JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
28 February 2002 *

In Case T-18/97,

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

Cho Yang Shipping Co. Ltd, established in Seoul (South Korea),

DSR-Senator Lines GmbH, established in Bremen (Germany),

Hanjin Shipping Co. Ltd, established in Seoul,

Neptune Orient Lines Ltd, established in Singapore,

Nippon Yusen Kaisha (NYK Line), established in Tokyo (Japan),

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

P & O Nedlloyd BV, established in Rotterdam (Netherlands),

P & O Containers Ltd, established in London (United Kingdom),

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

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

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

POL-Atlantic, established in Gdynia (Poland),

* Language of the case: English.

Sea-Land Service Inc., established in Charlotte (United States of America),

Tecomar SA de CV, established in Mexico City (Mexico),

Transportación Marítima Mexicana SA de CV, established in Mexico City,

represented by J. Pheasant and N. Bromfield, Solicitors, with an address for service in Luxembourg,

applicants,

v

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

defendant,

supported by

French Republic, represented by K. Rispal-Bellanger and R. Loosli-Surrans, acting as Agents, with an address for service in Luxembourg,

intervener,

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

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

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

Registrar: Y. Mottard, Legal Secretary,

having regard to the written procedure and further to the hearing on 8 June 2000,

gives the following

Judgment

Relevant legislation and facts

1 Council Regulation No 17 of 6 February 1962 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) initially applied to all activities covered by the EEC Treaty. However, given

the common transport policy, and in view of the distinctive features of the transport sector, it proved necessary to lay down rules governing competition different from those laid down for other sectors of the economy, and the Council therefore adopted on 26 November 1962 Regulation No 141 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291).

2 The detailed rules for the application of Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) to inland transport are defined in Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302). Articles 2, 5 and 8 of Regulation No 1017/68 transpose Articles 85(1), 85(3) and 86 of the Treaty respectively.

3 On 22 December 1986 the Council adopted Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4). Article 1(2) of that regulation provides that '[i]t shall apply only to international maritime transport services from or to one or more Community ports, other than tramp vessel services [meaning the transport of goods in bulk by means of vessels chartered on demand].'

4 As regards air transport, the Council adopted Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1).

5 Under Article 4(1) of Regulation No 17, agreements of the kind described in Article 85(1) of the Treaty and in respect of which the parties seek application of Article 85(3) of the Treaty must be notified to the Commission. Until they are notified, no decision in application of Article 85(3) may be taken. Article 6 of Regulation No 17 provides that the date from which the decision takes effect shall not be earlier than the date of notification.

6 Article 12 of Regulations Nos 1017/68 and 4056/86 and Article 5 of Regulation No 3975/87 lay down a procedure for objections in connection with the application of Article 85(3) of the Treaty. Under those provisions, undertakings which seek application of Article 85(3) of the Treaty in respect of agreements, decisions and concerted practices falling within Article 85(1) to which they are parties must submit an application to the Commission. Unless the Commission notifies applicants, within 90 days of publishing the application in the *Official Journal of the European Communities*, that there are serious doubts as to the applicability of Article 85(3) of the Treaty, or Article 5 of Regulation No 1017/68, the agreement, decision or concerted practice is deemed exempt, in so far as it conforms to the description given in the application, for a maximum of six years under Article 12(3) of Regulation No 4056/86 and Article 5(3) of Regulation No 3975/87, or for a maximum of three years under Article 12(3) of Regulation No 1017/68. If the Commission finds, after expiry of the 90-day time-limit, but before expiry of the three-year or six-year period, that the conditions for applying Article 85(3) of the Treaty or Article 5 of Regulation No 1017/68 are not satisfied, it must issue a decision declaring that the prohibition in Article 85(1) of the Treaty or Article 2 of Regulation No 1017/68 is applicable. Finally, if the Commission finds that the conditions of Articles 85(1) and 85(3) of the Treaty or Articles 2 and 5 of Regulation No 1017/68 are satisfied, it must issue a decision applying Article 85(3) of the Treaty or Article 5 of Regulation No 1017/68. The second subparagraph of Article 12(4) of Regulations Nos 1017/68 and 4056/86 provides that the date from which the decision is to take effect may be prior to that of the application.

