rise to a fine. In addition, in view of the fact that withdrawal of an exemption cannot be retroactive (Case T-51/89 *Tetra Pak* v *Commission*, paragraph 25), no fine could be imposed in respect of the past, even if the Commission had withdrawn the benefit of the exemption, as it had initially envisaged in the statement of objections. It follows

from Article 8(2) of the regulation that it is not until it has withdrawn the benefit of the exemption that the Commission is entitled to take, pursuant to Article 10 of Regulation No 4056/86, the appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty. Such measures cannot include the imposition of a fine, since the purpose of a fine is to punish past behaviour.

159 Lastly, the applicants point out that, under Article 8(3) of the regulation, before taking a decision under Article 8(2), the Commission may address to the conference concerned recommendations for termination of the infringement. In so far as it simultaneously addressed a recommendation and a decision to the undertakings concerned, the Commission therefore also infringed that provision.

160 In the second limb of their argument, the applicants deny that the loyalty contracts are capable of constituting an abusive practice within the meaning of Article 86 of the Treaty. The Commission's assertion that Cewal's overall conduct constituted an abuse is not substantiated at all. In fact, the Commission is simply attempting to get the Court to change the clear wording of the regulation.

161 In point 91 of the Decision, the Commission finds that the loyalty contracts offered by Cewal fail to comply in three respects with Article 5(2) of Regulation No 4056/86. The applicants contest that finding. The contract cannot be criticized for failing to spell out the rights of users or the obligations of the conference, when this is intrinsically the purpose of a contract; as regards notice of termination, the applicants state that after the hearing on 22 October 1990 the contracts were amended; lastly, the contracts expressly indicate the circumstances in which shippers may be released from their obligations and, since the contracts are not imposed, the regulation does not require that specified lists of cargoes should be excluded from their scope.

162 In any event, the alleged contradiction relates only to minor aspects of the contracts. Since, according to the last paragraph of point 91 of the Decision, this contradiction was to result only in a recommendation, the applicants consider that it cannot be the reason for the fine. They cannot be accused of any abuse other than partial non-compliance with the letter of Article 5(2) of Regulation No 4056/86 justifying the imposition of a fine.

163 Accordingly, in the first place the applicants claim that it cannot be objected that the conferences concluded 100% loyalty contracts. They observe that that practice has to be considered in the light of the particular provisions applicable in the international maritime transport sector. Contrary to the generally accepted approach (*Hoffmann-La Roche* v *Commission*), Regulation No 4056/86 authorizes the conclusion of 100% loyalty contracts. In those circumstances, the Commission is not entitled to condemn the alleged effects on competition inherent in such contracts, since they are themselves exempted. A loyalty contract inherently restricts users' freedom, reduces G & C's ability to maintain its activity on a durable basis and amounts to applying dissimilar conditions to equivalent transactions.

164 In addition, the Commission has not produced any evidence that 100% loyalty contracts were imposed on shippers. The mere fact that a contract contains such a provision is not enough to prove that that was the case; otherwise the whole effect of the regulation would be negated. Likewise, the fact that the contracts covered goods sold free on board ('fob') is inevitable in a 100% loyalty arrangement and does not prove that the contracts were imposed.

165 Secondly, the applicants deny that blacklists of disloyal shippers were drawn up. If that expression was used in the context of Cewal, it was merely to identify shippers using non-conference lines so as to deprive them of the benefits of the loyalty contract. Moreover, in practice not even that sanction was applied, as the Commission was informed during the administrative procedure. What is more, even supposing that such lists existed, the applicants point out that the tenth recital in the preamble to Regulation No 4056/86 allows penalties to be imposed on shippers who evade their obligation. Drawing up a list of such shippers is inherent in a system of 100% loyalty contracts, which is exempt.

166 Lastly, the applicants argue that the Court has held that an undertaking in a dominant position abuses it if it concludes loyalty contracts binding customers exclusively, unless such agreements are rendered permissible by exceptional circumstances under Article 85(3) of the Treaty (*Hoffmann-La Roche* v *Commission*, paragraph 90). In this case, the fact that there was an express exemption provided for by Regulation No 4056/86 constituted an exceptional circumstance.

167 The defendant considers that a distinction must be drawn between, on the one hand, the lack of conformity of the loyalty contracts concluded between Cewal and the shippers with Article 5(2) of Regulation No 4056/86, and the fact that Cewal imposed 100% loyalty contracts, extended their effects to goods sold fob and drew up blacklists of defaulting shippers, on the other. The latter circumstances constitute the abuse complained of, whereas the non-conformity of the contracts with Article 5(2) of Regulation No 4056/86 gave rise only to a recommendation addressed to Cewal to bring its contracts within the terms of the regulation.

168 The lack of conformity of the loyalty contracts with the terms of the regulation lies, first, in the failure to mention the rights of users and the obligations of members of the conference, secondly in the contracts' failure to list the cargoes excluded from their scope and, lastly, in the inappropriate provisions regarding notice.

