

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
13 May 1993 *

In Case T-24/93 R,

Compagnie Maritime Belge Transport NV, a company incorporated under Belgian law, established in 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, 34 Rue Philippe II,

applicant,

v

Commission of the European Communities, represented by Bernd Langeheine and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Nicola Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

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

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

represented by Mark Clough, of Gray's Inn, Barrister, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand Rue,

applying for leave to intervene,

* Language of the case: English.

APPLICATION for suspension of the operation of the Decision of the Commission of the European Communities of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.448 and IV/32.450 — Cewal, Cowac, Ukwal) and Article 86 of the EEC Treaty (IV/32.448 and IV/32.450 — Cewal),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts

- 1 By an application lodged at the Court Registry on 19 March 1993, the Compagnie Maritime Belge Transport NV (hereinafter 'CMBT') and the Compagnie Maritime Belge NV ('CMB') brought an action under the second paragraph of Article 173 of the EEC Treaty for annulment of the Commission Decision of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.448 and IV/32.450 — Cewal, Cowac, Ukwal) and Article 86 of the EEC Treaty (IV/32.448 and IV/32.450 — Cewal).
- 2 By a separate document lodged at the Court Registry on 13 April 1993, CMBT also made an application pursuant to Article 185 of the EEC Treaty for suspension of the operation of, first, Articles 6 and 7 of the contested decision imposing a fine on CMB pending delivery of the judgment in the main proceedings and, secondly, Article 3 of the decision in so far as it requires Cewal and its members to terminate the cooperation agreement with the Office Zairois de Gestion du Fret Maritime ('Ogefrem').
- 3 The Commission submitted its written observations on the application for interim measures on 26 April 1993.

- 4 By an application lodged at the Court Registry on 3 May 1993 Grimaldi and Cobelfret applied for leave to intervene in Cases T-24/93 and T-24/93 R in support of the Commission.
- 5 By letter lodged at the Court Registry on 3 May 1993 CMBT withdrew its claim for the suspension of the operation of Articles 6 and 7 of the decision, whilst adhering to its claim with respect to Article 3.
- 6 By letter of 3 May 1993 the Registrar of the Court served on the parties a copy of Grimaldi's and Cobelfret's application to intervene and asked them to give their views orally, before the hearing, on that application and on any questions relating to the confidentiality of certain procedural documents produced to the Court. By letter of the same day the Court's Registrar also asked the parties seeking to intervene to attend the hearing and informed them that they would be permitted to present their oral observations on the application for suspension, subject to the decision to be taken by the President of the Court after hearing the observations of the parties.
- 7 Prior to the hearing the parties to the interim proceedings informed the President of the Court that they had no objection to the application to intervene. CMB asked, however, that the interveners should merely receive a version of the application and the documents annexed thereto, excluding certain confidential information comprising business secrets, and stated that it had already sent Grimaldi and Cobelfret a non-confidential version of its application on 4 May 1993.
- 8 The parties presented oral argument at the hearing on 5 May 1993.
- 9 The following are the main facts underlying the dispute before the Court, as they appear from the contested decision and from the statements submitted by the parties and the oral explanation given at the hearing.

- 10 In 1987 the Commission received a number of complaints referring to alleged practices restricting competition in the liner shipping trade between Europe and West and Central Africa. As a result of those complaints the Commission opened an inquiry into the practices of the various shipping conferences involved in providing transport services between Europe and Africa.
- 11 In its Decision of 23 December 1992 the Commission found in substance that:
- the Cewal, Cowac and Ukwac shipping conferences and the undertakings that were members thereof had infringed Article 85(1) of the EEC Treaty by entering into non-competition agreements with a view to sharing out on a geographical basis the liner market between Northern Europe and Western Africa (Article 1).
 - the undertakings that were members of the Cewal conference had abused their joint dominant position by participating in the implementation of the cooperation agreement with Ogefrem and in steps to ensure strict compliance therewith, by engaging in the practice known as 'fighting ships' and by establishing loyalty arrangements going beyond the terms of Article 5(2) of 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) (Article 2).
- 12 Article 3 of the decision provides, first, that the undertakings concerned by the decision are to bring to an end the infringement referred to in Article 1 and, secondly, the member undertakings of the Cewal shipping conference are to bring to an end the infringements referred to in Article 2. By virtue of Article 8 the decision is addressed to the Cewal, Cowac and Ukwac shipping conferences and their members listed in Annex I to the decision. Fines were imposed in respect of the infringements found in Article 2 on a number of undertakings that are members of the Cewal conference, including CMB which was subject to a fine of ECU 9.6 million.