7 Under Article 15(2) of Regulation No 17, Article 19(2) of Regulation No 4056/86 and Article 12(2) of Regulation No 3975/87 the Commission may

by decision impose on undertakings fines where either intentionally or negligently they infringe Article 85(1) or Article 86 of the Treaty.

8 Article 15(5) of Regulation No 17, Article 19(4) of Regulation No 4056/86 and Article 12(5) of Regulation No 3975/87 provide that fines may not be imposed in respect of acts taking place after notification to the Commission and before the Commission's decision allowing or refusing application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification. That is not the case, however, where the Commission has informed the undertakings concerned that, after preliminary examination, it is of the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified (Article 15(6) of Regulation No 17, the third subparagraph of Article 19(4) of Regulation No 4056/86 and the second subparagraph of Article 12(5) of Regulation No 3975/87).

9 Article 22(2) of Regulation No 1017/68 merely provides that the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 2 or Article 8 of that regulation.

10 The applicants are all shipping companies and parties to the Trans-Atlantic Agreement (the 'TAA'), an agreement on scheduled transatlantic container transport between Northern Europe and the United States of America. The TAA was notified to the Commission on 28 August 1992 and entered into force on 31 August 1992. The TAA fixed, *inter alia*, the tariffs for maritime transport and intermodal transport, which, in addition to maritime transport and port and

handling services, includes the inland carriage of containers between Northern European ports served by the companies party to the TAA and inland locations within Europe. The tariffs applicable to intermodal transport thus cover, *inter alia*, maritime segments and inland segments.

11 On 19 October 1994 the Commission adopted Decision 94/980/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1, 'the TAA Decision'). In that decision, the Commission found that certain provisions of the TAA, including in particular those fixing the rates for inland transport services within Europe provided as part of an intermodal transport service, infringed Article 85(1) of the Treaty. It also refused to apply to those provisions Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68. In Article 4 of the TAA Decision the Commission required the undertakings to whom it was addressed to refrain in future from any agreement or concerted practice which might have the same or a similar object or effect as the agreements and practices sanctioned in the decision.

12 On 5 July 1994 the parties to the TAA Agreement had notified the Commission of a new agreement which was to replace the TAA, called the Trans-Atlantic Conference Agreement ('the TACA'). That notification was made under Article 12(1) of Regulation No 4056/86 with a view to obtaining exemption under Article 85(3) of the Treaty and Article 53(3) of the Agreement on the European Economic Area.

13 The parties are agreed that the TACA in no way altered the provisions of the TAA concerning the fixing of the inland tariffs for intermodal transport services. The TACA entered into force on 24 October 1994 and, as a result of successive amendments, several new versions of the agreement were notified to the Commission after the initial notification of 5 July 1994.

14 In accordance with Article 4(8) of Commission Regulation (EEC) No 4260/88 of 16 December 1988 on the communications, complaints and applications and the hearings provided for in Council Regulation No 4056/86 (OJ 1988 L 376, p. 1), the Commission informed the parties to the TACA by letter of 15 July 1994 that it would also examine their application under Regulation No 1017/68 and Regulation No 17.

15 On 23 December 1994 the parties to the TAA brought an action (Case T-395/94) for annulment of the TAA Decision. By separate application (Case T-395/94 R) they also applied under Articles 185 and 186 of the EC Treaty (now Articles 242 EC and 243 EC) for suspension of the operation of the TAA Decision in so far as it prohibited inland transport rate fixing.