169 As regards the imposition of the 100% loyalty contracts, the Commission emphasizes that shippers had no choice but to accept a 100% loyalty contract or to pay the full rate, thereby ruling out any rebate in the event of partial loyalty: such an attitude on the part of a conference in a dominant position, with over 90% of the market at the material time, is tantamount to imposing such contracts on shippers. Such compulsion constitutes an abuse (*Hoffmann-La Roche* v *Commission*). The applicants cannot effectively claim that such conduct falls within the exemption granted by Regulation No 4056/86. Whilst Article 5(2) of the regulation authorizes loyalty contracts, it nevertheless prohibits their being imposed unilaterally. Lastly,

the Commission argues that the application of the loyalty clause to goods sold fob accentuates their abusive nature. When goods are sold fob, the purchaser designates the vessel on which they are to be shipped, which has the effect of extending the loyalty obligation to goods not shipped by the seller.

170 As for the blacklists of disloyal shippers, the Commission contends in the first place that they cannot be regarded as having been exempted by Regulation No 4056/86. In this regard, the Commission reiterates that, in its view, the minutes of the meetings of the Zaïre Pool Committee of 28 June 1988 and 20 April 1989 prove the existence and the purpose of those lists. Their purpose was to penalize disloyal shippers by depriving them of usual adequate service.

171 Moreover, the applicants' argument to the effect that no fine may be imposed so long as the loyalty contracts are covered by the exemption is without foundation, since the fact that certain conduct benefits by an exemption under Article 85 has no bearing on any application of Article 86. The *Tetra Pak* case-law is perfectly applicable to this case.

172 The interveners contend that the operation by a liner conference enjoying a dominant position of blacklists of shippers who ship cargo with G & C instead of with Cewal with a view to excluding such shippers from normal conference treatment by means of 100% loyalty contracts, constitutes conduct intended to eliminate effective competition from G & C and, therefore, an abuse of a dominant position. Article 8 of Regulation No 4056/86 states that the regulation does not preclude the application of Article 86 of the Treaty; moreover, any other interpretation would, moreover, be without foundation.

— Findings of the Court

173 The Court finds that, in its examination of Cewal's loyalty contracts in points 84 to 91 of the Decision, the Commission identified two separate infringements, one of Article 85 and the other of Article 86 of the Treaty. The first consists in the conclusion of contracts which do not fulfil in every respect the obligations laid

down in Article 5 of Regulation No 4056/86 for exemption under Article 3; the second consists in the imposition of 100% loyalty contacts, the inclusion of goods sold fob and the use of black lists of disloyal shippers with a view to penalizing them.

174 As far as the first infringement is concerned, the Commission found that the loyalty contracts in question do not meet three of the conditions laid down by Article 5(2) of Regulation No 4056/86. Since the applicants contest that assertion, each of the three complaints set out by the Commission must be considered.

175 First, according to the first indent of Article 5(2)(a) of the regulation, 'under the system of immediate rebates each of the parties shall be entitled to terminate the loyalty arrangement at any time without penalty and subject to a period of notice of not more than six months'. However, it appears from the contract dated 10 January 1989 produced by the applicants that 'Each party may put an end to the present contract by giving a six months previous notice, either on the first of January or on the first of July of any year'. Consequently, the Commission rightly found that the contracts were not in conformity in that respect.

176 Secondly, under Article 5(2)(b)(i), the conference has to set out 'a list of cargo and any portion of cargo agreed with transport users which is specifically excluded from the scope of the loyalty arrangement'. Yet such a list does not appear from the contract produced. In addition, contrary to the applicants' assertions, it does not appear from Article 5(2)(b)(i) that such a list has to be drawn up only in the case of loyalty contracts imposed unilaterally by the conference.

177 Thirdly, Article 5(2)(b)(ii) of the regulation provides that the conference must set out a 'list of circumstances in which transport users are released from their obligation of loyalty'. Two such circumstances are expressly mentioned in the first and second indents of that provision of the regulation as having to appear on such a list: neither of those circumstances appear in the contracts concluded by Cewal.

178 Consequently, the Court considers that the Commission rightly found that the loyalty contracts in question were not in conformity with the provisions of Regulation No 4056/86. It was therefore correct in law for the Commission to have recommended members of Cewal, pursuant to Article 7 of the regulation, to amend the terms of their loyalty contracts in order to conform with Article 5(2) of the regulation.

179 The Court further considers that the fact the loyalty contracts were amended following the hearing on 22 October 1990, but before the Decision was adopted — according to the applicants, moreover, only as regards the period of notice — cannot render Article 5 of the Decision void. Such an amendment would merely cause the recommendation addressed to the members of Cewal to be without effect.

180 As regards the second infringement, the applicants put forward two sets of observations, one concerning the categorization of the practice at issue under Article 86 of the Treaty, the other concerning the relationship between Article 85 and Article 86 of the Treaty in the context of Regulation No 4056/86.

181 In the first limb of their argument, the applicants assert that the practice with which the Commission takes issue does not amount to an abuse of a dominant position. It should be called to mind, *in limine*, that the fact that Cewal's loyalty contracts did not comply in three respects with Regulation No 4056/86 was not taken into account in connection with Article 86 of the Treaty, but only in the context of the assessment carried out under Article 85 of the Treaty. Consequently, the applicants' argument that the lack of conformity in three allegedly minor respects is incapable of justifying fines as large as those imposed has no bearing on the consideration of the practices with which they are charged under Article 86 of the Treaty.

182 In this case, it is therefore necessary to determine whether, as the applicants claim, the Commission was wrong in concluding that the 100% loyalty contracts were imposed, that those contracts covered fob sales and that blacklists of disloyal shippers were drawn up with a view to penalizing them.

