

JUDGMENT OF THE COURT (Fifth Chamber)  
20 May 1987 \*

In Case 272/85

**Association nationale des travailleurs indépendants de la batellerie (Antib)**, represented by E. Boyer, with an address for service in Luxembourg at the Chambers of P. P. Schleimer, 26 rue Philippe-II,

applicant,

v

**Commission of the European Communities**, represented by C. Durand, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Commission of the European Communities of 10 July 1985 in Case IV/31029 — French inland waterway charter traffic: EATE levy (Official Journal 1985, L 219, p. 35),

THE COURT (Fifth Chamber),

composed of: Y. Galmot, President of Chamber, G. Bosco, U. Everling, R. Joliet and J. C. Moitinho de Almeida, Judges,

Advocate General: Sir Gordon Slynn  
Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 9 December 1986,

\* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 3 February 1987,

gives the following

### Judgment

1 By an application lodged at the Court Registry on 6 September 1985, the Association nationale des travailleurs indépendants de la batellerie (National Association of Self-employed Waterway Carriers) (hereinafter referred to as 'Antib') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the decision taken by the Commission on 10 July 1985 on the basis of Article 11 of Council Regulation No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (Official Journal, English Special Edition 1968 (I), p. 302), concerning an inter-association agreement introducing a levy in France on inland waterway transport to foreign destinations (Official Journal 1985, L 219, p. 35).

2 Article 2 of the abovementioned regulation prohibits agreements between transport undertakings which are liable to affect trade between Member States and have as their object or effect the distortion of competition within the common market. However, under Article 5 of the regulation, the prohibition laid down in Article 2 may be declared inapplicable to agreements which meet certain conditions, in particular those which improve the quality of transport services or promote greater continuity and stability in the satisfaction of transport needs.

3 Reference is made to the Report for the Hearing for the facts of the case, details of the applicable provisions of Community law, the course of the procedure and the arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

#### **The regulation of inland waterway transport in France**

In France, the inland waterway transport sector is strictly regulated; three aspects of that regulation must be explained here.

- 5 First of all, although export traffic, that is to say traffic from a French port to a foreign port, may be carried both by French boatmen and by boatmen who are nationals of other Member States, inland traffic may be carried only by French boatmen. An exception is made to that rule only where a boatman who is a national of another Member State, after carrying traffic from a foreign port to a French port, carries goods between two French ports on his way back to his starting point. That does not often happen, since it must be that boatman's turn in the queuing system, explained below, and he must have been offered a cargo for a point on French territory situated on his return journey.
  
- 6 Secondly, the French Code du domaine public fluvial et de la navigation intérieure (Inland Waterways and Shipping Code) provides that boatmen who own only one boat (owner-boatmen) can enter into only voyage charter-parties, that is to say for a specific voyage, or time charter-parties, that is to say for a fixed period. Such charter-parties, whether for export or inland traffic, may be entered into only after cargoes have been distributed under a queuing system. For that purpose the authorities have established shipping exchanges in the main inland ports. Cargoes are allotted to boatmen in the order in which they have joined the queue, although a boatman may refuse a cargo which has been offered to him. Under the Inland Waterway and Shipping Code, shippers must be represented at the exchanges by forwarding agents, who thus enjoy a monopoly.
  
- 7 Thirdly, the French authorities set compulsory rates for inland traffic allotted under the queuing system. They take no part, on the other hand, in the fixing of prices for international traffic. However, minimum prices are negotiated between the Chambre national des courtiers en frêts fluviaux (National Chamber of Inland Waterway Forwarding Agents), an organization governed by public law of which forwarding agents are members, and Antib.

## Background to the case

8 Antib is a trade association set up in 1978 by French boatmen pending the establishment of a national chamber of waterway carriers, with the purpose of informing the authorities on all questions of general interest concerning the activities of self-employed waterway carriers and of promoting any measures intended to improve their situation. According to its constitution, only natural persons who operate one or more vessels registered in France may become members of the association. The same condition applies to foreign boatmen, who in any event can never acquire voting rights.

9 On 13 June 1983 an inter-association agreement was entered into between Antib and the Chambre nationale des courtiers fluviaux under which the forwarding agents were to deduct a levy of 10% on freights for export traffic from France allocated under the queuing system, whether the cargoes were carried by French boatmen or by boatmen who were nationals of other Member States (hereinafter referred to as the 'EATE levy'). The sums collected in that manner were to be placed at the disposal of a cooperative association, the Entreprise artisanale de transport par eau (Boatmen's Cooperative, hereinafter referred to as 'EATE'), which was to be set up for the purpose of promoting inland waterway traffic under the queuing system, as soon as the necessary legislation had been passed.

