JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
11 December 2003 *

In Case T-56/99,

Marlines SA, established in Monrovia (Liberia), represented by D.G. Papatheofanous, lawyer, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for annulment of Commission Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24),

* Language of the case: Greek.

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2002,

gives the following

Judgment

Facts

1 The applicant, Marlines SA, is a Greek ferry operator which transports passengers and vehicles between the Greek port of Patras and the Italian port of Ancona.

2 Following a complaint from a customer to the effect that ferry tariffs were very similar on routes between Greece and Italy, the Commission, acting pursuant to Article 18(3) 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), carried out inspections at the offices of six ferry operators, including five in Greece and one in Italy.

3 By decision of 21 February 1997 the Commission opened formal proceedings, sending a statement of objections to nine companies operating lines between Greece and Italy, including the applicant.

4 On 9 December 1998 the Commission adopted Decision 1999/271/EC relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.466 — Greek Ferries) (OJ 1999 L 109, p. 24, hereinafter 'the Decision').

5 The Decision contains the following provisions:

'*Article 1*

1. Minoan Lines, Anek Lines, Karageorgis Lines, Marlines SA and Strintzis Lines have infringed Article 85(1) of the EC Treaty by agreeing prices to be applied to roll-on roll-off ferry services between Patras and Ancona.

The duration of these infringements is as follows:

(a) in the case of Minoan Lines and Strintzis Lines, from 18 July 1987 until July 1994;

(b) in the case of Karageorgis Lines, from 18 July 1987 until 27 December 1992;

(c) in the case of Marlines SA, from 18 July 1987 until 8 December 1989;

(d) in the case of Anek Lines, from 6 July 1989 until July 1994.

2. Minoan Lines, Anek Lines, Karageorgis Lines, Adriatica di Navigazione SpA, Ventouris Group Enterprises SA and Strintzis Lines have infringed Article 85(1) of the EC Treaty by agreeing on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes.

The duration of these infringements is as follows:

(a) in the case of Minoan Lines, Ventouris Group Enterprises SA and Strintzis Lines, from 8 December 1989 until July 1994;

(b) in the case of Karageorgis Lines, from 8 December 1989 until 27 December 1992;

(c) in the case of Anek Lines, from 8 December 1989 until July 1994;

(d) in the case of Adriatica di Navigazione SpA, from 30 October 1990 until July 1994.

Article 2

The following fines are hereby imposed on the following undertakings in respect of the infringement found in Article 1:

— Minoan Lines, a fine of ECU 3.26 million,

— Strintzis Lines, a fine of ECU 1.5 million,

— Anek Lines, a fine of ECU 1.11 million,

— Marlines SA, a fine of ECU 0.26 million,

— Karageorgis Lines, a fine of ECU 1 million,

— Ventouris Group Enterprises SA, a fine of ECU 1.01 million,

— Adriatica di Navigazione SpA, a fine of ECU 0.98 million.

...'

6 The Decision was addressed to seven undertakings: Minoan Lines, established in Heraklion, Crete (Greece) (hereinafter 'Minoan'), Strintzis Lines, established in Piraeus (Greece) (hereinafter 'Strintzis'), Anek Lines, established in Hania, Crete (hereinafter 'Anek'), Marlines SA, established in Piraeus (hereinafter 'the applicant'), Karageorgis Lines, established in Piraeus ('Karageorgis'), Ventouris Group Enterprises SA, established in Piraeus ('Ventouris') and Adriatica di Navigazione SpA, established in Venice (Italy) ('Adriatica').

Procedure and forms of order sought

7 By application lodged at the Registry of the Court of First Instance on 25 February 1999, the applicant brought an action for annulment of the Decision.

8 By separate document lodged at the Registry on the same day, the applicant also applied for suspension of the operation of the Decision. By order of 21 June 1999, the President of the Court of First Instance rejected that application and reserved costs.

9 On hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, by way of measures of organisation of procedure, called upon the Commission to answer, in writing, a question and to produce certain documents. The Commission complied with that request within the time allowed.