183 In the first place, the Court considers that, as the Commission has pointed out, the fact that the members of Cewal, which at the material time had more than 90% of the market, offered shippers only 100% loyalty contracts left no choice between obtaining a rebate in the event that the shipper agreed to ship all its goods by Cewal or no rebate in all other cases, and was in fact tantamount to imposing such contracts. The applicants cannot effectively claim that such a practice is exempt as regards Article 85 of the Treaty; it is sufficient to observe in this connection that, under Article 5(2)(b)(i), 100% loyalty agreements may be offered, but may not be imposed unilaterally.

184 Secondly, the Court considers that the Commission correctly decided that the loyalty contracts in question included fob sales; such a practice means that the seller has to bear an obligation of loyalty even when he is not responsible for shipping the goods.

185 Thirdly, the Court finds that the minutes of the Zaïre Pool Committee of 28 June 1988, which are expressly cited in a footnote to point 29 on page 3 of the Decision, refer to blacklists of disloyal shippers who no longer qualify for normal adequate conference treatment for their other shipments. After listing G & C vessels which made sailings between January and April 1989, later minutes of that committee, also cited in that footnote, stated under a heading relating to G & C's activity that the system of blacklists was working. Moreover, the Court considers that the use of the expression 'blacklists', albeit not enough to categorize a practice as abusive, testifies to the fact that the lists in question were not, as the applicants maintain, merely drawn up for statistical purposes. Lastly, it must be emphasized that, contrary to what the applicants seem to suggest, drawing up such lists cannot be regarded as being exempted by any provision of Regulation No 4056/86.

186 In those circumstances, the Court considers that the Commission was entitled in law to conclude that the practice taken as a whole had the effect of restricting users' freedom and thereby of affecting the competitive position of Cewal's only competitor on the market (*Hoffmann-La Roche* v *Commission*, paragraph 90).

187 In view of all of these factors, the first limb of the applicants' argument must be dismissed.

188 In the second limb of their argument, the applicants submit, first, that Regulation No 4056/86 grants exemption in respect of both Article 85 and Article 86 of the Treaty. However, as has already been pointed out, Article 86 provides for no possibility of exemption and, in view of the principles governing the hierarchy of legislation, a measure of secondary legislation cannot derogate from a provision of the Treaty. On the contrary, the Court points out that Article 8(1) of the regulation provides that 'the abuse of a dominant position within the meaning of Article 86 of the Treaty shall be prohibited, no prior decision to that effect being required'. Consequently, in so far as the applicants' argument is based on the premiss that Regulation No 4056/86 grants exemption in respect of Article 86 of the Treaty, it is manifestly unfounded.

189 It must also be emphasized that this does not affect the effectiveness of the regulation. The applicants' argument in this regard is based, *inter alia*, on the premiss that every liner conference, or the members of such a conference, occupy a dominant position. The Commission has not made any such assertion but has, on the contrary, clearly shown that in this case the members of Cewal together held a dominant position.

190 Secondly, the applicants claim that even if the regulation does not grant exemption in respect of Article 86, Article 8(2) of the regulation requires the Commission to withdraw the exemption granted in Article 3 before penalizing an abuse of a dominant position. In this regard, the Court recalls that, according to the wording of Article 8(2) of the regulation, 'where the Commission ... finds that in any particular case the conduct of conferences benefiting from the exemption laid down in Article 3 nevertheless has effects which are incompatible with Article 86 of the Treaty, it may withdraw the benefit of the block exemption and take, pursuant to Article 10, all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty'. Consequently, it is clear from the wording of that article that it contemplates a situation in which a practice, even if exempted under Article 85 of the Treaty, is nevertheless contrary to Article 86. It must be

held, however, that this is not the present case, since neither the imposition of 100% loyalty contracts nor the drawing up of blacklists in accordance with the Commission's understanding of that term is exempted under Article 85. Consequently, Article 8(2) of the regulation is not applicable in this case.

191 It follows from this finding that Article 8(3) of the regulation, according to which 'before taking a decision under paragraph 2, the Commission may address to the conference concerned recommendations for termination of the infringement', is not at issue in this case either. It follows that the argument based on the Commission's alleged infringement of that provision must be dismissed.

192 In view of all of these factors, the Court considers that the applicants' pleas and arguments relating to the examination of the loyalty contracts are unfounded.

193 Accordingly, the third plea must be rejected in its entirety.

4. *Fourth plea alleging absence of effect on intra-Community trade and that the markets concerned are not part of the common market*

Arguments of the parties

194 In the first place, in Cases T-24/93, T-25/93 and T-28/93, the applicants argue that, contrary to the assertions contained in points 39, 40 and 92 of the Decision, in so far as the practices in question relate to the southbound market and consequently exports to Africa, they do not affect competition in the common market. The Decision has not sufficiently made out that competition is so affected (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299). The

Commission was obliged to prove that each of the abuses individually affects competition in the common market; it cannot effectively rely on a line of case-law according to which the effects of an agreement on intra-Community transactions have to be determined in the light of the agreement as a whole and not of each of its clauses taken in isolation (Case 193/83 *Windsurfing* v *Commission* [1986] ECR 611).