0 In that regard the agreement stated that the EATE levies so collected and not refunded to non-members of that organization, together with other monies (in particular subsidies and special taxes), were to constitute a 'regulation fund' of which a 'small part' was to cover EATE's running costs and 'the main part' would be used for the benefit of the entire trade. As the applicant admits, it follows from that provision of the agreement that the levy would not in any event be refunded to boatmen who were not members of EATE. The intention of the parties to the agreement was thus to encourage the greatest possible number of boatmen to become members of EATE.

1 About FF 5 million were collected under the EATE levy. Collection of the levy ceased in October 1983 because of complaints to the French Government and to

the Commission by Belgian and Dutch boatmen and because of retaliatory measures imposed in Belgium and the Netherlands by the boatmen's unions.

- 12 It was Law 83-657 of 20 July 1983 on the development of collective economic activities (*Official Journal of the French Republic*, 21.7.1983) which, with a view to enabling self-employed workers to form associations, in particular in the inland waterway transport sector, made provision for the establishment of trade cooperatives. According to Article 1, the object of such associations must be to take all measures which may further their members' economic activities. Under Article 36, in the inland waterway transport sector such associations may be formed only by undertakings registered with the *Chambre nationale de la batellerie artisanale*.
- 13 The foundation of that chamber was provided for in a previous law, that of 30 December 1982 on the organization of inland transport (*Official Journal of the French Republic*, 31.12.1982). Article 40 of that law provided that the *Chambre nationale de la batellerie* was to have the status of a public institution and was to play the role of a 'chambre des métiers' (organization representing trade interests) in that sector. Its task was to coordinate the action of its members and to represent the general interests of owner-boatmen in relations with the authorities and with businesses involved in inland waterway transport. Article 40 stated that a decree would specify the composition of the *Chambre nationale de la batellerie* and the manner in which it was to operate. That decree was not adopted until 14 May 1984. Under Article 3 of the decree, undertakings carrying goods on inland waterway vessels registered in France must be entered in the register of owner-boatmen. Under Article 79 of the *Inland Waterway and Shipping Code*, only vessels more than 50% owned by French nationals may be registered in France, and it follows that only French undertakings are entered on the register of the *Chambre nationale de la batellerie artisanale*.
- 14 On 12 October 1983 French owner-boatmen established EATE. According to its constitution, EATE must endeavour to obtain new cargoes by offering shippers favourable terms, in particular rebates, to enter their cargoes in the queuing system. In accordance with Article 36 of Law 83-657, referred to above, the

constitution of EATE provides that only boatmen entered in the register of the *Chambre nationale de la batellerie* may become members of EATE.

- 15 Associations of Belgian and Dutch boatmen submitted complaints to the Commission concerning the introduction of the EATE levy. On 10 July 1985 the Commission adopted a decision holding that an infringement had been committed and refusing exemption.
- 16 The Commission considered first of all that two of the provisions of the inter-association agreement, namely the introduction of the levy on export traffic and the possibility of a selective refund of the levy, were discriminatory and had an anti-competitive effect in relation to undertakings not party to the agreement. According to the Commission, the introduction of the levy was discriminatory in relation to foreign boatmen who, because of their limited access to French inland traffic, could not benefit from the intended promotion of that traffic to a degree concomitant with their financial contribution and whose competitive position was therefore detrimentally affected. As for the possibility of a selective refund of the EATE levy, it was also discriminatory in relation to foreign boatmen since they were barred from becoming members of EATE and consequently of obtaining a refund of the levy.
- 17 Secondly, the Commission considered that the conditions for exemption were not met. It emphasized that the provisions in question were out of proportion to the benefits the parties to the agreement sought to achieve and were in reality intended to make boatmen carrying export traffic bear the cost of the EATE regulation fund.
- 18 Antib contests that decision in this action, in support of which it makes three submissions. It argues first of all that the Commission was wrong to hold that the introduction of the EATE levy was discriminatory in relation to boatmen who were nationals of other Member States and that it restricted competition. It further maintains that the Commission was wrong to consider that only French boatmen could obtain a refund of the EATE levy. Finally, it argues that no sufficient grounds were given for the refusal to grant exemption.

