

Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93

Compagnie Maritime Belge Transports SA and Others

v

Commission of the European Communities

(Competition — International maritime transport —
Liner conferences — Regulation (EEC) No 4056/86 —
Effect on trade — Collective dominant position —
Implementation of an agreement providing for an exclusive right —
Fighting ships — Loyalty rebates — Fines — Assessment criteria)

Judgment of the Court of First Instance (Third Chamber, Extended Composition), 8 October 1996 II - 1207

Summary of the Judgment

1. *Transport — Maritime transport — Competition rules — Block exemptions — Strict interpretation — Exemption for agreements allocating sailings between members of a liner conference — Scope*
(*EC Treaty, Art. 85(3); Council Regulation No 4056/86, Art. 3*)
2. *Competition — Dominant position — Collective dominant position — Definition — Liner conference*
(*EC Treaty, Art. 86; Council Regulation No 4056/86, Art. 1(3)(b)*)

3. *Competition — Dominant position — Existence — Holding of extremely large market shares — Generally sufficient evidence*
(EC Treaty, Art. 86)
4. *Competition — Dominant position — Obligations incumbent on a dominant undertaking — Reasonable exercise of its right of veto over third-party access to the market*
(EC Treaty, Art. 86)
5. *Competition — Administrative procedure — Respect for the rights of the defence — Statement of objections*
6. *Competition — Dominant position — Abuse — Failure to achieve the result sought — Irrelevant*
(EC Treaty, Art. 86)
7. *Transport — Maritime transport — Competition rules — Dominant position — Abuse — Absolute prohibition — No exemption under Regulation No 4056/86*
(EC Treaty, Art. 86; Council Regulation No 4056/86)
8. *Transport — Maritime transport — Competition rules — Applicability of Article 85 to liner conference loyalty contracts — Conditions — Commission's powers*
(EC Treaty, Art. 85; Council Regulation No 4056/86, Arts 5(2) and 7)
9. *Transport — Maritime transport — Competition rules — Dominant position — Abuse — Liner conference — 100% loyalty contracts, also covering job sales, unilaterally imposed, together with blacklists of disloyal shippers*
(EC Treaty, Art. 86)
10. *Competition — Agreements, decisions and concerted practices — Dominant position — Effect on trade between Member States — Assessment criteria*
(EC Treaty, Arts 85 and 86)
11. *Competition — Fines — Amount — Determination — Criteria — Deliberate nature of the infringement — Serious nature of the infringement — Practice implemented by a liner conference in a dominant position in order to drive out a competitor from the market*
(EC Treaty, Art. 86)
12. *Competition — Fines — Conduct of a liner conference imputable to its members — Amount — Fixed by reference to members' level of participation — Permissible*

13. *Competition — Fines — Amount — Determination — Criteria — Total turnover of the undertaking concerned — Turnover from goods in respect of which the infringement was committed — How to be taken into account*
(Council Regulations No 17, Art. 15(2), and No 4056/86, Art. 19)

14. *Actions for annulment — Pleas in law — Misuse of powers — Definition*

15. *Actions for annulment — Actionable measures — Decision imposing a fine for infringement of the competition rules — Rate of default interest — Included*

1. 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. 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.

Accordingly, Article 3(c) of Regulation No 4056/86 cannot apply to allocation agreements as between liner conferences, since it relates to the coordination or allocation of sailings or calls 'among members of the conference', and especially since the exemption provided for applies to agreements which have as their primary objective the joint fixing of rates.

2. Article 86 is capable of applying to situations in which several undertakings

together hold a dominant position on the relevant market. 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.

This may be the position where, as a result of the close relations which shipping companies maintain with each other within a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86, they are capable together of implementing in common on the relevant market practices such as to constitute unilateral conduct.

3. 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.

4. 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. 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 already weakened.
5. A decision finding that the competition rules have been infringed is not necessarily required to be a replica of the statement of objections.
6. 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.

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.

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. An undertaking does not make reasonable use of the right to veto where, as part of a plan designed to drive out its only competitor on the market, it takes steps to ensure that its rights are fully respected.

7. Since no exemption is available under Article 86 of the Treaty in respect of an abuse of a dominant position and, 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 that provision, Regulation No 4056/86 cannot be interpreted as allowing such an exemption, *a fortiori* since Article 8(1) thereof provides that the abuse of a dominant position within the meaning of Article 86 of the Treaty is prohibited, no prior decision to that effect being required.
8. Where Article 85 of the Treaty has been infringed owing to the fact that loyalty contracts agreed by liner conferences are inconsistent with the obligations laid down by Article 5(2) of Regulation No 4056/86, the Commission may, pursuant

to Article 7 of that regulation, advise the conference members to bring the terms of their loyalty contracts into line with those obligations.

9. Where a liner conference unilaterally offers shippers only 100% loyalty contracts, covering fob sales, and draws up a 'blacklist' of disloyal shippers with a view to penalizing them, this constitutes an abuse of its dominant position. Such practice taken as a whole has the effect of restricting users' freedom and thereby of affecting the competitive position of competitors.

10. For an agreement between undertakings, or moreover an abuse of a dominant position, to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability 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. Accordingly, it is not necessary that the conduct in question should in fact have substantially affected trade between Member States; it is sufficient to establish that the conduct is capable of having such an effect.

Agreements between liner conferences which seek to prohibit the members of a particular liner conference from operating, as independent shipping companies, a route from Community ports corresponding to the area of another liner conference which is party to the agreement, aim at partitioning to a greater degree the market in maritime services offered by Community undertakings, and are therefore liable to affect trade between Member States. Furthermore, 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.

As regards the abusive practices covered by Article 86 of the Treaty, account must be taken of the consequences for the effective competition structure in the common market in order to determine whether trade between Member States is capable of being affected by an abuse of a dominant position. Consequently, practices whereby a group of undertakings seeks to eliminate from the market their main competitor established in the common market are inherently capable of affecting the structure of competition in that market and thereby of affecting trade between Member States. In addition, such practices on the part of shipping lines are capable of indirectly affecting competition in the same way as agreements between the conferences to which they belong.

11. In fixing the amount of a fine to be imposed for infringement of the competition rules, the fact that a liner conference in a dominant position implemented an abusive practice in order to drive out its only competitor on the market must be regarded as a deliberate and serious infringement of Article 86.

12. In cases where the Commission finds that the competition rules have been infringed but the liner conference in question does not have legal personality, the Commission is entitled, if it has addressed statements of objections to each member, to impose fines directly on the conference members rather than on the conference itself. This is so, even if the statement of objections referred only to the possibility of imposing a fine on the conference, since its members could not have been unaware that they ran the risk of a fine being imposed upon them.

In such circumstances, it is not inconsistent with the principle of equal treatment for the Commission to fix the amount of the fines to be imposed on the various conference members by reference to their degree of participation in the infringement rather than to their share of the conference's earnings pool.

13. So far as concerns the taking into account of an undertaking's turnover for the purposes of fixing the amount of the

fine to be imposed on it for infringement of the competition rules, it is permissible — both under Article 15(1) of Regulation No 17 and under Article 19 of Regulation No 4056/86 — to have regard both to its total turnover, 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.

14. A decision is vitiated by 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. That cannot be the case where the Commission, in determining the amount of the fine to impose on a shipowner for infringement of the Treaty's competition rules, 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.

15. The addressee of a decision imposing a fine for infringement of the competition rules is entitled, by means of an action for annulment, to contest before the Community Court the decision's fixing of the default interest rate payable by the undertaking concerned.