195 Secondly, in Cases T-24/93 and T-25/93, the applicants argue that the markets affected by the practices in question are not part of the common market. Inasmuch as it applies the Community competition rules to export markets, the Decision disregards both the case-law (Case 174/84 *Bulk Oil* [1986] ECR 559) and the Commission's administrative practice [Commission Decision 77/100/EEC of 21 December 1976 relating to a proceeding under Article 85 of the EEC Treaty (IV/5715 — Junghans) (OJ 1977 L 30, p. 10)]. Likewise, in Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85 and 129/85 *Ahlström and Others* v *Commission* [1988] ECR 5193, the Court of Justice held that the only decisive factor is the place where the anti-competitive agreement is implemented.

196 The Commission takes the view that the trade in question covers the provision of transport services from and to Community ports by transporters established in the Community to shippers and importers also established in the Community. The relevant practices restricting competition have to be analysed in relation to their effect on the market for the service in question and then in relation to their indirect effect on trade in the goods carried (Case 136/86 *BNIC* v *Aubert* [1987] ECR 4789, paragraph 18). The southbound and northbound transport markets are moreover indissociable and consequently cannot be examined separately.

197 The defendant argues that the possibility that practices restricting competition in the field of international maritime transport may affect intra-Community trade is expressly envisaged in the sixth recital in the preamble to Regulation No 4056/86. It is therefore impossible to contest the existence of that condition without questioning the legality of the regulation itself.

198 As to the infringements of Article 85 of the Treaty, the Commission maintains that, by prohibiting members of one conference from operating as independent shipping companies in the sphere of activity of another conference, the conferences created an additional partitioning of the market.

199 With regard to the infringements of Article 86, the Commission states that the requirement for intra-Community trade to have been affected — which has to be broadly interpreted — has been proven to a sufficient legal standard, since it has shown a sufficiently plausible — and not purely hypothetical — effect on intra-Community trade resulting from the practice in question (*Consten and Grundig* v *Commission*).

200 The interveners have submitted no observations on this point.

Findings of the Court

201 It should first be recalled that it has been consistently held that, in order that an agreement between undertakings, or moreover an abuse of a dominant position, may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors 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 realization of the aim of a single market in all the Member States (Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54). Accordingly, it is not specifically 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, as regards Article 86, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 69, and, as regards Article 85, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289).

202 As regards the agreements between conferences which the Commission found to be incompatible with Article 85 of the Treaty, it must be recalled that their aim is to prohibit companies belonging to one liner conference from operating, as independent shipping companies from Community ports, a route corresponding to the area of another liner conference party to the agreement. Such an agreement, which seeks to avoid members of one conference competing with members of another conference as independent shipping companies, aims at partitioning to a greater degree the market in maritime services offered by Community undertakings. In addition, as the Commission has rightly pointed out, such agreements are capable of indirectly affecting competition in the common market, on the one hand, between the Community ports covered by the agreements by altering their catchment areas and, on the other, between activities in those catchment areas.

203 As regards the abusive practices covered by Article 86, it must be borne in mind that it has been consistently held that, in order to determine whether trade between Member States is capable of being affected by an abuse of a dominant position, account must be taken of the consequences for the effective competition structure in the common market (see, for example, *Bodson* v *Pompe Funèbres des Régions Libérées*, paragraph 24). Consequently, practices whereby a group of undertakings seeks to eliminate from the market their main established competitor in the common market are inherently capable of affecting the structure of competition in that market and thereby of affecting trade between Member States within the meaning of Article 86 of the Treaty. In view of that finding alone, the applicants' argument must be rejected. But, in addition, as the Commission has pointed out, with reference in particular to the sixth recital in the preamble to Regulation No 4056/86, such practices are capable of indirectly affecting competition between, on the one hand, the various Community ports by altering their catchment areas and, on the other, between activities in those catchment areas.

204 Lastly, the Court considers that, since each of the abusive practices aimed at driving out a competitor affects trade between Member States in the same way and for the same reasons, the Commission cannot be required to prove that each of them severally had such an effect, since that could only lead to a formal repetition of the same reasoning.

205 With regard to the second limb of the plea, alleging that the markets in question are not part of the common market, it must be emphasized that the relevent market which is directly affected is that in liner transport services and not that in the export of goods to third countries. Both the agreements between conferences and the abusive practices with which members of Cewal are charged seek to restrict the competition to which the conferences are exposed from non-member shipping companies established in the Community, be they companies belonging to another conference which are prohibited from operating as independent shipping companies or companies not belonging to any conference.

206 In those circumstances, the fourth plea must be rejected.

207 Consequently, the Court holds that the principal claims for the annulment of the Decision must be rejected in their entirety.

The alternative claims for the annulment of the fine imposed

Arguments of the parties

208 The applicants put forward eleven pleas or arguments in support of their alternative claims.

209 In the first place, the applicants contest the deliberate character and gravity of the infringements identified by the Commission.

210 Secondly, the applicants maintain that, in view of the general nature of the complaint, they could not have been obliged to terminate their practices as soon it was received. By way of contrast, they claim that the loyalty contracts were amended as soon as they received the statement of objections; Cewal cooperated with the

Commission during the procedure, as is clear from the fact that most of the practices had stopped by the date of the statement of objections. Lastly, Cewal assisted the Commission in negotiations with the OECD, on the one hand, and the countries of Western and Central Africa, on the other.