10 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 2 July 2002.

11 The applicant claims that the Court should:

— declare the action admissible,

— annul the Decision,

— order the Commission to pay the costs.

12 The Commission contends that the Court should:

— dismiss the action in its entirety,

— order the applicant to pay the costs.

Law

13 The applicant puts forward a single plea in law in support of its application for annulment of the Decision. It alleges that the Commission erred in its assessment of the facts in that it misconstrued the documents which it regarded as proving the applicant's participation in the cartel with which the Decision is concerned.

Arguments of the parties

14 The applicant maintains that it never wished to take part in discussions on tariff rates with the other companies operating the line between Patras and Ancona and asserts that it did not do so. It adds that, in view of its size and very limited commercial influence, it was not in a position to conclude price agreements with its competitors. Furthermore, it had no ship of its own and maintains that the owners of the ships which it managed never gave it authority to conclude such agreements.

15 The applicant observes, more specifically, that, during the period in question (1987 to 1989) it adopted an autonomous commercial policy different from that of the other ferry operators. In 1987 it applied a 50% discount and 10% and 5% discounts in 1988 and 1989 respectively. The applicant emphasises that those discounts were clearly mentioned in the advertising brochures which it distributed to European travel agencies in October every year.

16 Next, the applicant argues that at no point did it send documents to the other companies accepting the positions which they had adopted on tariffs. It criticises the Commission for basing its assessment solely on a very small number of documents, which had been sent to the applicant by the other companies by facsimile, without having any evidence that the applicant agreed to the conclusion of an agreement. In this connection it points out that, although the Commission conducted a thorough review, it found no documents sent by the applicant. The mere fact that the applicant received a certain number of telexes from other companies does not suffice to establish that it participated in any agreement on prices, all the more so because it was current practice among all transport and commercial companies to exchange information on prices or on conditions of sale and transport. Lastly, the applicant completely ignored the letters and facsimiles which it received.

17 In conclusion, the applicant emphasises that none of the evidence in the file indicates that it had any intention of collaborating with the other operators in the market.

18 The Commission, for its part, disputes the merits of the applicant's single plea. It observes that the Decision mentions in detail the evidence which enabled it to conclude that the applicant had participated in the cartel. Eight documents were exchanged by the companies involved in the cartel during the period from 15 March 1989 to 22 September 1989. In the majority of cases, the documents incriminating the applicant were telexes and letters that were sent to it.

19 The Commission also refutes the applicant's argument that it never attended meetings or sent any document proving its acceptance of or participation in any agreement on prices for roll-on roll-off ferry services between Patras and Ancona because, since it is not necessary for an agreement to have any particular form for it to be contrary to Article 85(1) of the EC Treaty (now Article 81(1) EC), communication of an agreement to the parties and its tacit acceptance are evidence of the existence of an agreement contrary to Article 85 of the EC Treaty (Case C-277/87 *Sandoz prodotti farmaceutici* v *Commission* [1990] ECR I-45). The Commission adds that even tacit acceptance may, where the person concerned does not distance itself, be treated as acceptance of and participation in a prohibited agreement (Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 85) and that it may take as evidence of an undertaking's conduct correspondence exchanged by third parties (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 164).

Findings of the Court

20 According to consistent case-law, in order for there to be an agreement within the meaning of Article 85(1) of the Treaty, it is sufficient for the undertakings in

question to have expressed their joint intention to conduct themselves in the market in a particular way (Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86, Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 130, *Tréfileurope* v *Commission*, cited above, paragraph 95, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 958).

21 The agreement need be in no particular form, whether written or verbal; nor need it be governed by any particular rules. Communication of an agreement to the parties and its tacit acceptance suffice to prove the existence of an agreement contrary to Article 85 of the EC Treaty (see, to that effect, *Sandoz prodotti farmaceutici* v *Commission*, cited above, paragraph 11). Even tacit acceptance may, where the person concerned does not distance itself, be treated as acceptance of and participation in a prohibited agreement (see, to that effect, *Tréfileurope* v *Commission*, cited above, paragraph 85).

