OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 29 October 1998 *

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I — Introduction

1. This appeal presents the Court with its first opportunity to consider the application of the competition articles of the Treaty to conference shipping lines. It concerns the finding of abuse of a collective dominant position by members of a shipping conference line, the Central and West African Conference (hereinafter 'Cewal'), operating between Zaïre and certain Northern European ports. The appellants challenge the finding regarding the collective character of the dominance found by the Commission. The appeal also raises issues regarding a defence of inducement of State action, the procedures to be followed under the applicable regulation implementing the competition rules in the maritime transport sector and the application of Article 86 to the pricing behaviour known as 'fighting ships'. The appellants also raise several procedural complaints regarding the handling of the case by the Commission and the Court of First Instance.

II — Legal and factual background

A — *The impugned Decision*

2. Article 1(3)(b) 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 (hereinafter 'the 1986 Regulation') [1] defines a 'liner conference' as 'a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services'.

3. Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (hereinafter 'the Decision'), [2] is the subject-matter of the present appeal. It was adopted pursuant to the 1986 Regulation. The Commission there describes Cewal as a shipping conference whose members operate 'a regular liner service between the ports of Zaïre [3] and Angola and those of the North Sea (except the United Kingdom)'. [4] Acting on foot of complaints received in July 1987, the Commission investigated various allegations of anti-competitive conduct on the part of the members of Cewal and other liner conferences operating between Europe

1 — OJ 1986 L 378, p. 4.

2 — OJ 1993 L 34, p. 20.

3 — Now the Democratic Republic of the Congo.

4 — Point 1 in the recital in the preamble to the Decision. There are in total 119 points in that recital, which, for convenience, will hereinafter be referred to simply as points of the Decision.

and West and Central Africa. In the Decision, it found that three liner conferences had infringed Article 85 and that the members of the Cewal conference had abused a position of collective dominance contrary to Article 86. Fines were imposed on four of the members of the Cewal conference (to wit, Compagnie Maritime Belge, Dafra-Lines, Deutsche Afrika-Linien and Nedlloyd Lijnen) though the most significant fine (ECU 9.6 million or 95% of the total of all the fines) was imposed on Compagnie Maritime Belge (hereinafter 'CMB').

4. These four members of the Cewal conference (hereinafter, in the context of proceedings before the Court of First Instance, 'the applicants') brought annulment actions relating to the Decision pursuant to Article 173 of the Treaty before the Court of First Instance. In a judgment of 8 October 1996 (hereinafter 'the contested judgment'), that Court, while reducing the four fines imposed by 10% in each case, [5] nevertheless dismissed their applications. [6] Although the applications sought the annulment of the Commission's findings that infringements of both Articles 85 and 86 of the Treaty had occurred, CMB and Dafra-Lines (hereinafter 'Dafra') have confined their present appeals to this Court to the aspects of the contested judgment which uphold the Commission's findings regarding abuse of a dominant position contrary to Article 86 and which substantially sustain the fines imposed by the Commission in respect of those abuses. [7]

5. Under a Code of Conduct for Liner Conferences agreed within the United Nations Conference for Trade and Development in 1974 (hereinafter 'the UNCTAD Code') the allocation of cargo among shipping conferences is subject to a '40: 40: 20' rule (hereinafter 'the UNCTAD 40: 40: 20 rule'), whereby national shipping companies at each end of a shipping route are to be allocated 40% of the conference's cargo, with the remaining 20% available for member-companies from other countries. Certain African countries claimed, as will be discussed more fully later, that the UNCTAD rule applied to all and not merely conference cargo. In respect of the maritime routes between Northern Europe and Zaïre, the sharing of cargoes according to the UNCTAD rule was implemented in the mid-to-late 1980s by various means, of which the most important for the purposes of this appeal is the conclusion in 1985 of a cooperation agreement (hereinafter 'the Ogefrem Agreement') between the Zaïrean Office Zaïrois de Gestion du Fret Maritime (Maritime Freight Management Office, hereinafter 'Ogefrem') and Cewal. Under the first subparagraph of Article 1 of the Ogefrem Agreement, Cewal and Ogefrem were obliged to ensure that 'all goods to be shipped within the context of the field of action of the Cewal conference [be] entrusted to shipping companies which belong to that maritime conference', while under the second subparagraph derogations were only to 'be granted with the express agreement of the two parties concerned'. Notwithstanding these provisions, Ogefrem unilaterally decided in and around 1986 to grant a rival shipping consortium, Grimaldi and Cobelfret (hereinafter 'G & C'), about a 2% share of the trade to and from Zaïre, a share which appears to have increased during the following years but not to an extent

5 — CMB's fine was reduced by ECU 960 000 and the other fines by ECU 20 000 in the cases of both Dafra-Lines and Deutsche Afrika-Linien and by ECU 10 000 in that of Nedlloyd Lijnen.

6 — See Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1201.

7 — Hereinafter, all references to 'Articles 85 and 86' will be to Articles 85 and 86 of the Treaty establishing the European Community.

that the dominance of Cewal was affected. [8]

6. Only the Commission's findings concerning Article 86 and the fines imposed are relevant in the appeals brought by CMB and Dafra (hereinafter 'the appellants', but, as explained in paragraph 4 above, where appropriate, 'the applicants'). [9] The Commission found that 'the whole of the routes on which Cewal's members operate[d] between Zaïre and Northern Europe constitute[d] a specific market'. [10] The Commission referred also to the benefits Cewal derived from the Ogefrem Agreement, its extensive network of routes, the capacity of its fleet and the frequency of the services it could provide, as well as the experience acquired from having operated a service for several decades on the market. The Commission found that the members of Cewal enjoyed collectively a very significant dominant position on that market both because of their very high market share and other factors.

7. The Commission found that 'Cewal had abused its dominant position by three different means ... in an attempt to eliminate its main rival (G & C)'. [11] Those means, as formulated in Article 2 of the Decision, were:

— 'participating in the implementation of the [Ogefrem Agreement] and ... repeatedly requesting by a variety of means that it be strictly complied with';

— 'modifying its freight rates by departing from the tariff in force in order to offer rates the same as or less than those of the principal independent competitor for vessels sailing on the same date or neighbouring dates (practice known as fighting ships)';

and

— 'establishing 100% loyalty arrangements (including goods sold f.o.b. [free on board]) [12] which went beyond the terms of Article 5(2) of [the 1986 Regulation], accompanied by the use,

8 — In point 14 of the published version of the Decision (loc. cit., footnote 2 above), the Commission omitted to publish, pursuant to Article 24(2) of the 1986 Regulation concerning the non-disclosure of business secrets, the figures for the share of the trade accounted for by Cewal in 1989 and 1991 respectively. In their appeal the appellants themselves refer, without contesting it, to the omitted information.

9 — It should, however, be noted that in Article 1 of the Decision the Commission found that trade-sharing agreements on routes between western Africa and northern Europe involving three shipping conferences, to wit Cewal, Cowac and Ukwal, whereby each conference operated a separate network of routes, infringed Article 85(1) of the Treaty and did not qualify for exemption under either Article 85(3) or Article 3 of the 1986 Regulation.

10 — Point 56 of the Decision.

11 — Point 62 of the Decision.

12 — In f.o.b. sales, the seller is only responsible for the cost of placing the goods on board ship.

as described in this Decision, of blacklists of disloyal shippers.' [13]

In the second subparagraph of Article 3, the Commission ordered the members of Cewal 'to bring to an end the infringements referred to in Article 2', while, in Article 5, it 'recommended' that the terms of the loyalty contracts be amended 'so that they comply with Article 5(2) of [the 1986 Regulation]'. In Article 6 the fines, to which reference has already been made (see paragraph 3 above), were imposed.

B — *The 1986 Regulation*

8. Council Regulation (EEC) No 17/62 [14] does not apply to transport. The 1986 Regulation thus laid down 'detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport services'. [15] As indicated in the sixteenth recital it makes 'provision for the procedures, decision-making powers and penalties that are necessary to ensure compliance with the prohibitions laid down in Article 85(1) and Article 86, as well as the conditions governing the application of Article 85(3)'.

9. Article 3 of the 1986 Regulation provides an 'exemption for agreements between carriers concerning the operation of scheduled maritime transport services' (hereinafter 'the exemption'), which is worded as follows:

'Agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 85(1) of the Treaty, subject to the condition imposed by Article 4 of this Regulation, when they have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the following objectives:

(a) the coordination of shipping timetables, sailing dates or dates of calls;

(b) the determination of the frequency of sailings or calls;

(c) the coordination or allocation of sailings or calls among members of the conference;

(d) the regulation of the carrying capacity offered by each member;

(e) the allocation of cargo or revenue among members.'

13 — Namely, lists of shippers who used, even if only occasionally, the alternative service offered by G & C; see, in particular, point 29 as well as the second footnote to that point of the Decision.

14 — Council Regulation (EEC) No 17/62, the First Regulation implementing Articles 85 and 86 of the Treaty; OJ, English Special Edition, First Series 1959–62, p. 87.

15 — Article 1(1).

The application of the exemption is expressly made subject, under Article 4, to 'the condition' that the agreement or other conduct thus exempted 'shall not, within the common market, cause detriment to certain ports, transport users or carriers by applying for the carriage of the same goods and in the area covered by the agreement, ... rates and conditions of carriage which differ according to the country of origin or destination or port of loading or discharge, unless such rates or conditions can be economically justified'. The effect of breaching this condition is that the agreement, or the offending part of it, if it is severable, 'shall be automatically void pursuant to Article 85(2) of the Treaty'.

10. On the other hand, Article 5 attaches a number of 'obligations' to the application of the exemption. In respect of 'loyalty arrangements', Article 5(2) provides that the shipping lines which are members of a conference 'shall be entitled to institute and maintain loyalty arrangements with transport users, the form and terms of which shall be matters for consultation between the conference and transport users' organisations'. However, such loyalty arrangements must comply with various conditions, including, under Article 5(2)(b)(i), the requirement that '100% loyalty arrangements may be offered but may not be unilaterally imposed'. Under Article 5(4), entitled 'Availability of Tariffs', the conference tariff must 'be made available on request to transport users at reasonable cost', or 'available for examination at offices of shipping lines and their agents'.

11. Article 7 deals with the effect of 'breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3 ...'. Article 7(1) authorises the Commission, in accordance with the rules of procedure laid down in Section II of the 1986 Regulation, to:

'— address recommendations to the persons concerned;

— in the event of failure by such persons to observe those recommendations and depending upon the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption according to Article 11(4) or withdraws the benefit of the block exemption which they enjoyed.'

12. Finally, Article 8 of the 1986 Regulation is entitled 'Effects incompatible with Article 86 of the Treaty'. Under Article 8(1), 'the abuse of a dominant position within the meaning of Article 86 of the Treaty [is] prohibited, no prior decision to that effect being required'. Article 8(2) deals with particular cases where the Commission finds that 'the conduct of conferences benefiting from the exemption laid down in Article 3 nevertheless has effects which are incompatible with Article 86 of

the Treaty ...'. It provides that the Commission 'may withdraw the benefit of the block exemption and take ... all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty'.

III — Overview of the appeal

13. The present appeal is limited to contesting, firstly, the collective character of the dominant position held to be enjoyed by the members of Cewal, secondly, each of the three findings of abuse of that position, and, thirdly, the fines imposed. The appellants contend that the fines imposed on them ought to be reduced and that the fine-imposition procedure applied by the Commission is penal in nature and, in this case, involved an infringement of Articles 6(3) and 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the ECHR'). Finally, it is also contended that the Court of First Instance, in reformulating some of the abuses described in the Decision, has infringed Article 7(1) of the ECHR.

14. The Commission, supported by the intervener, G & C, submits that the appeal should be dismissed in its entirety. However, in so far as G & C also contend that certain aspects of the appeals are also inadmissible, their intervention, in seeking to go further than the ruling sought by the Commission, should in my opinion be regarded, pursuant to Article 93(5)(a) of the Rules of Procedure of the Court of Justice, as being inadmissible.

IV — The finding of collective dominance

A — *Introduction*

15. The Commission found that the members of Cewal jointly held a dominant position 'within the meaning of Article 86 on the group of shipping routes it [Cewal] operates between Northern Europe and Zaïre' (point 61 of the Decision). While I see no meaningful distinction between 'joint' and 'collective' in this context, I shall use the latter, the term more usually employed by the Court. Neither that definition of the relevant market nor the relevant findings of market share are at issue in this appeal. The appellants contest only the collective character assigned to their market position.

B — *The appellants' case*

16. According to the appellants, the three conditions for the establishment of collective dominance between independent undertakings are:

— the undertakings concerned must be united by sufficient economic links;

— those links must be such that they adopt the same conduct on the market;

— collectively they must hold such a position of economic strength as enables them to prevent effective competition being maintained on the market.

In addition, the appellants claim that the postulated economic links cannot be established by relying upon facts constituting an infringement of Article 85.

17. In essence the appellants claim that:

— the Decision and the contested judgment erroneously relied on concerted behaviour of the members of Cewal which is cognisable under Article 85 but which cannot be simply 'recycled' to form the basis of a finding of collective dominance under Article 86;

— the Decision contained no sufficient reasoning to justify the applicability of Article 86 to the members of Cewal collectively and that the Court of First Instance impermissibly supplemented the Commission's inadequate reasoning.