211 Thirdly, as regards the nature and the value of the products, the applicants maintain that, contrary to the Commission's contentions, Cewal's market share has declined sharply and that of the independent shipping operation has increased, in spite of the practices complained of. Furthermore, the applicants consider that the charge in point 108 of the Decision that Cewal charged artificially high prices thanks to its dominant position is unsubstantiated and incompatible with the claims that Cewal's prices were abnormally low. The fact that CMZ, a member company of Cewal, has suffered heavy losses also gives the lie to that claim.

212 Fourthly, as regards the degree of involvement of each of the members, the applicants submit that the Commission infringed the principle of equal treatment in that it imposed no fine on Scandinavian West African Lines ('Swal') or on CMZ, even though it has a majority share of the conference. By the same token, CMB bears 95% of the total fine, whereas its share of the 'pool' of earnings from the conference amounts only to 30 to 35%. In addition, the Commission should have taken account, as an extenuating circumstance, of the undertakings' financial position and of the drop in freight tonnage shipped by Cewal (Joined Cases 154/78, 205/78, 206/78, 226/78, 227/78, 228/78, 263/78, 264/78, 31/79, 39/79, 83/79 and 85/79 *Valsabbia* v *Commission* [1980] ECR 907, paragraphs 156, 157 and 158). The Commission should have referred, *mutatis mutandis*, to the principles applied to cooperatives, where the fine imposed takes account of the profits made by members out of the cooperative [Commission Decision 86/596/EEC of 26 November 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.204 — MELDOC) (OJ 1986 L 348, p. 50)]. In fact, the applicants maintain, the real purpose of imposing a large fine on CMB was to strike a political balance with the fine imposed on a French shipowner (Decision 92/262 of 1 April 1992, cited above).

213 Fifthly, as regards the duration of the infringements, the applicants challenge the statement contained in point 115 of the Decision to the effect that the abuse continues until the agreement with Ogefrem is terminated. They argue that since Regulation No 4056/86 entered into force on 1 July 1987, while the agreement was concluded in December 1985, the Commission had no power to impose a fine. In addition, they argue that the duration could have been reduced if the Commission had acted with the requisite speed (Joined Cases 6/73 and 7/73 *Commercial Solvents* [1974] ECR 223). Furthermore, the Commission was not entitled to set the end of the reference period for fighting ships in November 1989 when it is basing itself on documents the most recent of which dates from 18 May 1989 and when other minutes contradict that assertion. As for the loyalty rebates, the Decision cannot find in point 115 that the practice ended in November 1989 and, at the same time, address a recommendation to the undertakings that they should bring their loyalty contracts into conformity with Article 5(2) of Regulation No 4056/86. The relatively short duration of the infringements does not justify the amount of the fine imposed.

214 Sixthly, in Case T-26/93, the applicant, DAL, submits that no fine may be imposed on it in respect of conduct after 1 April 1990. On that date, DAL sold its subsidiary Woermann-Linie to CMB.

215 Seventhly, in view of the novel nature of the application both of Regulation No 4056/86, which moreover raises difficulties of interpretation, and of the theory of the collective dominant position, the Commission wrongly failed to exercise moderation in determining the amount of the fine.

216 Eighthly, as to the calculation of the fine in the case of a collective dominant position, the applicants maintain that only Cewal's turnover, and not that of its members, should have been taken into account in calculating the amount of the fine. In addition, only turnover on the relevant market is material.

217 Ninthly, the applicants claim that a fine cannot be lawfully imposed on them because they were not the addressees of the statement of objections. The fact that no fine could be imposed on Cewal on the ground that it had no legal personality, did not, according to the applicants, relieve the Commission of the obligation to serve the statement of objections on the undertakings and to indicate that a fine would be imposed on them.

218 Tenthly, the applicants argue that the Commission was under a duty to take into account the regulatory and economic context of the practices called in question (Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 613 to 620) and hence of the existence of an exclusive right granted by law. In addition, the Commission infringed the principle of equal treatment by failing to adhere to the commitments which it undertook in its declaration on the application of Article 86 to the shipping sector (OJ 1981 C 339, p. 4).

219 Lastly, the applicants consider that the interest rates laid down by Article 7 of the Decision in the event of deferred payment of the fine are excessive, namely 13.25%, and ask the Court to set a lower rate.

220 The Commission stresses the serious and deliberate nature of the alleged infringements, by which the members of Cewal intentionally set out to eliminate a competitor.

221 Whilst it accepts that the complaints were of a general nature, it denies that the members of the conference systematically displayed a cooperative attitude.

222 As to the calculation of the fines, the Commission stresses that it imposed a separate fine on each undertaking and did not determine an overall amount which it distributed afterwards. The Commission submits that the statement of objections, which mentioned the risk of a fine, was addressed to each of the members of

Cewal. Each of them was therefore in a position to submit its observations and make known its points of view. Furthermore, the Commission contends that to find against Cewal necessarily meant finding against its members, since Cewal has no legal personality.

223 In the case of CMB, the substantial fine imposed reflects the leading role which it played in the infringements, which is a more pertinent factor than CMB's share in the conference's earnings pool. The Commission took as its basis the CMB group's turnover in respect of liner transport in 1991, which constituted a compromise between turnover in respect of trade with Zaïre and aggregate turnover. In the case of the three other undertakings, in view of their smaller role on the conference, the fines imposed were flat rate, symbolic and unrelated to turnover. The financial situation of each of the undertakings was duly taken into account, as witness the fact that no fine was imposed on CMZ owing to its serious financial difficulties. As for the fall in the volume of freight shipped, this related only to 1991 and 1992 and, as the applicants admit, was attributable to the political crisis in Zaïre.