16 By order of 10 March 1995 (Case T-395/94 R *Atlantic Container Line and Others* v *Commission* [1995] ECR II-595) the President of the Court of First Instance granted that application and suspended operation of Articles 1, 2, 3 and 4 of the TAA Decision until delivery of the final judgment of the Court in the main action, in so far as they prohibited the parties to the TAA from jointly exercising rate-making authority in respect of the inland portions within the Community of intermodal transport services. An appeal brought by the Commission against that order was dismissed by order of the President of the Court of Justice of 19 July 1995 (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165).

17 On 21 June 1995 the Commission sent the parties to the TACA a statement of objections in which it expressed its preliminary view that the TACA infringed Article 85(1) of the Treaty, in that it contained provisions whose purpose was to fix inland transport tariffs, and could not be exempted under Article 85(3). The

Commission gave the parties to the agreement notice of its intention to adopt a decision withdrawing any immunity from fines resulting from the notification of the TACA of 5 July 1994.

18 From March to September 1995 there were various meetings and exchanges of correspondence between the Commission's staff and the applicants.

19 By application lodged at the Registry of the Court of First Instance on 3 October 1995, the applicants submitted a second application for interim measures pursuant to Article 186 of the Treaty, in which they requested the President of the Court to issue an order to the Commission to the effect that 'a decision to withdraw [from them] immunity from fines in respect of European intermodal authority be stated to become effective, if ever, only after final judgment by the [Court] on an application to be lodged expeditiously by the applicants under Articles 173 and 174 of the EC Treaty for the annulment of such decision'. By order of 22 November 1995 (Case T-395/94 R II *Atlantic Container Line and Others* v *Commission* [1995] ECR II-2893) the President of the Court dismissed that application as inadmissible.

20 On 29 November 1995 the parties to the TACA notified the Commission of the European Inland Equipment Interchange Arrangement ('the EIEIA'), a cooperation agreement concerning inland segments of intermodal transport services and providing for the implementation of a system for the exchange of equipment, and in particular containers.

21 On 1 March 1996 the Commission sent the parties to the TACA a supplementary statement of objections in which it indicated that the EIEIA had not caused it to alter the opinion it had expressed in its statement of objections of 21 June 1995.

The applicants sent their reply to that supplementary statement of objections on 15 April 1996. The parties to the TACA attended a hearing on 6 May 1996.

22 On 26 November 1996 the Commission adopted Decision C(96) 3414 final relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (hereinafter 'the contested decision').

23 In Recital 122 of the contested decision, the Commission referred to Article 15(6) of Regulation No 17, which provides that the immunity from fines provided for in Article 15(5) does not have effect where it has informed the undertakings concerned that, after preliminary examination, it is of the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) of the Treaty is not justified. Recital 123 of the contested decision is worded as follows:

'Regulation (EEC) No 1017/68 contains no equivalent provision concerning immunity from fines to that contained in Article 15(5) of Regulation (EEC) No 17/62. However, in so far as any such immunity may be implied into the terms of Regulation (EEC) No 1017/68, the same criteria for its withdrawal should also be implied.'

24 After preliminary examination the Commission came to the opinion that the criteria for withdrawing immunity were satisfied in this case because the provisions of the TACA relating to inland transport rate fixing constituted a serious and manifest breach of Article 85(1) of the Treaty and could not benefit from exemption under Article 85(3) of the Treaty.

25 Accordingly, the Commission adopted the contested decision, Article 1 of which provides:

'*Article 1*

After preliminary examination the Commission is of the opinion that Article 85(1) of the EC Treaty, Article 2 of Regulation (EEC) No 1017/68 and Article 53(1) of the EEA Agreement apply to the price agreement between the parties to the Trans-Atlantic Conference Agreement relating to the supply to shippers of inland transport services undertaken within the territory of the Community in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between Northern Europe and the United States of America, and that application of Article 85(3) of the EC Treaty, Article 5 of Regulation (EEC) No 1017/68 and Article 53(3) of the EEA Agreement is not justified.'