22 In the present case, in paragraph 1 of the Decision, the Commission regarded it as established that the applicant had infringed Article 85(1) of the Treaty by agreeing with the other companies, between 18 July 1987 and 8 December 1989, the fares to be charged for roll-on roll-off ferry services between Patras and Ancona.

23 According to the Commission, proof of the applicant's involvement in the cartel between 1987 and 1989 and its verbal or tacit consent to the agreements in question may be found in the telex of 15 March 1989, the facsimile of 12 June 1989, and the telexes of 20 June 1989 (two telexes), 22 June 1989 (two telexes), 30 June 1989, 6 July 1989, 14 July 1989, 17 July 1989 and 22 September 1989. As the Decision states (in paragraph 118), the last occasion on which Marlines is mentioned in the documentary evidence is in a telex sent by Anek to Marlines on 22 September 1989. There is no evidence that the applicant took part in any further consultations with other companies nor is there conclusive evidence of its subsequent involvement in the cartel with which the Decision is concerned.

24 The applicant maintains that these documents, on which the Commission relies, are insufficient to establish its participation in the cartel.

1. The Commission's evidence

(a) The telex of 15 March 1989 (paragraphs 9 to 12 of the Decision)

25 On 15 March 1989 Minoan sent a telex to Anek, stating:

'We regret that your refusal fully to accept the proposals we put forward in our earlier telex, reference no 281, dated 27 February 1989, at least for the time being, prevents the conclusion of a broader agreement which would be extremely advantageous to our companies...

We refer of course to your refusal of our proposals concerning the definition of a joint pricing policy for the Patras-Ancona route; and we ask you to understand the positions we set out below, which are intended as a response to your view that you cannot accept the 1989 tariff in force for goods vehicles and that the pricing policy for the forthcoming year 1990 cannot be defined immediately (paragraphs 3 and 4 of your recent telex).

1. We do not think that any agreements that you may have concluded with transport companies or hauliers can prevent you from accepting the truck tariff already in force for 1989. It has been the experience of our various companies,

over a long period of time, that this type of agreement, if indeed concluded, does not tend to last for long, nor is it usually adhered to, especially by the hauliers...

Moreover, you are certainly not unaware that in the last three months two readjustments of the fares for goods vehicles have been agreed jointly by all the shipowners operating on the Patras-Ancona route, amounting to a total of 40%, and have certainly caused no agitation or difficulties with our driver colleagues.

2. It is perfectly feasible to establish right now a pricing policy for 1990 without your company finding that inappropriate. This is for the following reasons:

(a) Before we are able to reach an agreement with the other shipowners serving this line, your ships — in accordance with your programme — will already have begun sailing.

(b) The pricing policy for 1988, determined by common agreement with the other companies concerned, was established on 18 July 1987, in accordance with usual practice.

(c) Our pricing policy is always communicated to our foreign colleagues in the summer of the preceding year. Only the brochures published in French and Italian are put into circulation towards winter and that is because of the special nature of these markets.

In conclusion, we hope that you will be able to reconsider and review the opinions which you have recently communicated to us and we would be pleased if, with the points of view set out above, we will have been of assistance in that exercise'.

26 The Court finds that that document clearly shows that Minoan attempted to convince Anek to join in a common pricing policy for transport services, a cartel that had been implemented on 18 July 1987 or earlier by the companies operating on the route between Patras and Ancona.

27 The applicant emphasises that, in so far as the telex contains no reference to itself and merely a general reference to 'the other companies', the Commission ought not to have inferred, solely on the basis that it too operated on that route, that that general reference 'clearly includes it'.

28 Admittedly, since the telex does not expressly mention the applicant, it cannot by itself prove the applicant's participation in the cartel from 1987 onwards. Nevertheless, it must be borne in mind that the evidence must be assessed not in isolation, but as a whole (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 68, Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 175, and *Cimenteries CBR and Others* v *Commission*, cited above, paragraph 2062). In the present case, it must be observed that the steps taken by the companies serving the line between Patras and Ancona described in the telex of 15 March 1989 do not amount to an isolated event but form part of a course of conduct to which subsequent documents, which the applicant does not deny having received and which are reviewed hereinafter, refer.