18. The appellants complain that the Court of First Instance did not respond to the first of these points. It is true that the contested judgment, while noting (at paragraph 54) the appellants' plea that the Commission had 'simply "recycled" the facts allegedly constituting an infringement of Article 85 which were exempted under Regulation No 4056/86, to find that they amounted to an infringement of Article 86', does not expressly deal with this plea in its discussion (paragraphs 59 to 68) of the issue of collective dominance. The Court of First Instance, it is worth recalling, did, however, discuss and, quite correctly, dismiss the principal submission of the appellants, namely that 'the concept of a collective dominant position refers only to collective

abuse by undertakings *each of which* are in a dominant position' (paragraph 60, emphasis added). This finding is not contested in the appeal.

C — *The nature of collective dominance*

19. The only substantive issue under this heading raised in the appeal is whether it is permissible to rely upon behaviour which is concerted or collusive and, therefore, prohibited by Article 85 (unless exempted) in order to establish the existence of a position of collective dominance for the purpose of Article 86. The appellants claim that, in contradiction of the case-law, the Commission and the Court of First Instance have merely 'recycled' certain agreements or concerted practices between the Cewal members whereas the economic links required for a finding of collective dominance must be of 'another nature'. The Commission, on the other hand, submits that, in principle, the same conduct of undertakings may form both a concerted practice for the purpose of Article 85 and an abuse of a dominant position contrary to Article 86. The real issue, at this stage, is not, however, the abuse but the existence of a collective dominant position.

20. The issue of so-called 'recycling' cannot be resolved without consideration of the nature of collective or joint dominance as it has been progressively developed in the case-law. It raises, in turn, the distinction between Articles 85 and 86 and the extent to which, as the Court has said, they 'seek to achieve the same aim on different levels, viz. the maintenance of effective competition within the Common Market'. [16]

21. Article 85 is concerned with concerted or consensual behaviour between economically independent undertakings and is potentially applicable to all markets, including those where normal conditions of competition exist. Article 86, however, is concerned only with those markets where conditions of competition are abnormal by reason of a dominant position enjoyed by one or more undertakings. The activity prohibited by Article 86 under the name of 'abuse' is predominantly unilateral. [17]

22. Nevertheless, these articles, each of which has direct effect, [18] pursue the common aim of 'ensuring that competition in the internal market is not distorted'; [19] Articles 85 and 86 do not exist in water-

16 — Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215 (hereinafter '*Continental Can*'), paragraph 25.

17 — Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 (hereinafter '*Hoffmann-La Roche*'), paragraph 39.

18 — As long ago as 1974, the Court held in the first *BRT* v *SABAM* case (Case 127/73 [1973] ECR 51) that '[A]s the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard'; paragraph 16.

19 — Article 3(g) of the Treaty.

tight compartments. As the Court said in *Ahmed Saeed*, 'the possibility that Articles 85 and 86 may both be applicable cannot be ruled out'. [20] Thus the Court held that where an airline in a dominant position was, as a matter of economic reality, in a position to have agreed tariffs applied by other undertakings, Article 86 as well as Article 85 could apply, at least in the sense that participation in an agreement prohibited by Article 85 could, at the same time, amount to an abuse contrary to Article 86.

23. It is interesting to note, furthermore, that Advocate General Lenz in his Opinion in *Ahmed Saeed*, having expressed the view that, simply on the wording of Article 86, a dominant position can be held by 'several undertakings jointly', went on to suggest that 'members of a cartel or parties to agreements contrary to Community law under Article 85 may jointly occupy a dominant position'. [21] Article 86 does not, however, expressly envisage a dominant position held by one or more undertakings but an '... abuse by one or more undertakings'. The wording therefore is hardly decisive. [22] Obviously, Advocate General Lenz was not suggesting that a mere cartel with an important market share was enough to establish joint dominance. In *SIV v Commission*, [23] the Court of First Instance rejected an argument made at the hearing by the Commission's agent that it was sufficient to '"recycle" the facts constituting an infringement of Article 85, deducing from them the finding that the parties to an agreement or to an unlawful practice jointly hold a substantial share of the market [and] that by virtue of that fact alone they hold a collective dominant position ...'. [24] This finding gave birth to the term 'recycling'. It is clear, therefore, that a conclusion of collective dominance by independent undertakings must be supported by more than a mere cartel-like agreement, whether fixing prices or other collusive market behaviour. '*Italian Flat Glass*' represents the first express attempt to identify the elements of a collective dominant position between independent undertakings.

24. At the other end of the scale is concerted or coordinated behaviour within a group. Such behaviour under the control of a parent company does not normally come within Article 85. Rather, the several entities will be treated as a single undertaking, '... if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or

20 — Case 66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803 (hereinafter '*Ahmed Saeed*'), paragraph 37.

21 — Loc. cit., paragraph 27 of the Opinion.

22 — See the editorial by Professor Arnull in (1998) 23 E.L. Rev. June 1998, p. 199.

23 — Joined Cases T-68/89, T-77/89 and T-78/89 *SIV* v *Commission* [1992] ECR II-1403 (hereinafter referred to as '*Italian Flat Glass*').

24 — Ibid., paragraph 360.

practices are concerned merely with the internal allocation of tasks as between the undertakings'.[25] However, this distinction has not always been clearly stated. *Bodson*[26] has been cited by the Court as an authority on collective dominance, although the expression does not appear in the judgment. In *Bodson*, the mere fact that the holders of the exclusive communal funeral concessions belonged to the same group was not considered decisive in establishing a collective dominant position. Account had to 'be taken of the nature of the relationship between the undertakings belonging to that group' and, in particular, whether they pursued 'the same market strategy, which [was] determined by the parent company'.[27]

25. The two ingredients, relationship and common market strategy, cited in that passage are to be found consistently in the case-law on the definition of a collective dominant position. As long ago as 1975, the Court, in *Suiker Unie*,[28] had regard to 'the personal and financial links' between certain sugar producers and the largest sugar producer on the Belgian market together with the fact that they adopted a 'sales policy fixed by' that producer to conclude that the market shares of all the producers should be aggregated in establishing the extent of the dominant position enjoyed by the largest of them.

26. *Almelo*,[29] however, contains the clearest statement to date on the issue of collective dominance. The Court ruled that for 'a collective dominant position to exist, the undertakings ... must be linked in such a way that they adopt the same conduct on the market'.[30] In both *Centro Servizi Spediporto* and *DIP*, the Court also noted that the absence of competition between the supposed collectively dominant undertakings would be a salient feature.[31] More recently, in *France* v *Commission*, the Court considered whether a proposed concentration would result in a collective dominant position in the Community market for potash-salt-based products for agricultural use.[32] The test applied by the Court was whether the concentration

25 — Case 15/74 *Centrafarm* v *Sterling Drug* [1974] ECR 1147, paragraph 41. In Case C-73/95 P *Viho Europe* v *Commission* [1996] ECR I-5457 the Court, by referring (paragraph 16) only to the question whether subsidiaries 'enjoy any real autonomy in determining their course of action in the market', implicitly rejected the view advocated by some academic commentators that, in the light of *Centrafarm* v *Sterling Drug*, both criteria set out in paragraph 41 of the judgment in that case had to be satisfied before a group of undertakings would be regarded as a single undertaking.

26 — Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479 (hereinafter '*Bodson*').

27 — Ibid., paragraph 20.

28 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73 and 113/73 to 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663 (hereinafter '*Suiker Unie*'), paragraphs 377 and 378.

29 — Case C-393/92 *Almelo* [1994] ECR I-1477, paragraphs 41 and 42.

30 — Ibid., paragraph 42. This test has been repeated in Case C-96/94 *Centro Servizi Spediporto* v *Spedizioni Marittima del Golfo* [1995] ECR I-2883 (hereinafter '*Centro Servizi Spediporto*'), paragraph 33, and Joined Cases C-140/94 to C-142/94 *DIP and Others* v *Comune di Bassano del Grappa and Comune di Chioggia* [1995] ECR I-3257 (hereinafter '*DIP*'), paragraph 26.

31 — See, respectively, paragraphs 34 and 27. As I had occasion to point out in my Opinion in *DIP* (paragraph 65), there was no evidence before the Court which suggested that some or all of the supposed collectively dominant traders 'act[ed] or possess[ed] distinctive commercial features on their respective markets which in any way, with respect to their suppliers, competitors or customers, enable[d] them effectively to behave as a single economic unit'.

32 — Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375.

would '[lead] to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in particular because of *factors giving rise to a connection* between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and also of consumers'. [33] Applying this test, it found that some of the applicants' criticisms of the supposed 'cluster of structural links' [34] relied upon by the Commission were well founded.

27. However, it seems to me that all of the recent dicta of the Court amount to a substantive endorsement of the statement of the Court of First Instance in *Italian Flat Glass* that: [35]

'There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market.'

However, the phrase 'united by such economic links' in that passage should now be understood in the light of the formulation from *France* v *Commission*, [36] to wit, 'factors giving rise to a connection between them', which does not seem to me to be any different from 'economic links'.

28. The appellants claim, however, that, in order to establish the 'economic links' required to satisfy this test, it is not permissible to rely upon facts which also amount to agreements or concerted practices for the purposes of Article 85. I do not agree. It seems to me that the twofold test — the existence of sufficient economic links to lead to an effective single market entity — is in substance one and that the latter is the predominant element. A single dominant position has to be established, i.e. that several undertakings act as a single entity and thus unilaterally on the market. It is not necessary to specify exhaustively or at all the nature of the relationships or economic links. They might be the use of model conditions of supply drawn up by a common trade association (*Almelo*), cross-shareholdings, common directorships or even family links with economic consequences. They might equally consist of the pursuit of a common market strategy or sales policy (*Bodson, Suiker Unie*). They are not to be defined except by reference to their result, namely the establishment of a situation where a group of independent

33 — Ibid., paragraph 221, emphasis added. The italicised expression was rendered in the English-language translation of the judgment at the date of delivery as: '... correlative factors which exist between them ...'. The authentic version in French, the language of the case, is: '... des facteurs de corrélation existant entre elles ...'.

34 — Paragraph 232.

35 — Loc. cit., paragraph 358.

36 — Loc. cit., footnote 32 above.

undertakings performs as a single market entity.

29. Furthermore, I repeat that weakness in evidence of concertation cannot be overcome by resort to Article 86. I have already agreed that concerted behaviour alone does not satisfy that test of collective dominance. I do not, however, accept that reliance on such *evidence* can be precluded, whether by the Treaty or by any principle of law or logic.

30. A close reading of *Almelo* appears to support this view. The regional electricity distributors in the Netherlands whose relationships were at issue were bound to local distributors by the same type of vertical exclusive purchasing agreement, all of which were held to contravene Article 85. Advocate General Darmon drew attention to these agreements on the question of the 'links enabling the undertakings in question collectively to dominate the market'.[37] While both the Advocate General and the Court were careful to leave it to the national court to make the final determination on the issue, the Court appears implicitly to have accepted the Advocate General's view on the possible relevance of economic links created by such agreements.

37 — Loc. cit., paragraphs 117 and 118 of the Opinion.

31. In the present case, the Court of First Instance, at the outset of its assessment of the collective dominance of the members of Cewal, correctly posed for itself the test that 'the undertakings in question must be linked in such a way that they adopt the same conduct on the market' (paragraph 62). The contested judgment went on (paragraphs 63 to 65) to set out the reasons 'in the light of the Decision as a whole' which led it to the conclusion that 'it was necessary to assess the position of the Cewal members collectively' (paragraph 66). Paragraphs 63 to 65 read as follows:

> '63. In the Decision under review, the Commission expressly referred to Regulation No 4056/86. [The Court then quoted the definition of a "liner conference" from the 1986 Regulation, set out at paragraph 2 above]. The Court considers that the applicants, which rely on several occasions on Regulation No 4056/86, do not deny that Cewal is a liner conference within the meaning of that provision.
>
> 64. The Court further points out that Article 8 of Regulation No 4056/86 states that Article 86 of the Treaty is still potentially applicable. As a result of the close relations which shipping companies maintain with each other within a liner conference, they are capable together of implementing in common on the relevant market practices such as to constitute unilateral conduct. Such conduct may involve

infringement of Article 86 if the other requirements for the application of that provision are also met.

65. In this case, the Court finds, in view of the evidence set out in the contested decision, that the shipping companies formed a common entity, the Cewal shipping conference. It appears from the Decision that that structure formed a framework for a number of committees to which conference members belonged, such as the Zaïre Pool Committee and the Special Fighting Committee mentioned on many occasions in the Decision, in particular in points 26, 29, 31 and 32, and the Zaïre Action Committee referred to in point 74. In addition, as emerges from Article 1 of Regulation No 4056/86, by virtue of its nature that common structure is intended to define and apply uniform freight rates and other common conditions of carriage, which the Commission expressly finds to exist in point 61. Consequently, Cewal presents itself on the market as one and the same entity. Lastly, the Court observes, without its being necessary to consider at this stage how to categorise them, that the practices described in the Decision of which Cewal members stand accused reveal an intention to adopt together the same conduct on the market in order to react unilaterally to a change, deemed to be a threat, in the competitive situation on the market on which they operate. Those practices, which are described in precise terms in the Decision, constituted aspects of an overall strategy which Cewal members pooled their forces in order to implement.'