224 In addition, the Commission states that the fact that no fine was imposed on Swal and CMZ does not constitute discrimination. Since 1984, Swal has not played any active role in maritime transport between Europe and Zaïre. As for CMZ, the Commission states that its financial position was lamentable; its ships had been seized and sold; it had ceased operations and its share of the traffic was being carried by other conference lines in return for commission on each consignment carried under a bill of lading issued by it.

225 It observes that the Decision sufficiently explained how the duration of the infringements was determined. In its view, the time which elapsed between the discovery of the infringements and the statement of objections and then between the latter and the Decision was not excessive.

226 In the Commission's contention, the application of Regulation No 4056/86 falls within the more general framework of the application of the Community competition rules. There is nothing novel in the practices complained of which is capable of justifying a reduction in the amount of the fine. It also considers that the concept of a collective dominant position is a well-known one and has already been applied, even in the specific sector of liner conferences itself (Decision 92/262 of 1 April 1992, cited above).

227 The Commission argues that the fact that account was taken of the amount of the fine imposed in another case in order to determine the fine to impose in this case is sound administrative practice and cannot be construed as evidencing a political motive.

228 Lastly, the defendant submits that the determination of the interest rate applicable in the event of late payment has no effect on the validity of the Decision. It further asserts that the rate adopted in Article 7 of the Decision is reasonable, and points out that, in any event, the applicants have been granted special payment facilities.

229 The interveners have not submitted any observations on the alternative claims.

Findings of the Court

230 It should first be noted that under Article 21 of Regulation No 4056/86 the Court has unlimited jurisdiction within the meaning of Article 172 of the Treaty in actions brought against decisions of the Commission fixing a fine.

231 In the first place, it should be borne in mind that the fines imposed by Article 6 of the Decision relate solely to the abusive practices of which the members of Cewal are accused. Since those practices were implemented in order to drive out the only competitor on the market, the Court considers that the applicants have no grounds for denying the deliberate and serious nature of the infringements.

232 Secondly, as regards the calculation of the fine, the Court finds that, since the conference does not have legal personality, the Commission was entitled to impose a fine on the members of Cewal, rather than on the conference itself. In this regard, it should be stressed that, in addition to Cewal, each of the members of the conference was an addressee of the statement of objections. In those circumstances and having regard to the fact that Cewal had no legal personality, the Court considers that, even if the statement of objections referred only to the possibility of imposing a fine on Cewal in respect of the abusive practices, the applicants could not have been unaware that they ran the risk of a fine being imposed upon them, rather than on the conference.

233 In Case T-24/93, the applicants maintain that, by failing to take the appropriate turnover into account, the Commission imposed fines exceeding the 10% maximum indicated in Article 19(2) of Regulation No 4056/86. According to that article, the Commission may impose fines of up to 10% of the 'turnover in the preceding business year of each of the undertakings participating in the infringement', expecially where they commit an infringement of Article 86 of the Treaty either intentionally or negligently. According to settled case-law, under Article 15(2) of Regulation No 17 of the Council of 6 February 1962, it is permissible, in fixing the amount of the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94). The Court considers that this case-law may be applied to the present case, since, in this respect, the wording of Article 19 of Regulation No 4056/86 is identical to that of Article 15(2) of Regulation No 17. Accordingly, the Court considers that, by taking as its basis CMB's turnover in respect of maritime liner transport in 1991, the Commission has not infringed Article 19 of Regulation No 4056/86. As the fine imposed amounts to 1.4% of that turnover, the Commission has not exceeded the ceiling laid down by Article 19 of that regulation.

234 As for the applicants' criticisms of the discrimination by which they were allegedly wronged, the Court observes in the first place that those criticisms are based essentially on their contention that the fines should have been fixed in accordance with each of their shares of Cewal's earnings pool. That argument cannot be accepted. Where it appears that undertakings did not take part to the same extent in an infringement, referring to the fixed share of each of them in the earnings pool would have the effect of placing at an advantage those which had had a large hand in the infringement and of penalizing those which had participated to a lesser degree. Consequently, the mere fact that the Commission opted for the undertakings' degree of participation rather than their share of the earnings pool did not cause it to infringe the principle of equal treatment.

235 Moreover, the mere fact that the fine imposed on CMB is substantially greater than that imposed on the other undertakings is not in itself indicative of unequal treatment. In this case, the Commission had regard to the fact that CMB controls a preponderant share of the trade, with the result that the impact of its actions on the market is significant, and that it occupies a decisive position within Cewal. The Court further points out that, since the fine is also intended to dissuade the undertakings from committing the infringements in question anew, the Commission was lawfully entitled to take account of the fact that vessels belonging to the CMB group carried, at the time when the Decision was adopted, almost all the cargoes of the conference. In those circumstances, the Court considers that, by imposing on CMB a fine substantially greater than that imposed on the other undertakings, the Commission did not infringe the principle of equal treatment.

236 Moreover, in so far as Swal has subcontracted its rights to other members of the conference since 1984, resulting in its cargoes being carried by them, the Commission was lawfully entitled to conclude that that shipowner had not played an active role in the infringements and to decide, without infringing the principle of equal treatment, that no fine should therefore be imposed on it.