Procedure and forms of order sought

26 By application lodged at the Registry of the Court of First Instance on 27 January 1997, the applicants brought the present action for annulment.

27 By applications lodged on 19 June 1997 and 25 June 1997 respectively The European Council of Transport Users and The European Community Shipowners' Association applied for leave to intervene in support of the defendant and the applicants respectively. By order of 23 March 1998 of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance both of those applications were refused.

28 By application lodged on 25 June 1997 the French Republic applied for leave to intervene in support of the form of order sought by the defendant and this was granted by order of 23 March 1998 of the President of the Fifth Chamber, Extended Composition, of the Court of First Instance.

29 Having lodged an application on 3 July 1997 for leave to intervene in support of the applicants, the United Kingdom then withdrew that application by letter of 18 August 1997.

30 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

31 The defendant contends that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicants to pay the costs.

32 The intervener claims that the Court should declare the action inadmissible.

Admissibility

Arguments of the parties

33 The Commission maintains that the action is inadmissible because the contested decision has no legal effect, having been adopted merely as a precautionary measure. It points out in this connection that the provisions of the TACA relating to inland transport rate fixing in the context of intermodal transport services are governed by Regulation No 1017/68 and that, under Article 22 of that regulation, unlike Article 15(5) of Regulation No 17, Article 19(4) of Regulation No 4056/86 and Article 12(5) of Regulation No 3975/87, notification of an agreement does not confer upon the notifying undertaking any immunity from fines.

34 The applicants maintain that, by notifying the TACA on 5 July 1994, they attracted immunity from fines and that the Commission's claim that the action is inadmissible is unfounded.

35 The applicants point out, first of all, that the question whether the provisions of the TACA fixing inland transport tariffs should be examined in the light of Regulation No 1017/68 or Regulation No 4056/86 remains in dispute and is to be settled by the Court in Case T-395/94 *Atlantic Container Line and Others* v *Commission* and Case T-86/95 *Compagnie générale maritime and Others* v *Commission*. If it is the second regulation that applies, the Commission's claim that the action is inadmissible must be held to be unfounded and the contested decision annulled.

36 Secondly, the applicants emphasise that the TACA was notified under Regulation No 4056/86 and that they thus enjoy the immunity from fines provided for by Article 19(4) of that regulation.

37 According to the applicants, the Commission's claim that the contested decision has no real legal effect is based on the assumption that its letter of 15 July 1994 — by which it informed the parties to the TACA that it would also examine the agreement in the light of Regulation No 1017/68 — produced the same effect as a decision withdrawing immunity.

38 Thirdly, the applicants argue that the Commission would not have initiated the procedure to lift immunity from fines if it had genuinely believed that the applicants did not enjoy such immunity. Both the press release issued on adoption of the contested decision and the *XXVIth Report on Competition Policy* record the adoption of a decision to lift the immunity from fines arising from notification of the TACA. Similarly, the position adopted by the Commission in the interlocutory proceedings in Case T-395/94 R II implies that the applicants did enjoy immunity from fines following notification of the TACA. In those circumstances, the Commission cannot now dispute the legal basis on which its decision rests and on which rested the administrative procedure engaged with a view to the adoption of that decision.

39 Fourthly, it is a general principle of Community law that undertakings notifying an agreement in order to obtain exemption should not incur the risk of fines which are designed to penalise the illegality of such agreements. That principle, the effect of which is to provide an incentive to undertakings to notify agreements to which they are party, ensures the effective enforcement of Community competition law. That such a principle exists is clear from paragraph 93 of the judgment of the Court of Justice in Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, wherein the Court indicated that immunity 'is the counterpart of the risk incurred by the undertaking in itself reporting the agreement or concerted practice'. Similarly, in paragraphs 291 and 292 of the judgment in Case 27/76 *United Brands* v *Commission* [1978] ECR 207 the Court and the Commission took the view that notification of agreements excluded one of the conditions for the imposition of a fine, namely negligence, and that fines could not therefore be imposed in respect of notified activities which infringed Article 86 of the Treaty. That general principle finds legislative expression in all procedural regulations giving effect to Articles 85 and 86 of the Treaty, with the sole exception of Regulation No 1017/68. The lack of any express provision to the same effect in that regulation does not, however, mean that the general principle does not apply.