32. In my opinion, each of the elements cited in these paragraphs is *capable* of amounting to an 'economic link'. In particular, the Court of First Instance was right to refer to the definition of a liner conference, to consider the 'overall strategy' and the intention of the Cewal members and to insist, as it did repeatedly, in varying terms, on the establishment of a 'common entity'. Assuming that the Court of First Instance was entitled in law to consider these matters as amounting to economic links, its conclusion on the latter issue has not, correctly in my view, been contested in the present appeals; such a finding is the result of that Court's evaluation of the facts and, in the absence of error amounting to distortion of those facts, is not open to challenge before this Court.

33. Moreover, there is a certain unreality in the appellants' attempt to contest the concept of collective dominance as applied to liner conferences. They have argued repeatedly, in justification of the supposed non-abusive character of their loyalty rebates, that conference lines are normally in a dominant position.

34. Finally, it was alleged on behalf of the appellants that the contested judgment and the Decision should be annulled in respect of the finding of collective dominance because neither the Court of First Instance nor the Commission in the Decision had demonstrated the absence of internal non-price competition between Cewal members. Such a plea, which was raised for the first time at the hearing, is manifestly inadmissible having regard to both Articles 42(2) and 113(2) of the Rules of Procedure of the Court of Justice. In any event, although it emerges clearly from the case-law discussed above, particularly *Centro Servizi Spediporto*, *DIP* and *France* v *Commission*, that absence of competition between a number of putatively collective dominant undertakings is a salient feature of collective dominance, it would not suffice, in my view, for such undertakings, in answer to a charge from the Commission that they had adopted a single market strategy in respect of price competition, to contend that the presence of other forms of competition between them, such as competition regarding the quality of service provided, should negate a finding of collective dominance based on links established in respect of their mutual pricing strategy, unless the extent and intensity of the alternative forms of competition were such as to preclude reasonable reliance on their common pricing policies as the basis for establishing a single market entity. Since the members of the group would themselves most readily have access to the information that might support such a claim, they must produce evidence to rebut a finding of dominance based on their shared pricing policies. There was no evidence before the Court of First Instance or, at present, before this Court to suggest that Cewal members actively competed with each other in respect of the quality of the services offered to shippers.

35. I would reject, consequently, the argument that the Commission or the Court of First Instance, by citing matters also capable of amounting to concerted behaviour under Article 85, relied upon evidence which could not be used *pro tanto* to establish the existence of a joint dominant position for the purpose of Article 86. However, it is still necessary to consider the adequacy of the reasoning of the Decision and the complaint that the Court of First Instance has impermissibly supplemented it.

D — *The sufficiency of the reasoning*

36. The appellants had not explicitly raised the issue of sufficient reasoning, whether by reference to Article 190 of the Treaty or otherwise, before the Court of First Instance. They had claimed rather that the reasons advanced in the Decision, effectively limited to the existence of the conference agreement, were insufficient to sustain the finding of collective dominance. The Court of First Instance on this basis attributed to the applicants a plea of 'insufficient statement of reasons' (paragraph 59).

37. The complaint of the appellants on this appeal is that the Court of First Instance failed to respond to their arguments, but supplemented the reasoning of the Commission, i.e. furnished reasons for the finding of collective dominance other than those relied upon by the Commission. In particular, they complain of the reliance by the Court of First Instance on the Decision 'taken as a whole' (paragraph 66) and of its finding that 'quite apart from the agreements concluded between the shipping companies creating the Cewal conference ... there were links between the companies such that they adopted uniform conduct on the market' (paragraph 67).

38. The Commission contends that the Court of First Instance did not rely on anything which is not to be found in the Decision, that the use of the expression 'quite apart from' means that the conference arrangements were such that the conduct of the Cewal members should be examined collectively and that there could be no objection to the Court of First Instance pointing to other parts of the Decision to show that other factual elements addressed by the Commission reinforced the conclusion to which it had come.

39. It is appropriate to describe briefly the structure of the parts of the Decision on collective dominance before referring to the relevant case-law. Points 49 to 51 refer to the applicability of Article 86 to shipping conferences. Point 49 states:

'Article 8 of Regulation (EEC) No 4056/86 deals with the possibility of an abuse of a dominant position by shipping conferences. The Court of First Instance of the European Communities has, moreover, cited shipping conferences as an example of agreements between economically independent entities which enable economic links to be formed that can give these entities jointly a dominant position in relation to other operators on the same market.[38] The agreement between the members of Cewal constitutes such an agreement.'

Point 52 states that liner services (referring back to Articles 8 to 12 of the Decision) 'constitute the relevant services market'. Points 53 to 56 discuss the geographic market, concluding that the 'whole of the routes on which Cewal's members operate between Zaïre and Northern European ports constitute a specific market'. Points 57 to 60 discuss the dominant position of Cewal by reference to its market share. Point 61 then states:

'Taking such factors into account, the Commission concludes that Cewal has a

38 — The Decision cites '*Italian Flat Glass*', loc. cit. above.

dominant position within the meaning of Article 86 on the group of shipping routes it operates between Northern Europe and Zaïre. This dominant position is held jointly by the members of Cewal given that they are linked to each other by the conference agreement, which creates very close economic links between them, as evidenced, for example, by the existence of a common scale of freight rates.'

40. Thus, only point 61 (and to some extent point 49) expressly discuss the joint or collective nature of the dominance of Cewal, the conclusion being reached in the former on the basis that the Cewal members 'are linked to each other by the conference agreement ...'.

41. Read in isolation, this reasoning in support of the finding of a position of collective dominance is laconic. It does not expressly take account of the matters cited by the Court of First Instance at paragraph 67 of the contested judgment and does not allege that the Cewal members behaved as a single or common entity on the market. It is, however, abundantly clear throughout the points of the Decision dealing with market analysis that Cewal is so regarded, for instance that Cewal is able 'to act independently vis-à-vis its competitors and customers ...'.[39] The additional material cited by the Court of First Instance is largely extracted from the later parts of the Decision (point 63 et seq.), which contain the findings of abuse.

42. Consideration must be given to the permissibility of supplementing the conclusion of a position of joint dominance by reference to material set out in the same Decision by reference to the findings of abuse of that position. By doing so, I cannot but comment that it would have been more helpful if the Commission had addressed itself more explicitly to the issue of economic links when concluding on the establishment of a joint or single market entity.

43. The classic statement of the obligation of the Community institutions to support their decisions with a statement of the principal points of fact and of law upon which it relies is to be found in *Remia* v *Commission*:[40]

'[A]lthough under Article 190 of the EEC Treaty the Commission is required to state the factual matters justifying the adoption of a decision, together with the legal considerations which have led to its adopting it, the article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings. The statement of reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to the legality of the decision and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded.'

39 — Point 60 of the Decision.

40 — Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 26. See the discussion in my Opinion in Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraphs 107 to 109.

44. A review of the case-law shows that arguments of insufficiency of reasoning of decisions, though frequently advanced, have rarely succeeded. [41] When they have, the criticism of reasoning is often, in effect, a finding that the decision is substantively flawed. An example of a successful reliance is to be found in *Leeuwarder*, [42] where the Court found the statement of reasons seriously deficient in market analysis.

45. The function of the statement of reasons is explained in the second sentence of the citation from *Remia*. It is a purposive and not a 'mere formal' requirement. [43] It is designed to ensure that affected parties and by extension the Court are sufficiently informed of the factual and legal basis of the impugned decision to be able to defend their own interests. In *Belgium* v *Commission*, for example, the Court found that a point of fact omitted from the Commission decision under review had been covered both in the Court's judgment and in the Advocate General's Opinion in an annulment action relating to an earlier Commission decision on the same subject-matter, as well as in the Commission Communication reopening the administrative procedure. On this basis, the Court concluded that 'the interested parties could ascertain those matters and put their point of view in that regard to the Court'. [44] The Court may accept that the interests of an affected person are sufficiently protected if he is independently aware of the information upon which the Commission has relied, [45] such as, for example, through participation in the administrative procedure. [46]

46. Even if the Commission Decision might not survive a strict test of logic, the fundamental issue is one of fairness. The appellants cannot realistically claim to have been prejudiced by the reliance by the Court of First Instance upon material set out in the Decision on the subject of abuse in order to sustain the conclusion of collective dominance, when all the material at issue appears on the face of the Decision

41 — See, for example, Case 322/81 *Michelin* v *Commission* [1983] ECR 3461 (hereinafter '*Michelin*'), paragraph 14; Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19; Case 250/84 *Eridania* v *Cassa Conguaglio Zucchero* [1986] ECR 117, paragraph 17; Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 71.

42 — Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809; paragraphs 19 to 26 and particularly paragraph 24, where the Court held that, as regards the requirement of showing that the State aid at issue affected trade between Member States, the Commission's decision in that case did not, *inter alia*, 'contain the slightest information concerning the situation of the relevant market'.

43 — Case 24/62 *Germany* v *Commission* [1963] ECR 63, at p. 69.

44 — Case C-56/93, loc. cit., footnote 40 above, paragraph 89. To the same effect, see my Opinion in that case, at paragraph 109.

45 — Joined Cases 275/80 and 24/81 *Krupp* v *Commission* [1981] ECR 2489, in particular at paragraph 13.

46 — Case C-50/94 *Greece* v *Commission* [1996] ECR I-3331, paragraph 9.

and was, in any event, discussed during the administrative procedure. [47]

E — *Conclusion*

47. Accordingly, I would dismiss the ground of appeal relating to the finding of collective dominance.

V — The abuses upheld against Cewal

48. I now turn to consider seriatim the appellants' arguments regarding the abuses allegedly committed by the members of Cewal.

A — *The Ogefrem abuse*

(i) *Background*

49. In Article 2 of the Decision the Commission found that, in order to eliminate its competitor, Cewal had, *inter alia*, abused its joint dominant position by 'participating in the implementation of the cooperation agreement with Ogefrem and by repeatedly [requesting] [48] by a variety of means that it be strictly complied with'. This finding must be read in the light of points 20 to 27 and 63 to 72 of the Decision, from which it emerges that the Commission regarded Cewal's conduct, in respect of the Ogefrem Agreement, as designed to prevent and/or weaken the emergence of competition on the market for freight between Zaïre and Northern Europe. First, in point 63 of the Decision, the Commission invokes the principle that dominant firms must not engage in conduct that jeopardises the maintenance of existing, or the development of fresh, competition on the market on which they are dominant. [49] Second, in point 64, it expresses the view, reflected in Article 2 of the Decision, that the abusive conduct committed by Cewal consisted in its active participation in the implementa-

47 — This case would not, therefore, even fall into the category discussed by Advocate General Léger in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865 (hereinafter '*British Gypsum*'), whose reasoning in this respect, *inter alia*, was adopted by the Court (see paragraph 11), which concerned cases where statements of reasons are 'confirmed' by 'clarifications' given by the Commission during the course of the written or oral procedure before the Community judicature. The Advocate General expressed the view that '[I]f a point is "clarified", that clearly presupposes that it was already *contained* in the Decision and such is indeed the case here'; paragraph 24 of the Opinion.

48 — The word 'requesting' is actually omitted through an oversight from the published English text of Article 2 of the Decision. It is clear, however, from the published texts of the other authentic language versions of the Decision that the English text should be read as if the word were present. Moreover, in the English version of the Decision notified to the appellants (see Commission document C(92) 3253 final of 23 December 1992), which was annexed to their observations before the Court of First Instance, the word 'requesting' appears in Article 2.

49 — It refers to *Hoffmann-La Roche*, loc. cit.

tion of the Ogefrem Agreement and its repeated requests to Ogefrem to comply with Article 1 of that agreement, all with a view of ensuring 'the elimination of [its] sole competitor for the trade in question'. Noting that Cewal's pre-existing dominant position was 'strengthened' by the Ogefrem Agreement (point 65), the Commission stated at point 66 that Cewal had 'continually exerted pressure on Ogefrem to ensure the latter's compliance with the said agreement and, consequently, the elimination of its principal competitor'.

50. The Commission rejected the defence advanced by Cewal to the effect that it was obliged to engage in these practices as a result of obligations imposed on it by public authorities. It also rejected the defence advanced by Cewal that the conduct complained of fell outside Article 86, because the Ogefrem Agreement should be regarded as comprising obligations imposed by a public authority or, in effect, by a State measure; in its view, the agreement constituted a consensual agreement 'concerning the monitoring of the trade in question', which could be terminated by the parties 'subject to due notice being given' (point 70). Finally, it stressed 'that the Zaïrean rules in force do not oblige shipowners who are members of a conference to set up systems aimed at ensuring that cargoes are channelled towards their own ships while excluding independent companies', and then concluded that 'the conclusion of this agreement and Cewal's reminders that it be complied with do not result from obligations imposed by the public authorities' (points 71 and 72).