237 Moreover, the Court observes that, although it did not contest that CMZ might have taken part in the infringements in question, the Commission considered that it was fitting not to impose a fine on it, on account of the serious difficulties which it was undergoing. The Commission found in particular — and the applicants do not contest this — that CMZ had to give up its ships. Since it had no more ships,

CMZ was no longer carrying out any maritime transport business itself. In those circumstances, the Court considers that the Commission was properly entitled to decide not to impose any fines on CMZ without infringing the principle of equal treatment, since none of the applicants can claim to be in a situation identical to that of CMZ.

238 Lastly, as to the argument alleging misuse of power, according to which the fine imposed in this case was intended only to strike a political balance with Decision 92/262 of 1 April 1992, cited above, it should be recalled that it has been consistently held that a decision may amount to a misuse of powers only if it appears on the basis of objective, relevant and consistent factors to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than those stated (in particular, Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68). That cannot be the case where the Commission, in determining the amount of the fine imposed on a shipowner, takes account of a fine imposed some months earlier on another undertaking in the maritime transport sector, thus securing consistency in the application of Community competition law.

239 Thirdly, the Court considers that, in so far as the complaints which gave rise to this case were of a general nature, with the result that the practices ultimately taken issue with in the Decision were not identified, the members of Cewal cannot be accused of failing to terminate those practices when the complaints were lodged, contrary to what is stated in point 104 of the Decision. Consequently, the Court, in the exercise of its unlimited jurisdiction, considers that the amount of the fine imposed on each of the applicants must be reduced. On the other hand, the Court takes the view that account cannot be taken of the applicants' alleged cooperation with the Commission. In that regard, the fact that the loyalty contracts were made to conform with Article 5(2) of the regulation is irrelevant since no fine was imposed on that basis. Likewise, the fact that Cewal assisted the Commission in its negotiations with non-member countries or with the OECD has no bearing on the amount of the fine imposed in respect of three infringements of Article 86 of the Treaty. Lastly, in so far as the fine is imposed *ex hypothesi* for a given period, the mere fact that the practices at issue were terminated after that period is not sufficient to prove that there was any cooperation with the Commission.

240 Fourthly, as regards the duration of the infringements, the applicants set forth separate arguments in respect of each of the abuses with which they are charged.

241 In so far as the Cewal-Ogefrem agreement is concerned, the Court observes that, in point 115 of the Decision, the Commission regarded the period to be taken into account for the purpose of determining the fines as running from 1 July 1987, the date on which Regulation No 4056/86 entered into force, until the date of the Decision, as Cewal had never terminated the agreement. Consequently, the applicants cannot claim in effect that the Commission had no jurisdiction *ratione temporis* to impose a fine, as it specifically did not take account of the period before Regulation No 4056/86 entered into force. In contrast, the Court points out that an infringement of Article 86 can be penalized only to the extent to which it has been duly found to exist (*BPB Industries and British Gypsum* v *Commission*, paragraph 98). In this case, the abuse in question consists in having actively participated in the implementation of the agreement and of having repeatedly asked for it to be complied with in order to drive out G & C. However, there is no item in the case-file which suggests that the Commission could have duly found that the infringement was still going on in December 1992. In particular, it cannot be ruled out that the cooperation agreement, even if never formally terminated, nevertheless remained a dead letter. Accordingly, in the light of the evidence available to the Court, especially the minutes of the Cewal Principals' meeting of 21 September 1989, and in the exercise of its unlimited jurisdiction, the Court must hold that the period to be taken into consideration ended in September 1989. For that reason, the fine must be reduced.

242 Turning to the question of fighting ships, the Court finds that, as the applicants maintain, the Commission imposed a fine for the period ending in November 1989, whereas the most recent document on which it relies, dated 18 May 1989, mentioned that the practice ought to cease in September 1989. However, it appears from the minutes of the Zaïre Pool Committee of 18 September 1989, mentioned in the Decision under another heading, and from the minutes of the Zaïre Action Committee of 11 October 1989, not mentioned in the Decision but appended to the Commission's defence, that those practices continued, albeit on a less regular footing, at least during the last quarter of 1989. Accordingly, the Court, in the exercise of its unlimited jurisdiction, considers that there is no need to reduce the amount of the fine on this account.

243 As far as the loyalty contracts are concerned, the applicants rely on a purported contradiction between point 115 of the statement of reasons and Article 5 of the Decision. In this respect, it is sufficient to note that the subject-matter of those two provisions is different. Point 115 of the statement of reasons relates to the period to be taken into account in order to determine the fine imposed pursuant to Article 86 of the Treaty, whilst Article 5 of the Decision is concerned with the infringement based on the loyalty contracts' lack of compliance with the obligations laid down in Article 5(2) of Regulation No 4056/86. As has already been made clear, however, those two infringements are separate.

244 Furthermore, the Court finds that the argument alleging that the Commission's inquiry took an excessive amount of time can apply only to the period between the lodging of the complaints and the statement of objections, that is, from July 1987 to August 1990. Having regard to the factors identified above, no subsequent period could have been taken into account for the purposes of calculating the fine. In this instance, however, the Court considers that, in view of the complexity of the case, the number and diversity of the infringements which had to be considered on the basis of general complaints, and the number of liner conferences and shipping companies involved, the duration of the procedure cannot be regarded as excessive.

