

ORDER OF THE PRESIDENT OF THE FIFTH CHAMBER
OF THE COURT OF FIRST INSTANCE

23 March 1998 *

In Case T-18/97,

Atlantic Container Line AB and 15 other liner shipping companies, parties to the Trans-Atlantic Conference Agreement, represented by John Pheasant, Nicholas Bromfield and Shaun Goodman, Solicitors, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicants,

v

Commission of the European Communities, represented by Richard Lyal, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision C(96) 3414 final of 26 November 1996 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement),

* Language of the case: English.

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

makes the following

Order

Procedure and arguments of the parties

- 1 By application lodged at the Registry of the Court of First Instance on 27 January 1997, Atlantic Container Line AB and 15 other liner shipping companies (hereinafter 'ACL'), parties to the Trans-Atlantic Conference Agreement ('the TACA'), brought an action seeking annulment of Commission Decision C(96) 3414 final of 26 November 1996 ('the contested decision'), withdrawing any immunity from fines which might arise from notification of the TACA with respect to the joint exercise of rate-making authority in respect of the inland portion within the Community of through-intermodal services ('European intermodal authority').
- 2 By application lodged at the Court Registry on 19 June 1997, the European Council of Transport Users ASBL ('the ECTU'), an association governed by Belgian law, having its head office in Brussels, incorporating the European Shippers Council ('the ESC'), represented by Mark Clough, Solicitor Advocate, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue, sought leave to intervene in support of the Commission. The ECTU states that the ESC represents the deep-sea shipping and freight interests of European industry belonging to national shippers' councils and that the shipper members account for a major proportion of European exports and imports. The direct and specific

interest of the ESC, it states, is established by the facts that the contested decision was adopted following a procedure initiated in part in response to the complaint which it lodged against the TACA, that it participated in the administrative procedure and that it has an interest in the Commission's terminating the unlawful conduct of the applicants at the earliest possible date.

3 By application lodged at the Registry on 25 June 1997, the European Community Shipowners' Associations ('the ECSA'), an association governed by Belgian law, having its head office in Brussels, represented by Denis Waelbroeck and Denis Fosselard, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt, sought leave to intervene in support of the applicants. The ECSA explains that its members are the national shipowners' associations in the Member States of the European Union and Norway and that in the present instance it is acting on behalf of European liner operators, in particular those which are members of the various liner conferences serving the European Union and which, in turn, are members of the ECSA member associations. It submits that it fulfils the four conditions set out in the case-law (orders of 8 December 1993 in Case T-87/92 *Kruidvat v Commission* [1993] ECR II-1375, paragraph 14, and of 28 May 1997 in Case T-120/96 *Lilly Industries v Commission*, not published in the ECR, paragraph 24) for an association to be granted leave to intervene. First, it represents an appreciable number of undertakings active in the sector concerned. Second, the protection of its members' interests is among the objects in its articles of association. Third, the case may raise questions of principle affecting the functioning of the sector concerned; in the contested decision, the Commission found that the exercise of European intermodal authority by TACA members was a manifest and serious infringement of Article 85(1) of the EC Treaty which could not qualify either for the block exemption provided for in Article 3 of Regulation (EEC) No 4056/86 or for an individual exemption under Article 85(3) of the EC Treaty. The many shipowners represented by the ECSA are members of liner conferences serving the European Union which follow practices similar to European intermodal authority. Fourth, the interests of ECSA members

could be seriously affected by the judgment in the case; if European intermodal authority were no longer exercised, the effects could be detrimental to the liner operators and to their customers, the shippers.

- 4 By application lodged at the Registry on 25 June 1997, the Government of the French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in the same directorate, acting as agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri, sought leave to intervene in support of the Commission.
- 5 By application lodged at the Registry on 3 July 1997, the United Kingdom sought leave to intervene in support of the applicants. By letter of 18 August 1997, the United Kingdom withdrew its application to intervene.
- 6 Those applications for leave to intervene were served by the Registry on the applicants and the defendant, in accordance with Article 116 of the Rules of Procedure.
- 7 By letters of 17 and 30 July 1997, the Commission stated that it had no observations on any of the requests to intervene.
- 8 By letter of 25 July 1997, the applicants stated that they had no objection to the applications for leave to intervene lodged by France, the United Kingdom and the ECSA; they requested that the Court dismiss the ECTU's application to intervene, however, on the ground that it had not provided sufficient evidence of its direct and present interest in the result of the case. The applicants submit that, according to case-law, a complainant has no interest in a decision withdrawing the immunity

from fines enjoyed by parties to an agreement which has been notified (Case T-3/90 *Prodifarma v Commission* [1991] ECR II-1, paragraph 43) and that the finding by the Commission of a sufficient interest to justify intervention in its administrative procedure cannot bind the Court. They further claim that the reasons put forward by the ECTU relate not to its interest in intervening in Case T-18/97, which concerns an application for annulment of the contested decision withdrawing immunity from fines, but to its interest in the adoption of a final substantive decision examining the compatibility of the agreement notified with Article 85 of the Treaty and prohibiting intermodal rate-making. The applicants conclude that the ECTU's application to intervene should be dismissed.

- 9 In the event of the ECTU's being granted leave to intervene, the applicants request confidential treatment for certain parts of the case-file *vis-à-vis* the ECTU.