(b) The facsimile of 12 June 1989 (paragraph 14 of the Decision)

29 On 12 June 1989 Strintzis sent a facsimile to Anek, Karageorgis, Minoan and the applicant, saying: 'please find attached the tariff rates for the Patras-Igoumenitsa -Corfu-Ancona line for 1990. The prices were calculated on the basis of the telexes recently exchanged, following the agreement of all our companies to adhere to a common price policy'. As is emphasised in paragraph 14 of the Decision, the facsimile sets out the fares and discounts for passenger and vehicle transport and the port duties, in drachmas and in 10 other currencies.

30 The applicant was an addressee of that facsimile and, given that it has not denied receiving it, and in the absence of any sign that it distanced itself from the purpose of the agreement, the Commission was entitled to conclude that the document proved its participation in the cartel at the time the facsimile was sent, that is to say, on 12 June 1989. In the circumstances and given the numerous direct and consistent documentary proofs of the applicant's involvement in the cartel in question, the applicant cannot rely on the fact that it did not sign an acknowledgement of receipt of the document despite the sender's having expressly asked for the same. Even tacit acceptance, without distantiation, may be treated as acceptance of and participation in a prohibited agreement (see, to that effect, *Tréfileurope* v *Commission*, cited above, paragraph 85).

(c) The two telexes of 20 June 1989 and the two telexes of 22 June 1989

31 First of all, on 20 June 1989 Minoan sent to Karageorgis, Strintzis and the applicant telex reference no. D1193/PS/AB informing them of the tariffs for passengers and all types of vehicle applicable from 1 January to 31 December 1990. Minoan wrote: 'we would reiterate the points of view which we explained

to you orally concerning a common tariff for passengers and all types of vehicle on the Patras-Igoumenitsa-Corfu-Ancona route'. That telex was sent as an attachment to a telex which Minoan sent to Anek on 22 June 1989, in which it stated: 'we are sending you the telex which we have exchanged with the other companies and which is consistent with what we told you today. The telex contains the reply which you gave us orally'.

32 Secondly, again on 20 June 1989, Minoan sent to Karageorgis, Strintzis and the applicant telex reference no. D1194/PS/AB in which it suggested applying, from 26 June 1989 onwards, the same tariff as that announced by Anek and set out the new tariffs applicable to each category of vehicle, detailing the various services included in or excluded from the tariffs, such as cabins, meals for drivers and charges imposed by third parties, such as agents' fees and handling costs at Patras. The telex was sent as an attachment to a telex which Minoan sent to Anek on 22 June 1989, in which Minoan wrote: 'for your information and to prevent any possible mistake, please find below the truck tariffs which will enter into force on 26 June 1989'.

(d) The telex of 30 June 1989

33 On 30 June 1989 Minoan sent to Karageorgis, Strintzis and the applicant a telex in which it referred to its earlier telex of 20 June 1989, reference no. D1193/PS/AB, and stated: 'in accordance with the telex [of 20 June 1989] mentioned above, Anek ought to have answered our four companies by Wednesday 28 June 1989'. Anek had not replied, however, and so Minoan suggested to the addressees of the telex, and thus also to the applicant, as follows: 'in view of our professional obligations, we suggest we inform it of the tariff, taking account of the principles agreed between us. We hope that Anek will,

when it sees fit, adopt as sensible a policy as ours. If in the future Anek publishes a different tariff from the one proposed, each of our companies will be at liberty to publish its own prices when printing its brochure. If you disagree with this, we would suggest that our companies no longer be directly bound by the aforementioned agreements and that, consequently, each of us act as we think best.... We would be grateful to have your reply by Monday 3 July at the latest because Minoan needs to announce its 1990 tariffs on Wednesday 5 July 1989'.