245 Lastly, the Court considers that the fines imposed do not seem disproportionate when regard is had to the relatively long time for which the infringements went on, ranging in the various cases from 18 to almost 30 months.

246 In Case T-26/93, the applicant, DAL, argues that, since it sold its holding in Woermann-Linie with effect from 1 April 1990 and is no longer a member of Cewal, it cannot be held responsible for any abuse carried out after that date. When asked about this by the Court in the context of measures of organization of procedure, the Commission stated that the fine imposed on DAL was a flat-rate one, and was not calculated so as directly to take account of the duration of the infringements. The Court observes that this complaint can relate only to the abuse in respect of the implementation of the agreement with Ogefrem, that being the only practice for which the period taken into consideration went beyond that date. Having regard to paragraph 241 of this judgment, the Court holds that there is no need for it to rule on this plea.

247 Fifthly, as regards the nature and the value of the products, whilst it is true, as the Decision states, that it is impossible to determine what market share G & C would have had if the practices in question had not taken place, nevertheless the abusive practices in question, having been implemented in order to drive out the only competitor, were bound to have had the effect of slowing down that competitor's penetration of the market. In so far as Cewal and the independent shipping operation G & C were the only ones involved in movements between northern Europe and Zaïre, the whole of the market was affected. The Court further observes that the parties have not contested the effect of the freight rates on trade in goods shipped by the liner vessels. In the exercise of its unlimited jurisdiction, the Court considers therefore that there is no need to reduce the fine imposed.

248 Sixthly, the Court observes that the aim of the abusive practices at issue, namely to drive the only competitor out of the market, is not in any way novel in competition law; accordingly, the Commission was correct to consider that it was unnecessary to take account of the fact that the Decision was one of the first to be adopted pursuant to Regulation No 4056/86. Moreover, the Court considers that, in view of Commission Decision 89/93/EEC of 7 December 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.906, flat glass) (OJ 1989 L 33, p. 44) and of Article 8 of Regulation No 4056/86, the Commission was correct not to take account of the allegedly novel nature of the concept of a collective dominant position.

249 Seventhly, the Court considers that it is of no use to the applicants to rely on a purported legal exclusivity granted to Cewal or allege that there were rules of a non-member country. Not only are those facts not proved, they could not in any event justify the practices employed and therefore have no bearing on the determination of the amount of the fine (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 118). Furthermore, the applicants cannot accuse the Commission of infringing the principles which it itself laid down in its declaration on the application of Article 86 to the shipping sector, cited above, since that declaration, which was published in the Official Journal under the heading Prepa-

ratory Acts, related to the proposal for a Council Regulation (EEC) laying down detailed rules for the application of Articles 85 and 86 to maritime transport (OJ 1981 C 282, p. 4) and was not reformulated when Regulation No 4056/86 was adopted.

250 Lastly, the Court finds that, contrary to the Commission's assertions, the interest rate specifically fixed by the second paragraph of Article 7 of the operative part cannot be regarded as being extraneous to the Decision. As a result, the applicants are entitled to contest its amount. However, the applicants have not adduced any evidence such as to show that the Commission made any error in referring to the rate applied by the European Monetary Cooperation Fund to its operations in ECU on the first working day in the month in which the Decision was adopted, plus three-and-a-half points, namely 13.25%. In those circumstances, the applicants' argument should be rejected and there is no need to inquire into the applicants' interest in pursuing this matter given that they in fact benefited by more lenient measures on the part of the Commission.

251 In view of all of the foregoing, and particularly paragraphs 239 and 241 of this judgment, the Court, in the exercise of its unlimited jurisdiction, considers that the amount of the fines imposed must be reduced as follows:

— the fine of ECU 9 600 000 imposed on CMB is fixed at ECU 8 640 000,

— the fine of ECU 200 000 imposed on Dafra-Lines is fixed at ECU 180 000,

— the fine of ECU 200 000 imposed on DAL is fixed at ECU 180 000,

— the fine of ECU 100 000 imposed on Nedlloyd is fixed at ECU 90 000.

Costs

252 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads. In this case, the applicants have failed on all their main heads and most of their alternative heads. In those circumstances, it is not appropriate to apply Article 87(3) of the Rules of Procedure. The applicants must therefore be ordered to pay the defendant's costs.

253 In addition, the applicants in Case T-24/93 are ordered, jointly and severally, to pay the costs of the interveners, who have made an application to that effect.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. **Joins Cases T-24/93, T-25/93, T-26/93 and T-28/93 for the purposes of the judgment;**

2. **Dismisses the applications for the annulment of Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty;**

3. **Fixes the amount of the fines imposed by Article 6 of that decision as follows:**

— **Compagnie Maritime Belge SA: ECU 8 640 000,**

— **Dafra-Lines A/S: ECU 180 000,**

— **Deutsche Afrika-Linien GmbH&Co.: ECU 180 000,**

— **Nedlloyd Lijnen BV: ECU 90 000.**

4. **Orders the applicants to pay all the defendant's costs; in addition, orders the applicants in Case T-24/93 (Compagnie Maritime Belge SA and Compagnie Maritime Belge Transports SA) jointly and severally to pay all the costs of the interveners.**

Briët Lindh Potocki

Moura Ramos Cooke

Delivered in open court in Luxembourg on 8 October 1996.

H. Jung C. P. Briët

Registrar President