## The introduction of the EATE levy

- 19 In the applicant's view, the collection of the EATE levy is not discriminatory since all boatmen carrying export traffic, whether they are French or nationals of another Member State, are required to pay it. The applicant does admit that although boatmen who are nationals of other Member States contributed to the financing of EATE's activities, they derived only slight benefit from those activities. It argues, however, that that was due not to the agreement itself but to the fact that French legislation strictly limits the access of boatmen from other Member States to inland traffic. Furthermore, the applicant emphasizes that those boatmen and French boatmen are not in competition on the inland market, and it therefore argues that the introduction of the EATE levy could not have distorted their relative competitive positions. The applicant argues that in any event the Commission did not provide a sufficient explanation of the anti-competitive nature of the levy.
- 20 It must be emphasized that EATE's activities were intended to promote generally inland waterway traffic allotted according to the queuing system and that, as the applicant acknowledges, it was largely inland traffic which benefited from the sums collected under the EATE levy. Boatmen who were nationals of other Member States and could not carry inland traffic thus derived only a very limited benefit from EATE's activities and therefore suffered discrimination.
- 21 The cause of that discrimination lies not in the French legislation but in the fact that the parties to the agreement chose to collect sums intended to promote all traffic, including inland traffic, by a levy on export traffic alone, although they knew that boatmen who were nationals of other Member States had only very limited access to inland traffic and could not therefore derive the same advantages from EATE's activities as French boatmen.
- 22 Furthermore, there is little relevance in the fact that there is no competition between French boatmen and boatmen who are nationals of other Member States on the market for inland traffic inasmuch as the Commission, in its decision, held that competition was restricted on the market for export traffic.

- 23 Finally, with regard to the alleged failure to state sufficient reasons from the point of view of the anti-competitive nature of the agreement, it must be concluded that in the circumstances of this case there was no need for the Commission to provide lengthy explanations in that respect. The income of boatmen who were nationals of other Member States was cut by 10%, and that cut was not offset by the obtaining of new charter-parties. It is therefore obvious that those boatmen had to bear a substantial additional cost which would inevitably force them to increase their prices or decline to carry cargoes for which the rates offered were too low, and affected their ability to compete.
- 24 It follows from the foregoing considerations that the first submission must be rejected.

### **The rules governing refunds of the EATE levy**

- 25 The applicant submits that when the inter-association agreement was concluded, it was not aware that foreign boatmen could not become members of EATE and would therefore be unable to obtain a refund of the EATE levy. It was only on 10 May 1984, when the decree on the functioning of the *Chambre nationale de la batellerie* was adopted, that it became apparent that foreign boatmen would not be entered in the register of the chamber and could not therefore become members of EATE, since under its constitution only boatmen entered in that register could become members.
- 26 It must be pointed out that the inter-association agreement was entered into on 13 June 1983 in the expectation that EATE would be established in the form of a trade cooperative. At that time the applicant must have been aware of the substance of the draft law which would make it possible for the new association to adopt that structure, namely the draft which became Law 83-657, promulgated on 20 July 1983. It must therefore have been equally aware that in the inland waterway transport sector it was necessary for the members of a trade cooperative to be entered in the register of the *Chambre nationale de la batellerie artisanale*.
- 27 It is true that when the inter-association agreement was entered into there was no legislation stating that only French boatmen would be entered in that register. However, under Article 40 of the Law of 30 December 1982 on the organization of inland transport the *Chambre nationale de la batellerie artisanale* was to represent the general interests of owner-boatmen in relations with the French



authorities. It was therefore foreseeable when the inter-association agreement was entered into that boatmen who were nationals of other Member States would not be entered in the register of that chamber and would consequently be barred from becoming members of EATE and thus from obtaining a refund of the EATE levy.

28 It follows from the foregoing considerations that the second submission must also be rejected.

### **The alleged failure to state sufficient reasons for the refusal to grant exemption**

29 The applicant considers that no sufficient reasons are given for the decision in question inasmuch as the Commission failed to take into account the fact that foreign boatmen derived indirect benefit from EATE's activities. It explains that some French boatmen, who had previously carried both export traffic and inland traffic, began to concentrate on inland traffic, which had become more profitable as a result of EATE's activities. At the hearing it submitted statistics which it said showed that boatmen from other Member States increased their share of the market for export traffic during the period of application of the inter-association agreement.

30 It must be emphasized that in its decision the Commission recognized that EATE's activities benefited all boatmen taking part in the queuing system, including those carrying export traffic. However, it considered that the benefits obtained by foreign boatmen were not sufficient to offset the serious disadvantages they had suffered.

31 That assessment is not affected by the fact that those boatmen may have increased their share of the market for export traffic and thus obtained some benefit in return for the EATE levy. It is certainly not possible to conclude from the figures submitted by the applicant at the hearing that those benefits were in proportion to the charges imposed on foreign boatmen.

32 On the basis of the foregoing considerations it is to be concluded that the action brought by Antib against the Commission's decision of 10 July 1985 must be dismissed as unfounded.

**Costs**

<sup>33</sup> Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since Antib has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

- (1) Dismisses the action;
- (2) Orders Antib to pay the costs.

Galmot

Bosco

Everling

Joliet

Moitinho de Almeida

Delivered in open court in Luxembourg on 20 May 1987.

P. Heim

Y. Galmot

Registrar

President of the Fifth Chamber