40 Fifthly, none of the provisions in Regulation No 1017/68 discloses any legislative intention that undertakings notifying agreements under this regulation should not enjoy immunity. The absence of any express provision conferring immunity from fines is not the counterpart of the fact that, under Article 5, exemption can be granted for an agreement which has not been notified, since Regulations Nos 4056/86 and 3975/87 make provision both for immunity from fines and for exemption of unnotified agreements. The risk run by an undertaking which puts into effect an agreement covered by Regulation No 1017/68 without notifying it is the same as that inherent in a similar situation governed by Regulation No 17. The public interest which justifies the grant of immunity to undertakings in respect of notified agreements, namely the effective enforcement of competition law, is the same in the context of all the regulations and the incentive to notify agreements resulting from immunity should also be a factor in situations governed by Regulation No 1017/68. Furthermore, the Commission expressly

encouraged undertakings to notify forms of cooperation similar to agreements fixing inland transport rates. Lastly, none of the characteristics of rail, road and inland waterway transport justifies exclusion of the 'general principle of immunity'. Given that Regulation No 1017/68 is identical to the other regulations implementing Articles 85 and 86 of the Treaty as regards the level of fines or periodic penalty payments, the Commission's investigatory powers, and the principles upon which the Court may review the level of fines, there is no reason to suppose that the circumstances in which fines may be imposed should be different.

Findings of the Court

41 According to settled case-law, only measures the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) (see, *inter alia*, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

42 Given that the aim of the contested decision was to withdraw from the applicants any immunity from fines which they may have enjoyed in respect of the provisions of the TACA fixing inland transport rates and which might conceivably have arisen as a result of the applicants' notification of the TACA on 5 July 1994, it was capable of producing binding legal effects only if the notification did in fact confer upon the applicants the benefit of such immunity.

43 In order to determine whether or not notification of the TACA conferred upon the applicants immunity from fines in respect of the provisions of that agreement fixing inland transport rates, it is necessary first of all to establish whether the provisions at issue fall within the scope of Regulation No 4056/86 or Regulation No 1017/68.

44 The parties are agreed that those particular provisions of the TACA are identical to the corresponding provisions of the TAA. Furthermore, in these proceedings the applicants have not raised any argument as to which regulation applies and have merely referred to Cases T-395/94 and T-86/95. It is clear from paragraphs 230 to 277 of the judgment in Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, delivered today, that provisions fixing inland transport rates in the context of intermodal transport services, such as those in the TAA, and thus also those in the TACA, fall within the scope of Regulation No 1017/68, not Regulation No 4056/86.

45 The Court must therefore consider whether notification of an agreement coming within the scope of Regulation No 1017/68 gives rise to immunity from fines.

46 Article 15(5) of Regulation No 17, it may be recalled, provides that the fines which may be imposed under Article 15(2) for infringement of Articles 85 and 86 of the Treaty may not be imposed in respect of acts taking place after notification to the Commission and before the Commission's decision allowing or refusing application of Article 85(3) of the Treaty. However, under Article 15(6) of Regulation No 17, Article 15(5) does not have effect where the Commission has informed the undertakings concerned that, after preliminary examination, it is of

the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified. The immunity from fines provided for by Article 15(5) of Regulation No 17 is a temporary derogation benefiting undertakings that notify an agreement. It applies only to acts taking place after notification and only to the extent that those acts 'fall within the limits of the activity described in the notification'.

47 Article 19(4) of Regulation No 4056/86 and Article 12(5) of Regulation No 3975/87 contain provisions similar to those of Article 15(5) and (6) of Regulation No 17.