51. In their application before the Court of First Instance the applicants argued that the behaviour of which they were accused by the Commission could not constitute a breach of Article 86 of the Treaty. They submitted, *inter alia*, that the Ogefrem Agreement was a concession agreement under which they had been granted an exclusive right by the Zaïrean authorities, that Article 86 of the Treaty did not preclude them from taking steps to ensure respect for that right and, in any event, that mere inducement of government action could not constitute an abuse for the purposes of Article 86. They also argued, in their reply, that the Decision violated their right to a fair hearing since the Commission had also initially accused them in its statement of objections of abusing their dominant position by obtaining through the conclusion of the Ogefrem Agreement the exclusive right at issue, an accusation which was not maintained in the Decision.

52. In its defence before the Court of First Instance, the Commission contended that the Ogefrem Agreement was synallagmatic, i.e. consensual in nature, and stressed that the only abuse which it found Cewal to have committed comprised its voluntary efforts to uphold the exclusive right granted to it under that agreement. In its rejoinder, the Commission contended that the applicants' arguments regarding the supposed denial of a fair hearing were inadmissible as a new plea of law under Article 48(2) of the Rules of Procedure of the Court of First Instance and, furthermore, unfounded since there was no substantial difference between the statement of objections and the Decision, the applicants having been found

guilty, in the latter, of part only of the allegation levelled in the former.

53. In the contested judgment, the Court of First Instance initially observed that the case concerned the alleged abuse of a dominant position by the members of Cewal and that, 'since the only matter in issue [was] unilateral conduct on the part of Cewal, the application of Article 86 of the Treaty [did] not turn on the exact nature of the agreement between itself and Ogefrem' (paragraph 103). Referring to *Bodson,* [50] it stated that, even if the Ogefrem Agreement were to be regarded as one granting Cewal a concession, 'that would not be enough to exclude [Cewal's] conduct as constituting an abuse on its part'. This was because it was satisfied, by reference to the first and second paragraphs of the Ogefrem Agreement, that Cewal could have consented to derogations from the exclusive right granted to it under that agreement. Thus, even if that agreement were to be regarded as constituting a State concession, since it 'embodied a means of opening up to competition' so that Cewal members 'could have altered its implementation so as to satisfy the requirements of Article 86', there was no conflict 'between the Treaty' and the 'structure of the agreement' (paragraph 104).

54. Consequently, the Court of First Instance held that 'the Decision rightly sets out to analyse Cewal's attitude in implementing the agreement' (paragraph 105). Noting that there was no challenge to the finding that 'approaches to Ogefrem in order to have G & C removed from the market' had occurred, it proceeded to assess how they should be characterised. First, it referred to the 'special responsibility' of a dominant undertaking 'not to allow its conduct to impair genuine undistorted competition on the common market', [51] before observing that, although such undertakings may take 'reasonable steps ... to protect [their] commercial interests when they are attacked', [52] they may not thereby seek to strengthen their dominance. Applying those principles to Cewal's conduct, the Court of First Instance held that 'an undertaking in a dominant position which enjoys an exclusive right with an entitlement to agree to waive that right is under a duty to make reasonable use of the right of veto conferred on it by the agreement in respect of third parties' access to the market'; on the basis of the factual evidence before it, it was satisfied that 'the members of Cewal did not do so' (paragraph 108). The Court of First Instance thus held that 'the Commission was entitled to take the view that, by actively participating in the implementation of the agreement with Ogefrem and repeatedly asking that it be strictly complied with as part of a plan designed to remove the only independent shipping operation for which Ogefrem had authorised access to the market, the members of Cewal infringed Article 86 of the Treaty' (paragraph 109). The Court of First Instance also rejected as 'irrelevant' the applicants' argument that encouraging a government to take action cannot constitute an abuse 'since no charge of such a practice has been made in this case' (para-

50 — Loc. cit., footnote 26 above.

51 — Paragraph 106 citing its judgment in Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 114.

52 — Paragraph 107 citing its judgment in Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 69.

graph 110). Finally, it held inadmissible the applicants' plea concerning the difference between the statement of objections and the Decision regarding the supposed abusive nature of the conclusion of the Ogefrem Agreement, but also expressed the view that the difference at issue could not have affected the applicants' rights (paragraph 113).

(ii) *Synopsis of the observations submitted in the appeal*

55. Under this ground of appeal, the appellants advance four principal points. Firstly, they contend, primarily, that the Court of First Instance violated their rights to a fair trial by substituting for the Ogefrem accusation set out in the Decision an entirely new accusation concerning their alleged failure to act reasonably in exercising a right of veto. In their view, there is a fundamental difference between asking a public authority to act and formally 'vetoing' such an authority from acting, since the existence of a veto right refers to a situation where the person possessing it has a 'blocking power'. Secondly, the appellants say that this reformulation of the accusation enabled the Court of First Instance both to ignore the twofold nature of the charge initially made against them in the statement of objections and maintained in the Decision (albeit in a different format), and wrongly to treat as irrelevant their contention that merely encouraging a government to take action cannot constitute an abuse of a dominant position. Thirdly, the appellants assert that, since that Court took the view that Cewal's members were not accused of failing to terminate the agreement or of encouraging governmental action, it could not, without contradicting itself, have come to the conclusion that the Commission was entitled to find that their active participation in the implementation of the agreement constituted an abuse. Fourthly, the appellants contend that a failure to waive the exercise of exclusive rights cannot constitute an abuse of Article 86.

56. The Commission denies that there has been any breach of the appellants' right to a fair hearing. It asserts that the Court of First Instance's reference to the 'use of the right of veto' merely constitutes another explanation of the finding in the Decision that the abuse comprised the active efforts of Cewal to ensure that the terms of the Ogefrem Agreement were respected by Ogefrem. The Commission submits that neither the conclusion of the agreement nor Cewal's failure to terminate it were part of the alleged abuse. The 'Act of State' doctrine relied upon by the appellants was not relevant because the agreement permitted, as the Court of First Instance found, Cewal members to comply with Community competition rules, while the 'Noerr-Pennington' [53] doctrine was also irrelevant as no charge of encouraging governmental action had been brought.

53 — A further United States of America doctrine protecting the mere furnishing of information to State authorities with the intent of influencing legislative or executive action.

(iii) *Analysis of the appellants' pleas*

(a) The right to a fair hearing

57. I believe that the appellants have misconstrued the contested judgment as advancing a new complaint of failure to act reasonably in the exercise of a right of veto. At paragraph 109 (quoted at paragraph 54 above) the Court of First Instance explicitly upheld the Commission's central findings of acts of abuse relating to the Ogefrem Agreement. In the course of the preceding analysis, in particular at paragraph 105, the Court of First Instance summarised the behaviour of Cewal in implementing the Ogefrem Agreement as set out in the Decision and went on to recall the indisputable principles which should restrain the behaviour of dominant undertakings.

58. The references by the Court of First Instance to a 'right of veto' do not affect the characterisation of the abuse, which remains the active insistence on strict observance of Cewal's exclusivity. The Court of First Instance was, however, prepared to make the assumption, without so holding, that the Ogefrem Agreement amounted to a State concession and, on that assumption, to point out that it contained within it a mechanism capable of resolving any conflict between the Treaty and the agreement, viewed as a State concession. The reference to the 'right of veto' does not, therefore, constitute the description of an abuse, but rather an answer to the case advanced by the applicants that their behaviour was in some sense imposed upon them by the terms of the supposed State concession.

59. I would, therefore, reject the appellants' first argument, i.e. that the Court of First Instance deprived them of a fair hearing by the introduction of a charge of failing to act reasonably in exercising a right of veto.

(b) The incitement of government action plea

— Introduction

60. The mere fact that no violation of the rights of the appellants to a fair hearing occurred does not, however, suffice to dispose of their appeal, since they have also challenged the legal correctness of the characterisation of their conduct as abusive. The approach of the Court of First Instance raises, in connection with the second plea, the question whether it was correct to regard the precise nature of the agreement as irrelevant and, consequently, whether it was correct to dismiss the possibility that the impugned conduct

might merely have been tantamount to government lobbying on the part of Cewal.

61. The contested judgment prescinded entirely from the nature of the Ogefrem Agreement. The Court of First Instance was satisfied that, regardless of its precise legal nature, Cewal's members enjoyed an element of discretion and autonomy in respect of its implementation.

62. It is well established that dominant undertakings, since their very presence on a market leads to a weakening of competition, are precluded from engaging in conduct which may not be reprehensible if engaged in by non-dominant firms. [54] This is *a fortiori* the case where, as in the present case, the appellants enjoyed a near-monopoly position. [55] Nevertheless, the actual scope of that special responsibility 'must be considered in the light of the specific circumstances of each case which show a weakened competitive situation'. [56]

54 — *Hoffmann-La Roche*, loc. cit., paragraph 120 and *Michelin*, loc. cit., paragraph 57.

55 — *Hoffmann-La Roche*, paragraph 39.

56 — Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 24 (hereinafter '*Tetra Pak II*').

— The relevance of the 'Act of State' doctrine

63. The appellants contend that their behaviour should be characterised as amounting to no more than an attempt to lobby the Zaïrean authorities regarding the fulfilment of a State concession. During the oral hearing, the Commission did not dispute that conduct consisting of the mere encouragement of the government of a non-Member State to act in a particular way could not be described as an abuse of a dominant position. However, the Commission insisted at the hearing that in this case the appellants were parties to a commercial contract involving mutual obligations and benefits and that insistence on compliance with its terms went beyond mere lobbying.

64. The Court of First Instance stated at paragraph 110 of the contested judgment that:

'The applicants' argument that encouraging a government to take action is incapable of constituting an abuse is irrelevant, since no charge of such a practice has been made in this case.'

I do not believe that the issue can be resolved so simply. The abuse of which

Cewal was found guilty consisted of attempts to enforce the Ogefrem agreement. The appellants (formerly applicants) respond that those attempts cannot amount to an abuse, because they consist merely in the encouragement of government action. The failure of the Commission to characterise it as such encouragement cannot determine its substantive character.

65. Accordingly, I propose, so far as is necessary, to deal with the appellants' complaint that the Court of First Instance did not address their plea that the Ogefrem Agreement was, in the Commission's unusual phrase, a synallagmatic, that is to say a consensual, agreement. The crucial findings are at points 70 to 72 of the Decision, which are worded as follows:

'70. The agreement between Ogefrem and CEWAL referred to in recital 24 cannot be considered to constitute national rules obliging the CEWAL members to act as they did. On the contrary, as its title and content indicate, the agreement is in itself not a State measure, being an agreement which imposes obligations on its two signatories concerning the monitoring of the trade in question and which can be terminated by them subject to due notice being given. At all events, CEWAL accepted it and insistently urged Ogefrem to comply with its provisions with a view to eliminating its principal competitor.

71. It should also be stressed that the Zaïrean rules in force do not oblige shipowners who are members of a conference to set up systems aimed at ensuring that cargoes are channelled towards their own ships while excluding independent companies.

72. Consequently, the conclusion of this agreement and CEWAL's reminders that it be complied with do not result from obligations imposed by the public authorities.'

66. The appellants rely, in particular, on certain principles developed in the anti-trust case-law of the United States of America. They accept that no such principles have been established in Community law. In essence, this part of the appellants' argument depends on their showing that the Ogefrem Agreement represents an act exercising the sovereign power of the Government of Zaïre.

67. The applicants claimed before the Court of First Instance that mere induce-

ment of government action could not amount to an abuse of a dominant position. Under an 'Act of State' doctrine associated with the principle of comity of nations, it appears that the courts of the United States have held that acts of inducement or persuasion (even unlawful ones) of a foreign sovereign power fall outside the scope of the anti-trust rules. [57] In the view that I take of the nature of the Ogefrem Agreement, it is unnecessary for me to discuss this doctrine further. It is, of course, clear that the simple fact that a Member State creates a legal monopoly by granting exclusive rights does not infringe Article 86. [58] It is, no doubt, a corollary of this that acting so as to persuade a Member State to create such a monopoly also falls outside Article 86. The Court has, however, equally made it clear that 'the Treaty rules on competition and in particular those contained in Article 86' apply to such undertakings. [59] It can be supposed that, by extension, these principles also apply to the establishment of legal monopolies by foreign governments. Article 9 of the 1986 Regulation might then be relevant to resolving any conflict with Community competition rules.

68. The 'Act of State' principle will not apply, however, if the Ogefrem Agreement is not the unilateral act of a sovereign power but, as found by the Commission, in substance and reality a consensual agreement. For that purpose, it does not seem to me to matter that, as no doubt correctly urged by the appellants, Ogefrem is not an undertaking for the purposes of Articles 85 and 86. First, the abuse alleged consists of the acts of insistence on implementation of the exclusivity conferred by the agreement and not of its conclusion. Secondly, the application of Article 86 to an undertaking in a position such as that of Cewal is not dependant on the Ogefrem Agreement being an agreement for the purposes of Article 85.

69. In that light, I shall summarise the appellants' case regarding the 'Act of State' character of the agreement as made in very extensive pleadings before the Court of First Instance and before this Court.

70. First, the appellants attach great importance to the UNCTAD Code of 1974, which entered into force in 1983, to which I have referred at paragraph 5 above. Council Regulation (EEC) No 954/79 [60] of 15 May 1979 dealt with its ratification by Member States. The Code provided, at Article 2, for the distribution of conference

57 — They cited, for example, *American Banana* v *United Fruit Co* 213 US 347, 358 (1909) and a decision of the Federal Court of California in *Occidental Petroleum Corp.* v *Battes Gas & Oil Co* 331 F Supp. 92, 109-13 (C.D. CAL. 1971) affirmed per curiam, 461 F.2d1261 (ninth CIR) certiorari denied, 409 US 950 (1972).