- 13 In 1991 CMB transferred its business relating to services to and from Zaïre to CMBT, a joint subsidiary whose shares are held equally by CMB and Saffron Holdings.

Decision

The application to intervene

- 14 It should be noted first of all that Grimaldi and Cobelfret submitted their application to intervene within the periods prescribed.
- 15 Secondly, the contested decision brings to an end a proceeding instituted by the Commission following a number of complaints, including the complaint lodged on 7 September 1987 by AIWASI (Association of Independent West African Shipping Interests), whose members include the companies applying for leave to intervene, who also provide regular shipping services between the ports of the North Sea and those of Zaïre and Angola. Those companies also participated in the procedure before the Commission, in particular by the submission of written observations and attendance at the hearings.
- 16 Consequently, Grimaldi and Cobelfret have an interest in intervening in support of the Commission in these interim proceedings.

The request for confidentiality

- 17 With respect to the information for which the applicant claims confidential treatment on the ground that it comprises business secrets, it seems justified at the stage of these proceedings for interim relief to grant CMBT's request, in so far as such information appears, at first sight, to comprise business secrets.

The request for suspension of operation

- 18 By virtue of the combined provisions of Articles 185 and 186 of the EEC Treaty and Article 4 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.
- 19 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications to suspend the operation of any measure made pursuant to Article 185 of the EEC Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. The measures applied for must be of a provisional nature in the sense that they must not prejudice the decision to be given in the main proceedings.

Arguments of the parties

- 20 The applicant states, first of all, that there is some ambiguity as to the identity of the addressee of the decision. Although addressed to CMB, upon which company a fine was inflicted, the decision was notified at the address of CMBT, which from 1991 took over all the activities of CMB with respect to shipping to and from Zaïre. It considers that the decision must be understood as being addressed to CMBT with respect to both the fine and the obligation imposed by the decision to put an end to the infringements found.
- 21 As regards the question whether there is a prima facie case for suspending the operation of the decision, the applicant claims that the whole behaviour of the Commission amounts to a clear abuse of powers and that the Commission has not established any of the infringements of Articles 85 and 86 of the Treaty alleged in its decision.
- 22 The applicant in substance contests the existence of any decision between the Cewal, Cowac and Ukwal conferences according to which conference members

must refrain from operating as an outsider in the area of activity of the other conferences and observes that neither the Cewal conference nor its members occupy an individual or collective dominant position. CMBT observes, in particular, that it cannot be condemned for the alleged participation of Cewal and its members in the implementation of the cooperation agreement with Ogefrem, which is an act of the Zaïrean State, and emphasizes that in reality the Commission disregarded both the circumstances surrounding the exclusivity allegedly granted by Zaïre to Cewal (which in fact never really existed) and the repeated attempts by that conference to oppose the policy of the Zaïrean authorities. In any event, the applicant claims that the Commission failed to establish that the alleged infringements produced effects in the common market or on trade between Member States.

- 23 With respect to the question of urgency, the applicant states that it cannot terminate the cooperation agreement with Ogefrem, since, first, the agreement is imposed by the Zaïrean authorities which could not be induced to modify the agreement notwithstanding all the attempts by the companies, by governmental institutions and even by the Commission itself and, secondly, the termination of the agreement does not depend solely on the applicant but on the Cewal conference, in which the Zaïrean shipping company, CMZ, has the majority of the rights. The applicant emphasizes in particular that, even supposing that it had the power to terminate the agreement, such termination might have unforeseeable consequences for the Cewal conference and its members, since the Zaïrean State could decide to refuse access to Zaïrean ports to all non-Zaïrean Cewal lines or to impose much stricter conditions, making it impossible to serve the Zaïrean ports in the future.
- 24 For its part the Commission considers that the arguments put forward by the applicant with respect to the true addressee of the contested decision are unfounded and in any event fall to be considered in the main proceedings.
- 25 With respect to the question whether there are grounds establishing a *prima facie* case for suspending the operation of the measure, the Commission observes that,

contrary to the applicant's contentions, it neither exceeded its powers nor adopted an incorrect decision. It claims that the majority of the applicant's arguments concern questions of law or fact, which fall to be considered in the main proceedings. That is the case with respect, in particular, to the questions concerning the abusive nature of Cewal's practices or their effects within the common market, and the questions concerning the relationship between Regulation No 4056/86 and Articles 85 and 86 of the EEC Treaty. The Commission points out in addition that the cooperation agreement with Ogefrem contains a clause excluding competition from shipping lines which are not members of Cewal. It observes that it does not see how the participation of the Cewal conference or its members in the implementation of an agreement could constitute an act of a non-member country.