48 In so far as concerns Regulation No 1017/68, the fact remains that, whilst Article 22(2) of that regulation, like Article 15(2) of Regulation No 17, Article 19(2) of Regulation No 4056/86 and Article 12(2) of Regulation No 3975/87, provides that the Commission may impose fines for infringement of the competition rules, neither Article 22 nor any other article of Regulation No 1017/68 contains provisions equivalent to those of Article 15(5) and (6) of Regulation No 17, Article 19(4) of Regulation No 4056/86 and Article 12(5) of Regulation No 3975/87. Unlike the latter three regulations, Regulation No 1017/68 contains no provision whereby notification of an agreement triggers a derogation from the rule (contained, in the case of Regulation No 1017/68, in Article 22(2)) under which the Commission may impose fines on an undertaking for infringement of the competition rules. Since Regulation No 1017/68 contains no provision granting immunity from fines in the event of notification, notification of agreements falling within the scope of that regulation does not confer immunity on undertakings notifying such agreements.

49 Nevertheless, it is still necessary to consider whether immunity from fines may, as the applicants maintain, be regarded as a general principle of Community competition law arising from the public interest in encouraging undertakings to

notify agreements. If indeed it is, then, notwithstanding the lack of express provision in Regulation No 1017/68 for such immunity, notification of an agreement falling within the scope of that regulation will nevertheless confer immunity from fines upon the undertaking notifying it.

50 Under Article 87 of the EC Treaty (now, after amendment, Article 83 EC) the Council has responsibility for laying down all regulations or directives to give effect to the principles set out in Articles 85 and 86 of the Treaty and, in particular, regulations or directives designed 'to ensure compliance with the prohibitions laid down in Article[s] 85(1) and 86 by making provision for fines and periodic penalty payments'. The very principle of imposing fines in cases of infringement of the competition rules thus flows directly from the Treaty. Fines have a special importance and, according to case-law, their object is not merely to suppress illegal activities but also to prevent any recurrence (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 173).

51 Any immunity from fines that may be provided for, in appropriate cases, in secondary legislation and that arises, subject to certain limits, from notification is thus a form of derogation or exception. It would be wrong to conclude that such immunity might find application in the absence of express provision as a general principle of Community law. The mere fact that Regulations Nos 17, 4056/86 and 3975/87 all contain provision for immunity from fines in the event of notification does not imply the existence of any such general principle. Moreover, the applicants have in no way demonstrated that such a principle exists. They merely referred to the three regulations just mentioned. The fact that Regulation No 1017/68, unlike those three regulations, contains no express provision for immunity indicates, on the contrary, that notification of an agreement that falls within the scope of Regulation No 1017/68 does not give rise to immunity. Indeed, having regard to the general principle prohibiting anticompetitive agreements laid down in Article 85(1) of the Treaty and the right, laid down in Article 87(2) of the Treaty, to impose fines in order to ensure the effectiveness of that prohibition, provisions which derogate from that principle, such as those

providing for immunity from fines in the event of notification, cannot be interpreted broadly and cannot be construed in such a way as to extend their effects beyond cases expressly provided for (see, by analogy, Case C-230/96 *Cabour* [1998] ECR I-2055, paragraph 30).

52 Immunity from fines arising from notification of an agreement constitutes a derogation from the rule that the Commission has power to impose fines on undertakings in cases of infringement of the competition rules which is laid down in Article 15(2) of Regulation No 17 and in the corresponding provisions of Regulations Nos 1017/68, 4056/86 and 3975/87 and which merely translates Article 87(2) of the Treaty. That being so, any immunity from fines must be construed narrowly and may only apply if, and to the extent that, it is expressly provided for in legislation. It may be observed in this connection that the Court of Justice has held that the dispensation from notification provided for in Article 4(2) of Regulation No 17, which enables an agreement to be exempted without being notified in advance, does not preclude the Commission, in appropriate cases, from imposing fines upon undertakings for their involvement in an agreement covered by Article 4(2). The prohibition on imposing fines is expressly laid down only in the case of agreements which have in fact been notified (Joined Cases 240/82, 241/82, 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 70 to 78).