34 The applicant was an addressee of those documents and, given that it has not denied receiving them, and in the absence of any sign that it distanced itself from the purpose of the agreement, the Commission was entitled to conclude that the documents proved its participation in the cartel in June 1989.

35 It should be noted that the telex of 30 June 1989 mentions 'four companies'. As the Commission emphasises, those words reveal that in June 1989 the applicant was still a member of the cartel. The express mention of the possibility of disagreement, in which case each company would regain its autonomy and would be at liberty to publish its own prices, shows that the applicant and the other companies had bound themselves thus far (up to 30 June 1989) to a tariff policy with a uniform basis and a predetermined margin of variance. In the circumstances, and in the absence of any act of distantiation on the part of the applicant, and in view of the fact that it continued to receive similar telexes, as explained hereinafter, the applicant cannot claim that the fact that the Commission is not in possession of a copy of its reply to Minoan, despite the sender's having expressly asked the addressees of the telexes to inform it in the event that they should disagree, undoes that conclusion.

(e) The telex of 6 July 1989 (paragraph 13 of the Decision)

36 On 6 July 1989 Anek sent Minoan a telex, sending copies for information to Karageorgis, Strintzis and the applicant, in which it stated: 'in reply to the telex

which you sent us, we would inform you that we agree to the establishment of a uniform tariff for passengers by all five companies on the Patras-Ancona line...'.

37 It is clear from that document that Anek regarded the applicant as one of the 'five companies' participating in the cartel. The circumstances in which the telex was sent leave no doubt that the applicant participated in the cartel because the four companies that received copies were also the addressees of the telex of 30 June 1989 and the ones who decided to implement the agreement without Anek's involvement.

(f) The telex of 14 July 1989

38 On 14 July 1989 Anek sent Strintzis a telex, sending copies for information to Karageorgis, Minoan and the applicant, in which it confirmed to the four companies its agreement 'on the proposed tariffs for the Patras-Igoumenitsa-Corfu-Ancona route based on [their] decision concerning a common tariff policy'.

(g) The telexes of 17 July 1989 and 22 September 1989

39 On 17 July 1989 Strintzis sent a telex to Anek, Karageorgis, Minoan and the applicant. On 22 September 1989 Anek sent a telex to Strintzis, Karageorgis, Minoan and the applicant. The two telexes dealt principally with the advantages to be obtained from amending in some fashion the tariff rates for 1990 so as to remove 'all terrain' vehicles from category 4 (caravans, etc.) and place them in the category for vehicles over 4.25 metres in length.

40 These documents show that, at the time when they were sent, Anek regarded the applicant as one of the companies participating in the cartel.

41 It is therefore clear that the authors of those documents believed at the time that an agreement on tariff rates had existed between the 'five companies' since July 1987 and that the applicant was a willing participant in it. Given that the applicant admits having received the documents addressed or copied to it and was thus aware of the cartel's existence, and that it took no steps to disabuse them, the Court can only conclude that the applicant was content to allow the authors of the documents to assume that their belief was well founded. In light of the foregoing considerations, the necessary conclusion is that the Commission has established to the requisite legal standard the existence of a price cartel for roll-on roll-off ferry services between Patras and Ancona between July 1987 and December 1989 and that the documents just reviewed are sufficient to establish that the applicant was involved in that cartel at least from June to December 1989.

2. Evidence of the applicant's participation in the cartel before 1989

42 The applicant claims that the Commission was wrong to take the view that the telex of 15 March 1989 proved its participation in the cartel from July 1987 onwards because the author of the telex stated neither the identities nor the number of 'other companies concerned' where he speaks of 'all the shipowners operating the Patras-Ancona line' and where he writes 'the pricing policy for 1988, as mutually established with the other interested parties, was decided on 18 July 1987. This has in fact been the usual practice.'

43 However, in so far as this Court has held that the Commission has established, to the requisite legal standard, the existence of the cartel referred to in the telex and the applicant's participation in the same in 1989, the necessary conclusion is that,

interpreting the document in context and in light of the other available evidence, the Commission was entitled to treat the applicant as one of the undertakings to which the author of the telex of 15 March 1989 made general reference.