Findings of the Court

- 10 In accordance with the first paragraph of Article 37 of the EC Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 46 thereof, and with Article 115(2) of the Rules of Procedure of the Court of First Instance, Member States and institutions of the Community may intervene in cases before the Court. An application for leave to intervene submitted by any other person cannot be granted unless there is an interest in the result of the case and not merely an interest in relation to the pleas in law put forward (Joined Cases 116/77, 124/77 and 143/77 *Amylum and Others v Council and Commission* [1978] ECR 893; Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* [1997] ECR I-3491, paragraph 66). However, both the Court of Justice and the Court of First Instance, giving a broad interpretation to the right of associations to intervene, have adopted the practice of allowing inter-

vention by representative associations whose object is to protect their members in cases raising questions of principle liable to affect those members (*Kruidvat*, cited above, paragraph 14; *National Power and PowerGen*, cited above, paragraph 66).

- 11 The application to intervene submitted by the French Republic was presented in accordance with Article 115 of the Rules of Procedure of the Court of First Instance and must therefore be granted.

- 12 Whilst there is no need to decide to what extent the Commission is entitled to adopt a decision withdrawing immunity from fines under Regulation No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302), it is necessary to determine whether in the present case the ECTU and the ECSA have a sufficient interest, within the meaning of the case-law cited above, to intervene in the proceedings between ACL and the Commission.

- 13 A decision to withdraw immunity from fines adopted under Article 15(6) of Council Regulation No 17 of 6 February 1962 (OJ, English Special Edition 1959-1962, p. 87) is intended both to inform the undertakings to which it is addressed of the Commission's provisional opinion as to the compatibility of the agreements notified with Article 85 of the Treaty and to withdraw their immunity from fines, thus allowing the Commission, should the case arise, to impose a fine on the undertakings in question if they continue to implement the agreement notified.

- 14 First of all, therefore, such a decision withdrawing immunity does not have the effect of preventing the parties from implementing the agreement notified. Dissuasive though the risk of a fine may conceivably be, that contingent and purely factual effect depends solely on the will of the parties to the agreement.

Consequently, whilst outsiders to the agreement notified may prefer that there should or should not be such an effect in each specific case, their interest is merely indirect, hypothetical and insufficient for there to be a finding that their legal situation would be affected by the result of the case brought against the Commission by the parties to which the decision withdrawing immunity was addressed.

- 15 It has, moreover, been held that third-party complainants have no legitimate interest in having immunity withdrawn from parties to an agreement (*Prodifarma*, cited above, paragraph 43). Unlike the provisional measures which the Commission may adopt under Article 3 of Regulation No 17, withdrawal of immunity from fines cannot directly benefit third-party complainants. It must be stressed, furthermore, that a decision withdrawing immunity on the basis of considerations of expediency and the general interest does not seek to protect the interests of third-party market participants. Third parties cannot, therefore, show a sufficient interest in intervening in proceedings concerning such a decision withdrawing immunity.
- 16 A decision under Article 15(6) of Regulation No 17 constitutes, moreover, the culmination of a special procedure which is distinct from the substantive procedure examining the compatibility of the agreement notified with Article 85 of the Treaty, in which third-party complainants retain their full rights (Joined Cases 8/66 to 11/66 *Cimenteries CBR Cementbedrijven and Others v Commission* [1967] ECR 75).
- 17 Finally, such a decision withdrawing immunity from fines is entirely without effect on the final validity of the agreements notified and thus cannot affect the legal position of the applicants for leave to intervene or their members before the national courts.

- 18 Even if the broad interpretation of the right of associations to intervene is adopted, the specific nature of the present case means that the arguments put forward by the ECTU and the ECSA are not such as to justify their intervention here. Having regard to the nature of the contested measure, the fourth condition set out in the case-law for granting an association leave to intervene — that the interests of its members may be affected to an appreciable extent by the judgment — cannot be fulfilled.
- 19 None of the arguments put forward by the ECTU and the ECSA is such as to affect that analysis. It need merely be pointed out that they relate to the substantive procedure examining the compatibility of the agreement notified with Article 85 of the Treaty and not to the special procedure culminating in the withdrawal of immunity from fines, which is the subject-matter of ACL's present action.
- 20 The applications for leave to intervene submitted by the ECTU and the ECSA must therefore be dismissed.
- 21 Consequently, there is no need to rule on ACL's request for certain parts of the case-file to be given confidential treatment *vis-à-vis* the ECTU.

Costs

- 22 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since no application has been made by either the applicants or the defendant as to expenses incurred in connection with the applications for leave to intervene submitted by the ECTU and the ECSA, the parties must be ordered each to bear their own costs in relation to those applications.

On those grounds,

THE PRESIDENT OF THE FIFTH CHAMBER
OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The applications for leave to intervene submitted by the ECSA and the ECTU are dismissed.
2. The ECTU, the ECSA, the applicants and the defendant shall each bear their own costs in relation to the applications for leave to intervene submitted by the ECTU and the ECSA.
3. The French Republic is granted leave to intervene in Case T-18/97 in support of the form of order sought by the defendant.
4. The Registrar shall serve on the intervener a copy of every document served on the parties.
5. A period shall be prescribed within which the intervener must state in writing the pleas relied on in support of the form of order which it seeks.
6. The costs relating to the intervention of the French Republic are reserved.

7. The United Kingdom shall bear its own costs.

8. There is no need to take a decision on the request for confidential treatment.

Luxembourg, 23 March 1998.

H. Jung

Registrar

J. Azizi

President