53 Contrary to the applicants' assertion, there is thus no general principle of Community law according to which notification of an agreement confers immunity from fines on the notifying undertaking even where there is no express legislative provision for such immunity.

54 It might also be added that, since Regulation No 1017/68 contains no provision granting immunity from fines in the event of notification, it obviously does not

make provision for the Commission to withdraw such immunity. The argument raised by the applicants would, if conceded, lead to the unacceptable result that mere notification of an agreement falling within the scope of Regulation No 1017/68 would automatically give rise to complete immunity from fines, which could not be imposed even in cases where there is a clear breach of the competition rules.

55 Contrary to the applicants' assertion, the judgment in *Musique diffusion française*, cited above, does not suggest that immunity from fines in the event of notification is a general principle of Community law. Paragraph 93 of the judgment, which the applicants cite in part, does not contain any confirmation by the Court of the existence of such a principle. The applicants in that case had argued that no fine should have been imposed because their agreements satisfied the conditions for exemption and, at most, they had simply failed to comply with a procedural rule requiring them to notify the agreements. In paragraph 93 the Court merely responded to that argument by stating the nature and purpose of the immunity from fines which, subject to certain conditions and limits, is afforded by Article 15(5) of Regulation No 17. Similarly, in paragraphs 291 and 292 of *United Brands*, cited above, the Court merely took notice of the fact that the Commission did not impose a fine in respect of acts following notification by United Brands of its general conditions of sale on the view that the company had not been negligent during the period after notification. Contrary to the applicants' submission, the Court in that case did not hold that the immunity from fines provided for by Article 15(5) of Regulation No 17 also applies to conduct which infringes Article 86 of the Treaty. Still less did it lay down a general legal principle according to which notification always automatically entails immunity from fines, even in the absence of express provision.

56 Moreover, contrary to the applicants' submission, it does not appear that the absence of any provision for immunity from fines in the event of notification in Regulation No 1017/86 is a mere omission on the part of the Community legislature.

57 First of all, Article 22 of Regulation No 1017/68 reproduces almost identically Article 15 of Regulation No 17 with the single, telling exception of the provisions concerning immunity from fines.

58 Secondly, Regulation No 1017/68 defines a different mechanism offering advantages to undertakings which choose to notify their agreements, thereby encouraging them to do so. Article 12 of Regulation No 1017/68 establishes a procedure for raising objections according to which, if the Commission does not inform an undertaking that has applied to it for exemption, within 90 days of the date of publication in the *Official Journal* of a summary of the application, that there are serious doubts as to the possibility of exempting the agreement, the latter will be deemed exempt for a period of three years during which time the undertaking in question shall, as a result, be protected from fines.

59 In any event, even if the lack of any provision in Regulation No 1017/68 for immunity from fines in the event of notification were an anomaly in comparison with the other regulations laying down detailed rules for the application of Articles 85 and 86 of the Treaty to undertakings in a given sector, or a simple omission on the part of the Community legislature, it is not for the Court of First Instance to take on the mantle of legislator.

60 It follows that the applicants did not, by notifying the TACA, attract immunity from fines in relation to the provisions of that agreement fixing inland transport rates because those provisions fall within the scope of Regulation No 1017/68, under which no immunity from fines is offered in the event of notification.

61 That conclusion is not affected by the fact that the applicants notified their agreement under Regulation No 4056/86, Article 19(4) of which does provide for immunity from fines for notified agreements.