44 The Commission was entitled to take the view that the general reference to the 'other companies concerned', that is to say, any company having a commercial interest in setting uniform prices on the market for roll-on roll-off ferry services between Greece and Italy, included the applicant. Whilst the applicant is not referred to by name in the telex of 15 March 1989, it was, at the time of the relevant facts, indisputably one of the operators of roll-on roll-off ferries serving the Patras-Ancona line. It must be noted in this connection that, at the relevant time, the undertakings referred to in the telexes just mentioned, which include the applicant, accounted between them for almost all traffic between Patras and Ancona, as is clear from paragraph 6 of the Decision.

45 The applicant has not, in fact, furnished any other plausible explanation for the passages cited from the telex of 15 March 1989 nor any evidence to show that the author of the telex was not referring to it when he mentioned the shipowners serving the route between Patras and Ancona and when he mentioned the other companies concerned.

46 That being so, the fact that the applicant was not an addressee of the telex of 15 March 1989 does not deprive the document of its probative value because the Commission may accept as evidence of the conduct of an undertaking, such as the applicant, correspondence exchanged between third parties (*Suiker Unie and Others* v *Commission*, cited above, paragraph 164). Lastly, the fact that an undertaking is not mentioned in a document does not constitute evidence that it did not participate in a cartel where that is evidenced or corroborated by other documents and where the absence of any reference to it does not throw a different light upon the various pieces of documentary evidence which the Commission relies on to establish its participation in the cartel (see, to that effect, *Cimenteries CBR and Others* v *Commission*, cited above, paragraphs 1390 and 1391).

47 In light of all the foregoing, the Court holds that the Commission was entitled to conclude that the statements which the author of the telex made included the applicant along with the other companies. Those statements therefore reveal the date on which the applicant's participation in the cartel began, which is 18 July 1987 at the latest, and its involvement in the cartel throughout 1988.

48 The Court does not accept the arguments which the applicant puts forward to dispute the probative force of the inculpatory evidence on which the Commission relies.

3. The applicant's arguments

49 The applicant argues, first of all, that all of the documents to which the Commission refers in connection with the year 1989 in reality relate to the 1990 transport season because, as a matter of practice, shipping companies inform their associates overseas of their new tariffs in the course of the summer preceding the year in which they are implemented.

50 Admittedly, the Commission did not charge the applicant with having participated after 8 December 1989 in negotiations of the kind embarked upon by the other members of the cartel, which, at a meeting on 8 December 1989, not attended by the applicant, negotiated a new price agreement (paragraph 118 of the Decision). Nevertheless, it should be observed that, contrary to the applicant's submission, the Commission's conclusion was indeed that the applicant joined in the setting of tariffs for the 1990 commercial year, even though that exercise took place in 1989. The Commission did not, therefore, find that the applicant had not taken part in the negotiation of prohibited agreements relating to the tariffs for 1990.

51 The applicant cannot rely on the fact that the correspondence sent in 1989 dealt principally with the implementation of tariffs for 1990 to support its argument that the Commission has not established the existence of the cartel in 1989. On the contrary, read in the proper context, the correspondence equally proves that the cartel was already afoot in 1989, during the course of which year discussions were held on the prices to be applied in 1990. It is sufficient to recall the efforts made by Minoan, referred to in paragraphs 2 and 3 of the telex which it sent on 15 March 1989 to Anek to persuade it to accept the terms of the 1989 agreement, to conclude that the cartel was active in 1989. Various passages in the telex sent to Anek record proposals put forward in an earlier telex dated 27 February 1989: '... We refer of course to your refusal of our proposals concerning the definition of a joint pricing policy for the Patras-Ancona route; and we ask you to understand the positions we set out below... as a response to your view that you cannot accept the 1989 tariff in force for goods vehicles'. They also mention a 'truck tariff already in force'. These extracts show that there was a common pricing policy for 1989. The same may be said of Minoan's telex to Anek of 22 June 1989, a copy of which was sent to the applicant for information, to which Minoan attached the tariff applicable for goods vehicles from 26 June 1989 onwards. The applicant's argument that all of the documents to which the Commission refers in connection with the year 1989 in fact relate to the 1990 transport season must be rejected.