58 — See, among others, Case 311/84 *CBEM* v *CLT and IPB* [1985] ECR 3261 (hereinafter '*Télémarketing*'), paragraph 17 and Case C-266/96 *Corsica Ferries France* v *Gruppo Antichi Ormeggiatori del Porto di Genova and Others* [1998] ECR I-3949, paragraph 40.

59 — *Télémarketing*, loc. cit., paragraph 17.

60 — Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences; OJ 1979 L 121, p. 1.

shipping trade between any two States covered by such conference according to a 40: 40: 20 rule. Such trade should be shared as to 40% each between the national shipping lines of the two States between which the trade was conducted with 20% being allocated to any third-country conference-member shipping line. It is common case that there were, from an early date, seriously divergent views as to the correct interpretation of the Code between the OECD signatory States and a number of African States, among them Zaïre. The former maintained that both the clear wording of the Code and its context show that it applies only to conference-liner trade. The latter claimed that it extends to all liner traffic.

71. The applicants have recounted at length the steps taken by a number of African States and Zaïre in particular to impose their interpretation with a view to protecting their national shipping lines. Zaïre incorporated Ogefrem as a public body in 1980. It became operational in 1983 pursuant to 'Ordonnance Presidentielle No 80-256'. Its tasks included the control of cargo and negotiation of freight rates, the protection of the profitability of the national shipping line, Compagnie Maritime Zaïroise (hereinafter 'CMZ') and the defence of Zaïrean shipping interests.

72. A further legislative act, an 'arrêté d'exécution' No 001-83 of 17 January 1983, applied the UNCTAD 40: 40: 20 rule to the distribution of all cargo. Cewal and other European shipping interests, Member States and the Commission made extensive but unsuccessful efforts politically and otherwise to secure the reversal or modification of this policy.

73. Ogefrem from 1984 imposed a number of additional financial and administrative burdens on Cewal including the payment by each Cewal member of a deposit of USD 10 000 to Ogefrem, and payment of a 3% commission on the freight rate in supposed protection of CMZ's participation in 40% of the cargo.

74. In these circumstances, Cewal says that the Ogefrem Agreement was 'imposed' upon it. It cites the terms of the agreement to demonstrate, in particular, that it 'results from', *inter alia*, 'Ordonnance 80-256', and claims that it could not resist the imposition by a government whose policy was vital to its trade of an agreement which implemented that policy.

75. The Commission, while not disputing most of the recited facts, maintains that the Ogefrem Agreement does not have the

character of an imposed 'Act of State' but constitutes an agreement imposing mutual obligations and granting reciprocal benefits.

— The true nature of the Ogefrem Agreement

76. In the first instance, it says that the appellants commit a fundamental error of logic with regard to the Code. It points out that the application of the UNCTAD 40: 40: 20 rule to all liner traffic and the proportion of liner traffic carried by conferences are completely separate issues, so that there is no logical connection between the participation of the African national lines in their full share of the market and any exclusivity for conferences. In short, the guarantee of the 40% of all cargo to those lines does not mean that all of the remaining 60% should go to members of the conference lines.

78. It must be accepted that it was the policy of the Government of Zaïre, in common with those of several other African States, to apply the UNCTAD 40: 40: 20 rule, by law if necessary, to all cargo and not merely to conference traffic. To that end, it established Ogefrem with extensive powers to regulate and supervise shipping into and out of Zaïre. However, I agree with the Commission that Zaïre's approach to the UNCTAD 40: 40: 20 rule does not justify Cewal's attempt to exclude non-conference traffic. The appellants' arguments in this respect are highly inconsistent. They insist on the error of the Zaïrean Government in seeking to apply the rule to all traffic. Yet, they are equally insistent on enforcing that interpretation for their own benefit. In effect, their actions involved an attempt, on their part, to exclude non-conference lines from the Zaïre market.

77. As to the terms of the Ogefrem Agreement, the Commission refers to the provision for unilateral termination by either party on one year's notice, the provision for reference of disputes to arbitration and the apparent success of Cewal in negotiating the rate of commission down from 3 to 0.5%. Furthermore, the Commission repudiates the description of the agreement as a State concession. That would presuppose legislation providing for the grant of an exclusive right and for its grant through an administrative procedure.

79. Nor do the difficulties described by the appellants in dealing with Ogefrem go further than to establish a certain inequality of bargaining power. In spite of many problems described, Cewal wished to continue to operate the conference line on which it had, as it concedes, a *de facto*

monopoly. It had already, if reluctantly, agreed to concede 40% of the traffic to CMZ, which became a member of the Cewal conference.

80. Next, it is necessary to turn to the text of the Ogefrem Agreement, drawn up in French. I do not agree that the introductory recital in the agreement of the several Zaïrean legal acts and instruments is enough to give it the character of a sovereign act of the State of Zaïre. For example, it recites a resolution of the Ministerial Conference of Central and West Africa inviting the shipowner companies of the member states of that conference to undertake concerted action with the maritime conferences serving Central and West Africa with a view to stabilising freight rates and adapting their statutes to conform with the Code of Conduct for Maritime Conferences. Nor does its recital of Ogefrem's own principal objectives limit the character of the agreement itself. The introductory recitals explain Ogefrem's status and objectives. They do not show the contents of the 'cooperation' agreement to be an act of State with the character of a legal act conferring a monopoly right.

81. In its operative part, the Ogefrem Agreement is just that, i.e. an agreement. The exclusivity clause in Article 1 is the heart of the matter. It does not purport to exercise any legal or administrative power. I agree with the Commission that it does not identify any particular basis for the grant, by way of State concession, of a legal right. It is, in fact, expressed in the simple terms of a joint or mutual obligation. The remainder of the operative part of the agreement imposes respective obligations of a general kind regarding the maintenance and exchange of statistics (Article 6), the deduction of an agreed percentage from the freight for payment to Ogefrem (Article 7), the maintenance of accounting records (Articles 8 and 9) and the observance of negotiated rates (Article 10). By Article 11, the agreement was concluded for a single year, but automatically renewed in default of one year's notice of termination by either party. Finally, Article 12 contains provision for obligatory reference of disputes to an arbitral college of three persons, one to be chosen by each party and the third by the persons so chosen.

82. In my view, neither the terms of the Ogefrem Agreement, the legal background recounted by the appellants nor the circumstances of its conclusion give it the character of the act of a sovereign power granting any form of State concession as claimed by the appellants. It is, accordingly, unnecessary for the purposes of this appeal, to determine the role to be allowed in Community law to the State-action doctrine.

83. Accordingly, I would dismiss the second head of the ground of appeal relating to the Ogefrem Agreement.

(c) The supposed contradiction in the contested judgment

84. The third and fourth arguments of the appellants fail inevitably as a result of the view I have taken regarding the nature of the Ogefrem Agreement. The appellants accuse the Court of First Instance of contradictory reasoning in so far as it says at the same time that Cewal was not accused of encouraging a government to take action (paragraph 110 of the judgment) and that the Commission was 'entitled to take the view that, by actively participating in the implementation of the agreement with Ogefrem and repeatedly asking that it be strictly complied with ..., the members of Cewal infringed Article 86 of the Treaty' (paragraph 109 of the judgment). There is no contradiction in the judgment. The Court of First Instance was not, in the latter paragraph, treating Cewal's exclusionary behaviour as 'encouragement of a government to take action' in the sense urged by the applicants. Furthermore, my own analysis of the nature of the Ogefrem Agreement demonstrates, I trust, that it did not in fact have the character of State action, thus removing any hypothetical inconsistency.

(d) The permissibility of the Ogefrem conduct under Article 86

85. A similar fate must befall the appellants' fourth argument, namely that Article 86 does not prohibit an undertaking which has been lawfully granted a legal exclusivity from insisting that it be respected. The appellants rely on the constant case-law of the Court to the effect that '[i]t is not incompatible with Article 86 for an undertaking to which a Member State has granted exclusive rights within the meaning of Article 90 of the Treaty to enjoy a monopoly'. [61] Since we are not dealing with such a monopoly, the issue simply does not arise. Moreover, it is here appropriate to recall the view of the Court of First Instance (paragraphs 104 and 108) that Cewal members had, under the very terms of the Ogefrem Agreement, a mechanism for opening up competition. They chose to insist on not availing of this possibility.

86. Consequently, I would also dismiss the fourth argument and, therefore, the entire ground of appeal relating to the finding of abuse in respect of the Ogefrem Agreement.

B — *The use of 'fighting ships'*

(i) *Introduction*

87. The appeal against the finding of the 'fighting ships' abuse has a procedural and a substantive aspect.

61 — *Télémarketing*, loc. cit., footnote 58 above, paragraph 17. The appellants also cite Case 155/73 *Sacchi* [1974] ECR 409.

88. There are two, alternative, aspects of the procedural complaint. The appellants say, firstly, that their right to a fair hearing in the administrative proceeding was infringed because the Commission, in its Decision, made a finding in respect of the 'fighting ships' pricing practice which departed from that notified in the statement of objections and that the Court of First Instance erred in law in not accepting this complaint.

89. The Commission counters that this plea is and was inadmissible because it was not raised in the original application before the Court of First Instance but only in the applicants' reply.

90. The appellants' response to this objection is to say, relying on the exception recognised in the first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, that it was only in the Commission's defence before the Court of First Instance that it became clear that there *was* a material difference between the statement of objections and the Decision. Thus it arose in the course of the proceedings.

91. However, the Court of First Instance found (paragraph 140) that the defence did not introduce any new element and was fully consistent with the Decision.

92. Alternatively, the appellants claim that the Court of First Instance has violated its right to a fair hearing because, by its finding that there was no difference between the Decision and the Commission's defence, it introduced a new element in the complaint not considered by them to have been included in the statement of objections. Thus, they say that they were justified in raising the complaint for the first time in their reply.

(ii) *The procedural grounds of appeal*

(a) Background

93. In paragraph 12 of the statement of objections, the Commission described the alleged 'fighting ships' conduct of Cewal, undertaken from the spring of 1988, as being designed to eliminate the competition of the independent company (i.e. G & C)

from the relevant routes. The salient features of the conduct thus described were that:

— the secretariat of Cewal informed members of Cewal of the next scheduled sailings of G & C;

— approximately every two months, meetings of a special 'Fighting Ship Committee' were held to determine both the sailings of conference members which should be designated to sail at the same time as or close to the sailings of G & C ships and the 'fighting rates' to be offered, in derogation from the normal conference scale of rates, in respect of those sailings, those rates being fixed by reference to the rates offered by G & C;

— the losses resulting from the application of such rates were shared among the members of the conference.

In paragraph 23 of the statement of objections, the Commission referred to the use of a method of 'fighting ships' which comprised programming Cewal sailings around the departure times of G & C sailings, the establishment of a rotation system to ensure 'a sharing of the losses related to the operation', [62] claimed that the 'fighting rates' were not fixed by reference to economic criteria (i.e. by reference to costs) but solely in order to be *lower* than those announced by G & C, and described this conduct as constituting 'the fixing of *predatory prices* with a view to eliminating a competitor from the market'. [63]

94. At point 73 of the Decision, the Commission states that Cewal used the fighting-ships method in order to eliminate its principal competitor on the relevant route. The practice employed comprised:

'... designating as fighting ships those Cewal vessels whose dates of sailing were closest to the sailings of G & C ships and in fixing special "fighting rates" for the ships so designated. These jointly fixed rates were different from the rates normally charged by Cewal and were determined not according to economic criteria (i.e. on the basis of costs) but solely in order for them to be *the same or lower* than the prices advertised by G & C, with the *shortfall in revenues* resulting from application of this price-fixing system rather than the conference tariff being borne by all Cewal members. It was clearly accepted by

62 — The description in the original French-language version of the text reads as follows: 'un partage des pertes liées à l'opération'.

63 — The description in the original French-language version of the text reads as follows: 'fixation des prix prédatoires en vue d'éliminer un concurrent du marché'.

those members that the system of fighting ships was in principle likely to result in a *loss of revenue*, which they would have to shoulder' (emphasis added).

In point 74 of the Decision reference is made to a leading academic definition of the practice of 'fighting ships', which, *inter alia*, refers to the specific scheduling of fighting ships on the same day as interlopers' sailings. The Commission points out, however, that in the present case, since its ships sailed so regularly, Cewal, in designating fighting ships, did not have to alter its scheduled timetables.

95. There is therefore no reference to 'predatory prices',[64] the Commission distinguishing the practice at issue from the unilateral fixing of 'abusively low prices'. It is this formulation which is also reflected in the formal finding in Article 2 that Cewal had 'modif[ied] its freight rates by departing from the tariff in force in order to offer rates the same as or less than those of the principal independent competitor for vessels sailing on the same date or neighbouring dates (practice known as fighting ships) ...'.

64 — The Decision cites Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359 (hereinafter '*AKZO*').