- 26 With respect to the risk of serious and irreparable harm, the Commission emphasizes that the discontinuance of an infringement of the competition rules of the EEC Treaty cannot in itself constitute serious and irreparable harm even where it results in financial loss. It observes that the applicant merely states that the termination of the Ogefrem agreement may have unforeseeable consequences for Cewal and its members and, in particular, that Zaïre may refuse access to its ports to all non-Zaïrean Cewal lines. In the Commission's view, it is hard to imagine why Zaïre might wish to do that when, first, the sole Zaïrean line has no ships and, secondly, the agreement itself, in Article 11, provides for the possibility of its unilateral termination by one of the parties. In any event, such speculation does not, in the Commission's view, amount to grounds for a finding of serious and irreparable harm.

Assessment of the judge hearing the application for interim measures

Admissibility of the application for interim measures

- 27 It should be noted, first, that Article 3 of the contested decision requires the Cewal members to bring to an end the infringements established in Article 2, in particular the infringement consisting in the participation in the implementation of the cooperation agreement with Ogefrem.

- 28 Secondly, it is CMB, not CMBT, which appears in the list, in Annex I of the decision, of members of the Cewal, Cowac and Ukwal shipping conferences which Article 8 of the decision defines as addressees of the decision.
- 29 Persons other than the addressees of the decision may claim to be concerned for the purposes of the second paragraph of Article 173 of the EEC Treaty only if the decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances of fact in which they are differentiated from all other persons and hence distinguished individually just as in the case of the addressee (see, most recently, the order of the President of the Court of First Instance of 2 April 1993 in Case T-12/93 R *CCE Vittel v Commission* [1993] ECR II-449, paragraph 21).
- 30 It is common ground that CMB transferred its activities relating to shipping to and from Zaïre to CMBT with effect from 1 January 1991 and that CMBT is now a member of Cewal. Consequently, although the decision was not formally addressed to CMBT, it seems possible, at first sight, that a number of obligations imposed by the decision, in particular the obligation relating to participation in the implementation of the Ogefrem agreement, are of direct and individual concern to CMBT. Consequently, that question cannot be settled at this stage.

The risk of serious and irreparable harm

- 31 It has been consistently held (see the order of the President of the Court of First Instance of 15 December 1992 in Case T-96/92 R *CCE Grandes Sources v Commission* [1992] ECR II-2579, paragraph 42) that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure. It is for the party requesting suspension of the operation of the contested decision to prove that he cannot await the outcome of the main proceedings without suffering harm which would involve serious and irreparable consequences.

- 32 In support of its application for suspension of the operation of the decision, the applicant merely states, first, that it does not itself have the possibility of terminating the cooperation agreement with Ogefrem and, secondly, that the termination of the agreement would have unforeseeable consequences for Cewal and its members.
- 33 With respect to the first argument, it appears, as the Commission stated at the hearing, that Article 3 of the decision does not in any event require the addressees of the decision to terminate the cooperation agreement with Ogefrem. It merely requires the addressees of the decision to bring to an end their participation in the implementation of that agreement and the steps taken to ensure strict compliance therewith. The applicant has not established, nor even alleged, that it is impossible for it to bring to an end its participation in the implementation of the agreement or that its failure to participate in the implementation of that agreement would cause it to incur a risk of serious and irreparable harm.
- 34 With respect to the second argument, unforeseeable circumstances such as those referred to by the applicant cannot be regarded as a risk of serious and irreparable harm providing grounds for the granting of the interim measure requested. Such circumstances do not constitute a present risk of damage but an aleatory, uncertain and future risk against which the applicant may, should the risk materialize, assert its rights before the Court (see the order of the President of the Court of First Instance of 7 June 1991 in Case T-19/91 R *Vichy v Commission* [1991] ECR II-265).
- 35 Consequently, without its being necessary to consider the prima facie merits of the pleas put forward by the applicant in its main application, it must be held that the legal conditions for the grant of the interim measure requested are not satisfied and that the application must therefore be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **Grimaldi and Cobelfret are granted leave to intervene in Case T-24/93 R in support of the defendant.**
2. **CMBT's request for confidential treatment of certain information contained in its application for suspension of operation is granted at the stage of these interim proceedings.**
3. **The application for interim measures is dismissed.**
4. **Costs are reserved.**

Luxembourg, 13 May 1993.

H. Jung

J. L. Cruz Vilaça

Registrar

President