62 The various regulations laying down detailed rules for the application of Articles 85 and 86 of the Treaty apply only to those agreements which fall within their specific scope. Given that the provisions of the TACA fixing inland transport rates fall within the scope of the regulation on inland transport, namely Regulation No 1017/68, the applicants cannot rely on the provisions of Regulation No 4056/86 on maritime transport. The fact that the TACA was notified under Regulation No 4056/86 is irrelevant. The consequences attaching to notification of an agreement flow from the regulation by which the agreement is governed, rather than the regulation under which the parties to the agreement may have mistakenly notified it. It would be quite wrong to allow parties to an agreement to cause provisions relating to immunity from fines to be applied for their benefit simply by selecting the regulation under which they notify the agreement.

63 The applicants' argument that the letter of 15 July 1994 — in which the Commission informed them that, because it concerned inland transport, their application for exemption would also be considered under Regulation No 1017/68 — had the same effect as a decision withdrawing immunity from fines is irrelevant and unfounded. Since the provisions of the TACA fixing inland transport rates fall within the scope of Regulation No 1017/68, notification of that agreement, even under Regulation No 4056/86, could not obtain for the applicants the immunity from fines afforded by Regulation No 4056/86. Clearly, the letter of 15 July 1994 could not withdraw from the applicants an immunity they did not enjoy. It should also be observed that Article 4(8) of Regulation No 4260/88 provides that, where an undertaking notifies an agreement that falls outside the scope of that regulation under Article 12 of Regulation No 4056/86, the Commission must inform the applicant that it intends to examine the

application under the provisions of the applicable regulation. That provision is intended for the convenience of undertakings in that it dispenses them from making a fresh application and in that the date of the incorrect notification remains the effective date of notification. A letter such as the Commission's letter of 15 July 1994 does not, therefore, have an effect equivalent to the withdrawal of immunity. On the contrary, it gives the applicant an advantage. Furthermore, if, as the applicants maintain, the letter of 15 July 1994 had had the effect of withdrawing their immunity from fines, *quod non*, the present action would be inadmissible on the ground that it was brought out of time, the contested decision, dated 26 November 1996, merely confirming the decision contained in the letter of 15 July 1994.

64 The applicants' argument that because the Commission conducted the entire procedure as if they had enjoyed immunity from fines, it cannot now contend the opposite must also be rejected.

65 First, it is untrue that the Commission conducted itself as if it believed that the applicants enjoyed immunity from fines in respect of the provisions of the TACA fixing inland transport rates. Admittedly, the Commission did complete the whole of the administrative procedure to withdraw any possible immunity from fines. However, as early as 21 June 1995, when it sent its statement of objections (see points 47 and 93 thereof), the Commission stated that, in view of the unusual nature of the provisions in question and, in particular, the fact that, unlike the other regulations implementing Articles 85 and 86, Regulation No 1017/68 contained no provision for immunity from fines in respect of notified agreements, and the lack of case-law on the point, it was adopting the contested decision as a precautionary measure, in the event that the applicant should enjoy immunity.

Secondly, whether or not an action is admissible is a matter of public policy. Thus, incorrect interpretation of a point of law on the Commission's part cannot imbue an act with a legal effect it does not have.

66 Lastly, there is no question in the present case of protecting legitimate expectations or of complying with the principle of estoppel. First, the Commission made no promise or declaration to the applicants that might lead them to believe that they did enjoy immunity from fines. Secondly, the applicants in no way altered their position to their own disadvantage in reliance on declarations or promises made by the Commission.

67 It follows from all the foregoing that the contested decision did not alter the legal position of the applicants. The action is therefore inadmissible.

Costs

68 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. Article 87(4) of those rules of procedure provides that Member States which intervene in the proceedings are to bear their own costs. As the applicants have been unsuccessful, they must be ordered to pay their own costs together with those of the Commission, in accordance with the latter's application on costs. The French Republic, as intervener, shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action as inadmissible;

2. Orders the applicants to bear their own costs together with those of the Commission;

3. Orders the French Republic to bear its own costs.

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 28 February 2002.

H. Jung
Registrar

M. Jaeger
President