96. In their reply before the Court of First Instance the applicants originally stated that there was no difference between the statement of objections and the Decision but claimed that the defence of the Commission redefined their alleged abusive conduct in respect of the *designation* rather than *programming* of 'fighting ship' sailings, in moving from losses to 'loss of revenue' and in failing to rely on the well-defined notion of 'predatory pricing'. They made two legal arguments in respect of these supposed differences. First, they contended that, if the Decision were properly based on what they regarded as the 'new' definition of 'fighting ships', then the relevant parts of it should be annulled for having condemned Cewal for a practice of which they had not been accused in the statement of objections. In the alternative, it was argued that if the Decision were in reality based on the 'new' definition, it should still be annulled since the requirement to state reasons under Article 190 of the Treaty would have been infringed.

97. In its rejoinder, the Commission firstly contested the admissibility of the claimed discrepancy between the statement of objections and the Decision as being raised (contrary to Article 48 of the Rules of Procedure of the Court of First Instance) for the first time in the reply. Furthermore, the scheduling of specific sailings to coincide with those of the outsider, the charging of lower rates or the suffering of losses are essential features either of the 'fighting ships' practice or of conduct constituting an abuse contrary to Article 86 of the Treaty. As regards the lack of correlation

between the practice of fighting ships and the pricing practices condemned in *AKZO*, the Commission referred to point 80 of its Decision where the application of that judgment is expressly distinguished.

(b) The contested judgment

98. The Court of First Instance analysed the terms of the Decision and the Commission's defence (paragraphs 138 to 140) and held that the Commission '... [did] not introduce a new definition of the practice of fighting ships by comparison with the Decision, but [was] fully consistent therewith' (paragraph 140). It then concluded that '[S]ince the premiss underlying the applicants' reasoning is without foundation, *both* pleas raised against the concept of fighting ships must be rejected' (paragraph 140, emphasis added).

(c) The arguments advanced in the present appeal

99. The first ground of appeal before this Court concerns an alleged difference between the statement of objections and the Decision. Consequently, it is necessary first to consider the admissibility of this ground of appeal.

100. In its response, the Commission, supported by the intervener, points out that the Court of First Instance clearly rejected the applicants' explicit plea that the definition of the impugned conduct relied upon by it in its defence before that Court differed from that set out in the Decision. The Commission then contests the admissibility of any plea before the Court of First Instance, and, in consequence, in the present appeal, to the effect that the Decision and the statement of objections were inconsistent. It contends that there was no justification in the light of Article 48(2) of the Rules of Procedure of the Court of First Instance for advancing such a plea at the reply stage before the Court of First Instance, since an alleged discrepancy between the statement of objections and the Decision could hardly be said to have come to light only in the course of proceedings before that Court. Consequently, the Commission maintains that pursuant to Article 113(2) of the Rules of Procedure of the Court of Justice, under which the 'subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal', it must be equally inadmissible before this Court.

101. The appellants contend that *it was only on reading the Commission's defence before the Court of First Instance that it became clear to them that the Commission had altered the initial allegation of below-cost rates made in the statement of objections*. It will become apparent why I high-

light this argument. They point firstly to their initial application before that Court, where, in order to show that they had not made losses, they asserted that the Commission had abandoned in the Decision the claim made in paragraph 23 of the statement of objections that Cewal members had suffered losses. They also refer to the alternative argument made in their reply before the Court of First Instance that, if the Decision were to be read as based on what they described as the 'new' definition, it should be annulled, in relevant part, for condemning the members of Cewal for a practice of which they were not accused in the statement of objections. Consequently, they maintain that, since their alternative plea alleged an infringement of an essential procedural requirement by the Commission, it should have been raised *ex officio* by the Court of First Instance as a matter of public interest. [65] They assert that that Court, however, did not even address the admissibility of this plea.

(d) Analysis

102. It seems to me that I should first consider the complaint regarding the rejection by the Court of First Instance of the applicants' principal procedural argument concerning the supposed reinterpretation of the Decision, which they alleged was advanced by the Commission in its defence. In short, did the reliance on losses of revenue in the Decision so depart from the allegation of losses in the statement of objections as materially to prejudice the applicants' interests?

103. In my opinion, the Court of First Instance was clearly correct, in paragraph 141 of the contested judgment, to interpret the Decision as being based on losses of revenue rather than net losses. This emerges from points 73 and 74 of the Decision where the Commission refers, respectively, to 'shortfall in revenues' and Cewal members' acceptance of the likelihood of 'a loss of revenue' and to 'financial losses of the "fighting vessel"'. The Commission was entitled, in its defence before that Court, to deny that the Decision was based on the fighting rates at issue resulting in actual losses.

104. However, the appellants now direct this complaint at a claimed significant difference between the statement of objections and the defence, which was their alternative plea before the Court of First Instance, their initial position being that there was no such difference. I agree with the submissions of the Commission in its rejoinder before the Court of First Instance, and repeated in its pleading before this Court, that, to the extent that the applicants had pleaded in their reply before that Court a breach of their right to a fair

65 — The appellants cite, *inter alia*, Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983.

hearing flowing from a supposed difference between the statement of objections and the defence, that plea constituted an inadmissible 'new plea in law', which, by virtue of Article 48(2) of the Rules of Procedure of the Court of First Instance, may not 'be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'. Consequently, I agree with the Commission that it is equally inadmissible before this Court by virtue of Article 113(2) of the Rules of Procedure of the Court of Justice. Since, however, the Court of First Instance did not, notwithstanding the third subparagraph of Article 48(2) of its Rules of Procedure, which provides that '[C]onsideration of the admissibility of the plea shall be reserved for the final judgment', address the admissibility of the plea, it behoves this Court, in my opinion, to explain the reasons underlying such inadmissibility.

105. I also agree with the Commission that it is not open to the appellants to contend that they only became aware of the supposed difference between the statement of objections and the Decision on reading its defence before the Court of First Instance.

106. It is, however, incumbent on this Court to consider whether any 'matters of law or of fact [came] to light in the course of the procedure' which might have justified the appellants in only raising the difference at issue in their reply before that Court. I am satisfied that there was none. It is clear beyond peradventure from point 80 that the Commission based the Decision on a legal characterisation of the applicants' behaviour distinct from the situation addressed by the Court in *AKZO*. The applicants had every right to challenge that decision as well as any prejudice to their right to a fair hearing at the administrative-hearing stage before the Commission in their initial application before the Court of First Instance.

107. To my mind the appellants' arguments are unconvincing and defective in logic. The arguments regarding infringement of rights of the defence appear for the first time in the reply before the Court of First Instance and are, thus, prima facie inadmissible. In reply, they claim that they had not appreciated prior to the Commission's defence the nature of the abuse found against them due to differences between the defence and the Decision. The Court of First Instance has found, and I agree, that there was no such difference. The appellants cannot, therefore, continue to rely on an alleged difference of that sort to justify the lateness of a plea made for the first time in the reply that the difference lay, not between the Decision and the defence as they had claimed, but between the state-

ment of objections and the Decision. That plea is clearly inadmissible.

108. The appellants contend in their reply before this Court, in response to the Commission's contention that their plea regarding the possible discrepancy between the statement of objections and the Decision is inadmissible, that a plea concerning an alleged violation of the right to a fair hearing resulting from an inadequate statement of reasons '... constitutes a matter of public interest which may, and even must, be raised by the Community Court of its own motion'. [66] The Court has further held that 'consideration of such pleas may take place at any stage in the proceedings' and 'the applicant cannot be debarred from relying upon them solely on the ground that he did not raise them in his complaint'. [67]

109. In the present case, on the other hand, the prejudice supposedly suffered by the appellants in the course of the administrative procedure derives from the fact that the Decision was not based on what they regard as the only correct legal construction of the concept of 'predatory pricing', an expression used in the statement of objections. Put at its best, the prejudice might arise from the fact that the appellants viewed the use of the expression 'predatory pricing' in the statement of objections as referring only to below-cost pricing, and that they concentrated, when preparing their response to that document, only on advancing legal arguments based on their assertion that their fighting rates were not below cost. It is not claimed, however, that the Commission introduced any new material prejudicial to the appellants which they were unable to counter. On the contrary, all of the claimed discrepancies (designating instead of programming sailings; prices the same or lower, instead of simply lower; loss of revenue instead of losses, and omission of the term 'predatory') involve a reduced level of alleged abusive behaviour. On this basis the appellants claimed in the administrative procedure that they could not be found guilty of abuse. The fact that they were, none the less, so found does not amount to an infringement of the rights of the defence. In reality, the appellants have not shown that they have been prejudiced in advancing their principal legal case in great detail before both the Court of First Instance and this Court to the effect that their conduct should not have been classified as being abusive since it did not involve below-cost rates.

110. In those circumstances, this is not a case in which the Court would be justified in raising of its own motion the alleged prejudice that the use of the expression 'predatory pricing' might have entailed for the appellants when they were at the stage of preparing their initial defence to the Commission's statement of objections.

66 — See *Commission* v *Daffix*, loc. cit. above, paragraph 24.
67 — Ibid., paragraph 25.

(iii) *The abusive nature of the impugned conduct*

(a) The issues raised

111. According to the contested judgment (paragraph 139), 'the Commission identified three factors constituting the practice of fighting ships used by members of Cewal to drive out its competitor G & C, namely: designating as fighting ships those Cewal vessels whose sailing dates were closest to the sailings of G & C ships without altering its scheduled timetables; jointly fixing fighting rates different from the rates normally charged by Cewal members so that they were the same or lower than G & C's advertised prices; and the resulting decrease in earnings, which was borne by Cewal's members'.

112. Arguably the issue of the greatest general importance raised by the present appeal concerns the correctness of the Commission's view, as upheld by the Court of First Instance, that the method of 'fighting ships' conduct employed by Cewal members, although it did not involve net losses, still constituted an abuse contrary to Article 86 of the Treaty and not, as alleged by the appellants, a reasonable reaction by a dominant undertaking to competition presented by the entry onto its market of a new competitor. The Commission based the Decision (see points 72 and 73) not on losses but on revenue shortfalls sustained by Cewal members as a result of the impugned conduct. The substantive aspect of the appellants' appeal can, thus, be addressed on the basis that, in contrast to the below-cost selling discussed in *AKZO*, the fighting rates applied by Cewal were above cost but involved a 'resulting decrease in earnings' for conference members. [68]

113. The relevant paragraphs of the contested judgment comprise paragraphs 146 to 148:

'146. As has already been pointed out, it has been consistently held that whilst the fact that an undertaking is in a dominant position cannot deprive it of entitlement to protect its own commercial interests if they are attacked; and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its real purpose is to strengthen this dominant position and thereby abuse it (in particular, *BPB Industries and British Gypsum* v *Commission*, paragraph 69). [69]

68 — See paragraph 139 of the judgment of the Court of First Instance.

69 — The Court of First Instance referred to its own judgment in *British Gypsum*, loc. cit., footnote 52 above.

147. In this regard, the Court considers, having regard in particular to the minutes of the Special Fighting Committee cited in the footnote to point 32 on page 2 of the Decision, and especially the minutes of 18 May 1989, which refer to "getting rid" of the independent shipping operation, that the Commission has established to a sufficient legal standard that that practice was carried out with a view to removing Cewal's only competitor on the relevant market. In addition, the Court considers that whilst the mere name given to the practice used by the members of Cewal is not sufficient to characterise it as an infringement of Article 86, the Commission was entitled to regard the use by professionals in the international maritime transport sector of a well-known description in that sector of activity and the establishment of a Special Fighting Committee within the conference as disclosing an intention to implement a practice designed to affect the operation of competition.

148. Since the purpose of the practice was to remove their only competitor, the Court considers that the applicants cannot effectively argue that they merely reacted to an infringement by G & C of the monopoly legally granted to Cewal, compensated for discrimination which they suffered at the hands of Ogefrem, entered into a price war started by the competitor or even responded to expectations of their customers. Even assuming them to be proven, those circumstances could not render the response put into effect by the members of Cewal reasonable and proportionate.'

114. The appellants essentially allege that the Court of First Instance has erred in law in failing to recognise that a dominant undertaking is entitled, in reaction to price competition presented by a new entrant to its market, to devise a plan to eliminate that entrant through selective price reductions, once the prices that it offers are not abusive in the sense defined by the Court in *AKZO*. In their view, the Court of First Instance erroneously upheld the Decision on the sole basis of incriminating documents found by the Commission which showed that Cewal members wished to eliminate their competitor, which is not in itself anti-competitive.

115. The Commission considers that the 'fighting ships' practice which it had found the appellants to have employed differs from that of 'classic' predatory pricing, a term not in fact used by the Court, which the Commission regards as involving the incurring of losses as in *AKZO*. The Commission says, in effect, that a dominant undertaking which departs from its published list of rates by selectively reducing them as part of a strategy to eliminate a competitor from the market is not engaging in normal competition. The fact that the fighting rates offered by Cewal were merely a reaction to price competition from a new competitor does not justify them, in particular where dominant undertakings, such as Cewal, enjoy a virtual monopoly on the market. In the Commission's view, normal price competition would have been for Cewal members to lower their published conference tariff rates across the board.