52 Furthermore, and for the same reasons, the applicant cannot claim that the second telex sent to it on 20 June 1989 by Minoan has nothing to do with the 1989 pricing policy and refers solely to 1990. It is clear from its wording that, as far as goods vehicles are concerned, that telex relates to the tariffs applicable from 1 November 1989.

53 Second, the applicant takes pains to point out that the telex which Minoan sent it on 20 June 1989 solely concerns the tariff applicable to goods vehicles and that that is a specific category in relation to which the Commission did not include the applicant among the undertakings participating in agreements to fix a uniform

tariff (see paragraph 144 of the Decision). That argument too must be rejected for the reason that the applicant has misinterpreted paragraph 144 of the Decision, which states: 'on the basis of the above, the Commission considers that Minoan, Anek, Karageorgis, Marlines and Strintzis, participated in an agreement contrary to Article 85 by agreeing prices which would be applied to roll-on roll-off ferry services between Patras and Ancona. The Commission also considers that Minoan, Anek, Karageorgis, Strintzis, Ventouris and Adriatica agreed on the levels of fares for trucks to be applied on the Patras to Bari and Brindisi routes.'

54 It is appropriate to point out that, contrary to the applicant's apparent submission, paragraph 144 of the Decision clearly shows that the Commission found that the applicant had participated in an unlawful agreement on the tariffs applicable to all roll-on roll-off ferry services on the route between Patras and Ancona, including passenger transport and the transportation of tourist vehicles and goods vehicles. That being so, the fact that the Commission decided to restrict its findings in the Decision, in the case of the routes between Patras and Bari and Patras and Brindisi, to conduct in relation to the transport of goods vehicles, does not call into question the reliability of the evidence of unlawful conduct in relation to the Patras-Ancona line.

55 Third, the applicant maintains that it never wished to take part in discussions on tariff rates with the other companies operating the line between Patras and Ancona and asserts that it did not do so. Nevertheless, the documents which the Court has examined do not lend themselves to such an interpretation. What is in issue is not merely one isolated document. There was a whole series of items of

correspondence between the applicant and the other companies serving the line between Patras and Ancona and it clearly shows that steps were taken to reach agreement on the prices of services provided and to implement that agreement.

56 Fourth, the Court equally cannot accept the applicant's argument that it at no time participated in meetings or sent any document proving its acceptance of or adherence to the cartel, given the probative value of the documents cited by the Commission and considered by the Court. The applicant cannot rely on the fact that the Commission has no documentary evidence proving that it contacted the other companies in question to inform them that it accepted their point of view. The inculpatory documentary evidence in the present case is made up of items of correspondence which refer to agreements and conduct that are clearly prohibited. Therefore, only by openly and unequivocally distancing itself from the cartel upon receiving the correspondence in question could the applicant avoid infringing Article 85 of the Treaty. However, it is established that the applicant did not distance itself and so the mere fact of receiving from other companies a certain number of telexes referring to price agreements can suffice to prove that the applicant did participate in those agreements.

57 Nor can the applicant rely on the circumstance that, in the course of its inspection of the premises of the undertakings concerned, the Commission did not find any document sent by the applicant, given that the Commission is entitled to accept as evidence of the conduct of an undertaking correspondence exchanged between third parties (*Suiker Unie and Others* v *Commission*, cited above, paragraph 164). The fact that the inculpatory documents were not found at the applicant's premises does not cast doubt over their probative value (see, to that effect, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 667).

58 Fifth, the applicant's point that it was current practice among all transport and commercial companies to exchange information on prices or on conditions of sale

and transport avails it nothing given the clarity with which the authors of the correspondence in question express themselves regarding their joint interest in setting common tariffs and the precise manner in which to implement a price agreement.

59 Sixth, the fact that the applicant is the smallest of the five undertakings and that the number of passengers it carries is negligible compared with its larger competitors in no way alters that conclusion. It was always an addressee of the correspondence considered by the Court and that shows that, on the contrary, it was regarded by the other undertakings as a sufficiently significant competitor for its participation in the cartel to be important. The case-law shows that being perceived by its partners as an undertaking whose opinion should be ascertained in order to establish a common position is a factor which tends to prove an undertaking's participation in an agreement contrary to the competition rules (see, to that effect, *Tréfileurope* v *Commission*, cited above, paragraph 84).

60 Seventh, the fact that the owners of the ships which the applicant managed never gave it authority to conclude such agreements is not a factor which can prevent the Commission applying Article 85 of the Treaty given that the institution has sufficient evidence of the applicant's being involved in a cartel with its competitors. It is quite clear from the file that it was indeed the applicant, not the shipowners whose vessels the applicant managed, that the other undertakings regarded as a competitor with which it was necessary to reach agreement on prices. Lastly, and in any event, the Commission was entitled to take the view that the applicant and the shipowners whose vessels it managed formed one and the same entity for the purposes of applying Article 85 of the Treaty. It is clear from case-law that, where an agent works for his principal, he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking (*Suiker Unie and Others* v *Commission*, cited above, paragraph 539).

61 Eighth, the applicant submits that it did not apply the agreements in question during the relevant period (1987 to 1989) and that it adopted an autonomous commercial policy different from that of the other ferry operators, characterised by significantly lower prices. Nevertheless, in order to establish the existence of a cartel, the Commission is not obliged to take account of the actual effects of the agreement in question provided that its purpose is to prevent, restrict or distort competition. Moreover, the Court of First Instance has held that the fact that an undertaking does not abide by the outcome of meetings which it has attended and which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings (Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 130, Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 87, *Tréfileurope* v *Commission*, cited above, paragraph 85, and *Cimenteries CBR and Others* v *Commission*, cited above, paragraph 1389). Furthermore, it is clear from the file that even the discounts which the applicant applied, at least from 1988 onwards, fell within the margins authorised by the cartel and agreed with the other companies. The cartel in fact tolerated limited price variance in certain situations. For example, it is clear from the facsimile of 12 June 1989 and the telex of 20 June 1989, sent to the applicant by Minoan, that, under the agreement, discounts could be given of up to 10% of certain tariffs.

62 Finally, the applicant cannot successfully put forward a new plea alleging that, because the Commission's statement of objections and Decision refer to Greek ferries whereas it has its head office in Liberia, the Decision was adopted without its knowledge and without its arguments having been heard and considered prior to adoption of the Decision. That plea was not put forward until the reply was lodged (see paragraph C1 on page 3 of the reply) and so, in accordance with Article 48(2) of the Rules of Procedure of the Court of First Instance, it is inadmissible. In any event, it is clear from paragraph 119 of the Decision that the Commission took that point into account and dismissed it, stating that it never claimed that the infringement was limited to Greek companies. Thus, the applicant cannot rely on the fact that it is not a Greek company in order to say that the Decision, which, it maintains, refers to Greek ferries, does not concern it.

Conclusion

63 In light of all the foregoing considerations, it is clear that the Commission has established to the requisite legal standard that the applicant participated in a price cartel for roll-on roll-off ferry services between Patras and Ancona between 18 July 1987 and 8 December 1989, as indicated in Article 1(1) of the Decision.

64 Furthermore, it is clear from the Court's review that the applicant cannot complain that, in its regard, the Commission gave insufficient reasons for the conclusions it reached in the Decision.

65 It follows that the application must be dismissed in its entirety.

Costs

66 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 the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs including the Commission's costs in the interlocutory proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Marlines SA to bear its own costs and those incurred by the Commission, including both parties' costs in the interlocutory proceedings.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 11 December 2003.

H. Jung P. Lindh

Registrar President

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