(b) Analysis

— The multilateral character of the abuse

116. At point 80 of the Decision the Commission stated that 'the multilateral and intentional character demonstrates the abusive nature of conduct that consists in establishing a concerted exceptional price with the aim of removing a competitor'. However, in this case, the relevance of the concerted behaviour is limited to its role in establishing the collectively dominant position, enabling Cewal to act unilaterally. The 'multilateral' character of the price behaviour at issue has no bearing on the finding of abuse. It follows, in my opinion, that the Court of First Instance was correct to ignore the Commission's reference in point 80 of the Decision.

117. The present appeal presents certain novel features from the point of view of the competition rules. It is the first time the Court has been asked to consider the 'fighting ships' practice, but also more particularly, the circumstances in which a pricing strategy not found to be below cost can, none the less, be found to be an abuse of a dominant position. It is natural to approach this latter problem with reserve. Price competition is the essence of the free and open competition which it is the objective of Community policy to establish on the internal market. It favours more efficient firms and it is for the benefit of consumers both in the short and the long run. Dominant firms not only have the right but should be encouraged to compete on price. More usually their market power tends to enable them to maintain prices above competitive levels. It is necessary, therefore, to consider, firstly, the facts which have given rise to the finding of abuse and, secondly, the application of the relevant legal principles.

118. It is necessary to examine carefully the structure and the legal and economic characteristics of the particular market, bearing in mind, of course, that the finding of a dominant position is itself not in issue. As the Commission's agent stated at the hearing, this is a case of a liner conference where price-fixing behaviour between individual shipping lines has, very exceptionally, been granted a group exemption (contained in a Council regulation) from the prohibition prescribed in Article 85(1). Liner conferences, by definition, involve a degree of concertation by a number of shipping undertakings. Thus, the Commission could refer to meetings of committees established by the conference to demonstrate the purpose of a particular scheme of conduct, or to a revenue-pooling arrangement so as to illustrate that cross-subsidisation of rates occurred. On the other hand, the appellants refer to the generally accepted stabilising effect, from the point of view of shippers, of the presence of liner conferences in international maritime transport and the need to take account of the disadvantages which they suffer in competing with non-conference shipping

companies, such as the requirement to provide regular services. I turn then to consider the elements of the 'fighting ships' practice as found by the Commission and summarised by the Court of First Instance. The facts are not in dispute — only the legal conclusion.

— The exclusionary intent

119. The essence of the abusive conduct of Cewal members as found resides in a strategy of selective and targeted application of lower rates in response to the fresh competitive threat posed by G & C pursued *for the avowed purpose of eliminating that competitor*. Although the appellants criticise both the Decision and the contested judgment for basing the finding of exclusionary intention on the descriptions used by Cewal members of their behaviour at various meetings of the 'Special Fighting Committee', which oversaw the implementation of the Cewal 'fighting ship' practice, they have not sought to dispute the exclusionary intention attributed to them. Indeed, it would be inconsistent with their claimed right to rely on the Ogefrem Agreement for such an exclusionary purpose for them to do so. Instead, they contend that, in the absence of predatory pricing as defined in *AKZO*, such an intention should not be regarded as sufficient to constitute an abuse of a dominant position, but rather as representing a normal competitive response to a price war initiated by a new competitor.

120. The appellants criticise paragraph 147 of the contested judgment for concluding that the minutes of the 'Special Fighting Committee' of 8 May 1989, to which the Decision refers and in which reference is made to 'getting rid' of G & C, coupled with the mere use of the expression 'fighting ship', a term well-known in the international maritime transport sector, were sufficient to justify the Commission's finding that elimination of G & C was the intention of the members of Cewal. A finding of abuse can only be established by proper proof of the facts. [70] However, neither the contested judgment nor the underlying Decision were based solely on the name applied to the conduct. As the Court of First Instance held, the appellants have not disputed the three criteria relied upon by the Commission in the Decision as demonstrating the pursuit of 'fighting ships' practice — to wit the designation of fighting ships, the fixing of fighting rates lower than Cewal's normal rates and the

70 — They refer to Cases 23/63, 24/63 and 52/63 *Usines Henricot* v *High Authority* [1963] ECR 217, and *Suiker Unie*, loc. cit., paragraphs 203, 482 and 541.

sharing of the resulting loss of earnings. Accordingly, the appellants' challenge to the finding in paragraph 147 of the contested judgment as to their 'intention to implement a practice designed to affect the operation of competition' is unfounded.

— Departure from the conference tariff

121. The selectivity of the price reductions is an important element in the finding of abuse. Combined with Cewal's exclusionary purpose, it meant selecting for reductions *only* those sailings which had to meet the competition of G & C. In point 81 of the Decision the Commission, referring to the abusive nature of 'recourse' by dominant undertakings 'to methods different from those which condition normal competition on the basis of merit', admittedly stated that '[t]his [was] the case with fighting ships, especially since, Cewal being a shipping conference, its members are bound to respect the conference tariff'. In violation of their obligations under Article 5(4) of the 1986 Regulation Cewal failed to ensure the public availability of the Cewal conference's tariff. However, the Commission, in drawing attention to this, was merely restating a central aspect of the practice which it regarded as abusive, namely the selective as distinct from general price reductions. If a general rather than a selective price reduction policy had been adopted, assuming the reduced rates were still not below cost, it would have been much more difficult to make a finding of abuse. The plan or intention of the dominant undertaking would then have been associated with reduced but not below-cost prices and there would have been no need for a special plan for sharing loss of revenue. Without some additional element, such as high barriers to market entry, it would not be obvious why such a reaction to the entry of a new competitor should be treated other than as competition on the merits.

— Sharing of revenue losses

122. The Commission's finding that the 'shortfall in revenue resulting' from the fighting rates was 'borne by all Cewal's members' (point 73 of the Decision) has never been contested by the appellants, who claimed only that such pooling of risks was covered by the exemption. Naturally, there can be no exemption for sharing the costs of abusive behaviour. In the Commission's view, the abusive nature of Cewal members' conduct flowed not only from the intent to eliminate the competitive threat posed by G & C but, in particular, from the fact that Cewal members were able to subsidise 'the cost of fighting rates by the conference's normal rates charged on its other sailings' and that such anti-competitive conduct, even if G & C were as efficient as Cewal, could have the effect of eliminating 'from the market an undertaking which is perhaps as efficient as the

dominant conference but which, because of its lesser financial capacity, is unable to resist the competition practised in a concerted and abusive manner by a powerful group of shipowners operating together in a shipping conference'. [71]

— The case-law on 'predatory' pricing

123. Notwithstanding the Commission's attempt entirely to distinguish this case from classic below-cost 'predatory' pricing cases like *AKZO*, it is necessary to assess whether the Court of First Instance was correct in upholding the Commission's finding that the 'fighting ships' practice was abusive in the absence of below-cost selling. The commonly used term 'predatory' pricing has no, of course, particular legal status. The only test justified by Article 86 is examining whether there is an abuse.

124. The starting point for the discussion of abuse of a dominant position is the Court's judgment in *Hoffmann-La Roche*: [72]

'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which ... has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'

125. The Commission had argued in *AKZO* [73] that Article 86 'does not make costs the decisive criterion for determining whether price reductions by a dominant undertaking are abusive' since account had also to be taken of 'the need to prevent the impairment of an effective structure of competition in the common market'. [74] Price-cutting could be anti-competitive 'whether or not the aggressor sets its prices above or below its own costs, whatever the manner in which those costs are understood'. [75] In the Commission's view, a 'detailed analysis of the costs of the dominant undertaking' would only be of 'considerable importance' when the exclusionary intention of its pricing practice was not obvious. [76]

126. It is significant, as the appellants stress, that the Court in *AKZO* did not endorse the Commission's approach; nor, however, it must be said, did it expressly reject it. Referring to *Hoffmann-La Roche*,

71 — See point 82 of the Decision.

72 — Loc. cit., paragraph 91.

73 — Commission Decision 85/609/EEC of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.698 — ECS/AKZO); OJ 1985 L 374, p. 1.

74 — See point 77 of Decision 85/609/EEC and paragraph 64 in *AKZO*.

75 — See point 79 of Decision 85/609/EEC and paragraph 64 in *AKZO*.

76 — See point 80 of Decision 85/609/EEC and paragraph 65 in *AKZO*.

the Court held that Article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality and, consequently, that 'not all competition by means of price can be regarded as legitimate'. [77] In the next two paragraphs (paragraphs 71 and 72) the Court enunciated the following principles in respect of *below-cost* pricing by dominant undertakings:

'71. Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

72. Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.'

127. Therefore, sales below average variable (or short-run marginal; *AKZO*, paragraph 70) costs are in effect presumed to be abusive. While it is usually rational to sell above average variable costs, because that permits some return on capital, where the market will not bear a higher price, it is not usually rational to sell below average variable costs. Marginal costs need not be incurred and business has no interest in incurring them so as to make a loss. A dominant firm would be permitted, however, to rebut this presumption by showing that such pricing was not part of a plan to eliminate its competitor.

128. Furthermore, even prices above average variable costs (yet still below average total or long-run marginal costs; *AKZO*, paragraph 17), although not considered presumptively to be predatory, 'must be' considered abusive where it is established that they are part of a plan to eliminate a competitor. On the facts, the Court, later in

77 — Paragraph 70.

its judgment, considered the reduction of prices by more than necessary to obtain orders and their selective application to the competitor's customers only, thus permitting setting of loss-making against profitable sales, to establish the required intent. [78] Although a dominant undertaking is permitted to meet competition by 'making defensive adjustments, even aligning itself on [the competitor's] prices, in order to keep the customers which were originally its own', [79] it would not be legitimate for it to attempt to maintain, through a selectively offered price reduction, the customers that it has poached through below-cost pricing from its competitors unless it gives its own 'customers the benefit of this adjustment'. [80]

129. In *Tetra Pak II* the Court upheld the judgment of the Court of First Instance in which the approach laid down in *AKZO* had been applied in circumstances where the abuses were found to have occurred on a market other than that on which Tetra Pak was dominant but on which it held a leading position. [81] The appellants in that case challenged — largely by reference to United States Supreme Court case-law [82] — the refusal of the Court of First Instance to require the Commission to demonstrate '... a reasonable prospect of recouping losses so incurred'. [83] The Court upheld the finding that the appellant had engaged in below-cost predatory pricing but held that 'it would not be appropriate, *in the circumstances of the present case*, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses'. [84] I shall revert (paragraph 136 below) to the significance of that expression in the circumstances of the present appeal.

130. The categories of abusive exclusionary pricing practices have not been exhaustively defined in *AKZO*. The Court in *AKZO* did not definitively preclude the application of Article 86 to cases where a dominant firm undertakes selectively targeted price reductions while retaining its prices above its total costs. I agree with the view expressed by Advocate General Ruiz-Jarabo Colomer in his Opinion in *Tetra Pak II* that in *AKZO* 'the Court considered that competition based on pricing [was] not always legitimate and went on to identify *two types* of predatory pricing contrary to Article 86'. [85] Indeed, prior to its judgment in *AKZO*, it had, for example, held in

78 — *AKZO*, paragraphs 102 and 115.

79 — *AKZO*, paragraph 156.

80 — *AKZO*, paragraph 155.

81 — *Tetra Pak II*, loc. cit., footnote 56 above.

82 — *Brooke Group* v *Brown & Williamson Tobacco* 509 U.S. 209 (1993).

83 — *Tetra Pak* II, loc. cit. above, paragraph 39.

84 — *Tetra Pak II*, paragraph 44 (emphasis added). The Court would not appear to have gone as far as Advocate General Ruiz-Jarabo Colomer, who had recommended (paragraph 78 of his Opinion) that the Court 'should not lay down the prospect of recouping losses as a new prerequisite for establishing the existence of predatory pricing contrary to Article 86', *inter alia*, because, in his view, 'recouping losses is the result sought by the dominant undertaking, but predatory pricing is in itself anti-competitive, regardless of whether it achieves that aim'.

85 — Paragraph 73 of the Opinion (emphasis added).

Ahmed Saeed that the imposition by a dominant air carrier on a particular route, on other air carriers operating on that route, of '... excessively high, or, in order to eliminate from the market [competitors] which are not parties to the [price-fixing] agreement, *excessively low*' tariffs would constitute an abuse of its dominant position. [86] Among the criteria mentioned for assessing whether the rate employed was excessive were whether it was '... reasonably related to the long-term fully allocated costs of the air carrier, while taking into account the needs of consumers, the need for a satisfactory return on capital, the competitive market situation, including the fares of the other carriers operating on the route, and the need to prevent dumping'. [87] It is the Commission's express contention in this case (see particularly point 73 of the Decision) that Cewal's fighting rates were not fixed by reference to its costs but, in effect, solely by reference to the rates offered by G & C. It is, accordingly, necessary to see whether the circumstances of the present case, where there is no finding of below-cost selling and where, furthermore, the selectively reduced rates were (except in one case) set so as to be the same as, but not below, those of the competitor, can properly lead to a finding of abuse.

86 — Loc. cit., footnote 20 above, paragraph 43 (emphasis added).

87 — Ibid., paragraph 43. The Court, in *Ahmed Saeed*, was, however, able to rely for assistance, in this respect, upon Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States; OJ 1987 L 374, p. 12. There is no comparable legislation regarding conference rates in international maritime transport.

— The abusive nature of the 'fighting ships' conduct

131. It is clear that the abuse of which the appellants have been found guilty does not figure on the non-exhaustive list contained in Article 86(a) to (d). [88] In *Continental Can* the Court confirmed (in the context of the acquisition of a competitor) that the practices prohibited by Article 86 were not only 'those which are detrimental to [consumers directly] through their impact on an effective competition structure' but also those which cause the dominant position of the undertaking to be strengthened 'in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one'. [89] In *AKZO* the Court observed (paragraph 70) that 'not all competition by means of price [could] be regarded as legitimate', having regard to the special obligations of dominant undertakings. However, it would, in my opinion, potentially significantly impair the pursuit of the objective of Article 3(g) of the Treaty of ensuring the establishment of an internal market in which competition is not distorted, if the Court were to regard a threshold such as total average (or long-run marginal) costs as an absolute yardstick against which all possible abusive or exclusionary pricing practices had to be assessed. The Court in *Tetra Pak II* approved the view taken by the Court of First Instance in that case '... that the actual scope of the special responsibility imposed on a domi-

88 — *Continental Can*, loc. cit., footnote 16 above, paragraph 26.

89 — Ibid.

nant undertaking must be considered in the light of the specific circumstances of each case which show a weakened competitive situation'. [90]

132. I would, on the other hand, accept that, normally, non-discriminatory price cuts by a dominant undertaking which do not entail below-cost sales should not be regarded as being anti-competitive. [91] In the first place, even if they are only shortlived, they benefit consumers and, secondly, if the dominant undertaking's competitors are equally or more efficient, they should be able to compete on the same terms. Community competition law should thus not offer less efficient undertakings a safe haven against vigorous competition even from dominant undertakings. [92] Different considerations may, however, apply where an undertaking which enjoys a position of dominance approaching a monopoly, particularly on a market where price cuts can be implemented with relative autonomy from costs, implements a policy of selective price cutting with the demonstrable aim of eliminating all competition. In those circumstances, to accept that all selling above cost was automatically acceptable could enable the undertaking in question to eliminate all competition by pursuing a selective pricing policy which in the long run would permit it to increase prices and deter potential future entrants for fear of receiving the same targeted treatment. [93]

90 — Loc. cit. above, paragraph 24.

91 — There is considerable scholarly debate regarding the below-cost requirement of predatory pricing, much of which is summarised in Mastromanolis, 'Predatory Pricing Strategies in the European Union: A Case for Legal Reform' [1998] *E.C.L.R.* 211; see in particular pp. 216 to 218. Thus, for example, Areeda & Turner, 'Predatory Pricing and Related Practices under Section 2 of the Sherman Act' (1975) 88 *Harv. L. Rev.* 697, in an article that triggered an extensive academic debate and influenced the development of case-law in the United States, expressed the opinion that '[E]xclusion by charging prices equal to average costs is also competition on the merits — only those competitors who cannot survive at the efficiency related price are kept out'; p. 706. This view has been restated more recently in Areeda & Hovenkamp, *Antitrust Law*, Vol. III, § 748, '[E]ven deep price cuts that are not to predatory levels are not unlawful in the first place'; p. 462. This view has been disputed; see notably Scherer, 'Predatory Pricing and the Sherman Act: A Comment' (1976) 89 *Harv. L. Rev.* 868, who advocated that '... above-cost pricing, too low to allow small rivals to expand in the market and thereby to achieve economies of scale' should be considered 'as potentially exclusionary'; pp. 880-881. In the United Kingdom, the Monopolies and Mergers Commission has taken the view that where a dominant undertaking is '... able to contain new entrants' market penetration and accompanying price competition at relatively low cost to themselves by means of selective discounting', it is illustrative of how 'deep selective discounting may be used by established firms as a means of preserving their dominant position' and, in its opinion, such behaviour could operate as 'a barrier to entry' contrary to the public interest; see *Report of the Monopolies and Mergers Commission on the Supply of Concrete and Roofing Tiles* (1981-1982) H.C., paragraph 10.57.

92 — Korah, *An Introductory Guide to EC Competition Law and Practice* (London, 1994), 5th ed., p. 106, cautions against the use of competition rules '... to protect smaller and medium sized firms at the expense of efficient or larger firms'.

93 — See, in this respect, the discussion of the dangers of selective price cuts in Andrews, 'Is Meeting Competition a Defence to Predatory Pricing? — The Irish Sugar Decision Suggests a New Approach' (1998) *E.C.L.R.* 49.

133. There are peculiar features of certain markets such as maritime transport where costs may be an unreliable guide to the reasonableness of competitive strategies adopted by dominant firms. In the first place, once a ship has been designated to sail on a particular day, then, provided capacity is available, the cost of transporting an additional container shipped as a result of a reduced-rate offer may be close to zero. [94] More generally, freight rates will largely be determined not by the marginal cost for the shipping line of providing the service but by the price elasticity of demand for the product shipped. [95]

134. The fundamental question posed in the present case is whether, at the material time, the adverse potential effects of the conduct undertaken by Cewal members, in reaction to the competitive threat posed by the entrance of G & C, on the structure of competition on the market at issue were such as, having regard to the extent of the market power collectively enjoyed by them, to be sufficient to constitute an abuse.

135. Certain specific features of the 'fighting ships' practice and its setting in the current case can be recalled. Cewal enjoyed not merely a dominant position but, as it says, a *de facto* monopoly. The practice flowed from Cewal's unjustified claim to maintain a monopoly on the relevant market which it had sought to enforce via the Ogefrem Agreement and was incontestably designed not merely to beat competition but to eliminate the competitor. At the same time, Cewal was in a position to devise a scheme of selective designation of sailings for the rate reductions. The resulting loss of revenue was shared between conference members. Both because of the selectivity of the reductions and their very large market share, the members could spread and absorb the loss of revenue. Furthermore, as the Commission suggests (point 82 of the Decision), the very fact that Cewal was able to set the fighting rates at or above cost may suggest in itself that

94 — Temple Lang, 'European Community Antitrust Law: Innovation Markets and High Technology Industries', in (1996) *Fordham Corporate Law Institute* 519, has pointed out that 'if nothing is added to the *AKZO* criteria, dominant companies selling products or services of which the variable cost is near-zero, which are relatively common in high tech industries, have much scope for putting competitors out of business by what would widely be regarded as predation'; see note 117 to p. 575. He suggests the following test: 'In industries where the marginal cost of additional production is near to zero, it is suggested that the test to be applied is whether a company charges a price for goods or services which, although above the average variable cost of providing the specific goods or services for which the price in question is paid, is so low that its overall revenues for all the goods or services in question would be less than its average variable cost of providing them if it sold the same proportion of its output at the same price on a continuing basis, even where no intent to exclude a competitor is proved'.

95 — See, for example, Rakovsky, 'Sea Transport under EEC Competition Law' (1992) *Fordham Corp. Law Institute* 845, 847 and Pirrong, 'An Application of Core Theory to the Analysis of Ocean Shipping Markets' (1992) 35 *J. Law & Econ.* 89, 107.

the normal rates were substantially above cost, or, I would observe, that marginal cost was, in any event, very low.

136. The sharing of loss of revenues prompts me to revert briefly to the possible need to establish an intention or a possibility of recoupment. The process of sharing revenue losses is in essence a form of recoupment. The strategic purpose of the fighting rates carries with it the unspoken implication that rates will not be reduced for any sailings, current or future, where that is not necessary to meet competition. Furthermore, once the competitor was eliminated, they would clearly no longer be justified. Thus, to the extent that it is necessary, I believe that the present case passes the test of recoupment. At the same time, I would say that some such requirement should be part of the test for abusively low pricing by dominant undertakings. It is implied in the first paragraph of the quotation from *AKZO* (see paragraph 126 above). It is inherent in the *Hoffmann-La Roche* test (see paragraph 124 above). The reason for restraining dominant undertakings from seeking to hinder the maintenance of competition by, in particular, eliminating a competitor is that they would thus be enabled to charge abusively *high* prices. Thus, an inefficient monopoly would be reinstated and consumers would benefit only in the short run. If that result is not part of the dominant undertaking's strategy it is probably engaged in normal competition.

137. In all these circumstances, the Court of First Instance committed no error of law in finding that the response of Cewal members to the entrance of G & C was not 'reasonable and proportionate'.[96] To my mind, Article 86 cannot be interpreted as permitting monopolists or quasi-monopolists to exploit the very significant market power which their superdominance confers so as to preclude the emergence either of a new or additional competitor. Where an undertaking, or group of undertakings whose conduct must be assessed collectively, enjoys a position of such overwhelming dominance verging on monopoly, comparable to that which existed in the present case at the moment when G & C entered the relevant market, it would not be consonant with the particularly onerous special obligation affecting such a dominant undertaking not to impair further the structure of the feeble existing competition for them to react, even to aggressive price competition from a new entrant, with a policy of targeted, selective price cuts designed to eliminate that competitor. Contrary to the assertion of the appellants, the mere fact that such prices are not pitched at a level that is actually (or can be shown to be) below total average (or long-run marginal) costs does not, to my mind, render

96 — Paragraph 148.

legitimate the application of such a pricing policy.

138. In this case the Court of First Instance has, rightly in my view, upheld the Commission's finding that Cewal members devised a strategy, for the sole and exclusive aim of eliminating G & C, their only competitor. The Commission has demonstrated that the appellants sought, by targeting G & C sailings with fighting rates equal to or lower than those offered by G & C in respect of its sailings, to inflict the maximum damage to G & C while minimising the losses of revenue thereby incurred through the operation of their revenue pool system. To my mind, the Commission was manifestly correct to take the view that, even if G & C were as efficient a shipping line as the members of Cewal, it could not be expected to 'resist' such 'competition practised in a concerted and abusive manner by a powerful group of shipowners operating together in a shipping conference' (point 82). In other words, the 'fighting ships' practice was designed to drive G & C out of the market with the minimum of cost for Cewal members, so as to restore them to their previous position of virtual monopoly and accordingly permit them to return their rates to the level of the published conference tariff.

139. Consequently, I recommend that the appeal against the decision of the Court of First Instance to uphold the Commission's characterisation as abusive of the 'fighting ships' conduct undertaken by Cewal members be dismissed in its entirety.

C — *The imposition of 100% loyalty contracts*

(i) *Introduction*

140. The appellants' challenge to the decision of the Court of First Instance upholding the Commission's finding of this third heading of abuse has two limbs. Firstly, the appellants say that the Court of First Instance was wrong in law because, in concluding that the loyalty arrangements were imposed, it misinterpreted Article 5(2) of the 1986 Regulation, which exempts such arrangements. Secondly, they say that the Commission was precluded by the 1986 Regulation, in particular Article 8, from proceeding to impose fines for abuse without first withdrawing the exemption.

(ii) *The content*

141. Before considering these grounds of appeal in greater detail, it is necessary to recall the relevant features of the Commission Decision.

142. Article 2 of the Decision found the members of Cewal to have 'abused their joint dominant position by ... establishing 100% loyalty arrangements (including goods sold f.o.b.) which went beyond the terms of Article 5(2) of [the 1986 Regulation], accompanied by the use, as described in this decision, of blacklists of disloyal shippers'. Two general points of importance need to be made about this finding. Firstly, the Cewal members are not accused of three independent kinds of abuse; rather the elements of 'establishing' the arrangements, of including goods sold f.o.b. and of using blacklists are taken together as amounting to 'unilaterally imposing loyalty arrangements' (point 85 of the Decision). Secondly, and more importantly, the essential character of the abuse is, in common with the other two headings, in the finding that it was adopted '[i]n order to eliminate the principal independent competitor in the trade in question' (Article 2 of the Decision). The facts and reasoning behind this conclusion are found in points 28, 29 and 84 to 88 of the Decision.

143. According to the Decision, shippers of goods between Europe and Zaïre were able only occasionally to use non-conference services. Since they had no real choice but to use Cewal for most of their trade, offering rebates only on the basis of 100% loyalty (extended even to f.o.b. sales) was tantamount to imposing those contracts (points 84 to 86 of the Decision). The Commission also found that Cewal aggravated the imposed terms by using blacklists in order to impose sanctions on shippers 'linked to the supply or quality of the service' (point 86). The Commission relied in this respect on extracts from minutes of the Zaïre Pool Committee as showing that Cewal used blacklists as part of a defensive strategy to ensure that shippers using the services of the only competitor could not claim the benefits of the loyalty contract or count on a normal adequate service from Cewal (point 29). The Commission found Cewal's overall conduct to be abusive so that no claim to rely on an exemption pursuant to the 1986 Regulation could 'stand in the way of the applicability of Article 86 of the Treaty ...' (point 87).

144. The Court of First Instance explained that the Commission had found this abuse to consist of the 'imposition of 100% loyalty contracts, the inclusion of goods sold f.o.b. and the use of blacklists of disloyal shippers with a view to penalising them'. [97] The Court of First Instance agreed with the Commission that 'the fact that the

97 — Paragraph 173.

members of Cewal, which at the material time had more than 90% of the market, offered shippers only 100% loyalty contracts left no choice between obtaining a rebate in the event that the shipper agreed to ship all its goods by Cewal or no rebate in all other cases, and was in fact tantamount to imposing such contracts'.[98] It thus held that Cewal's practice could not be regarded as exempt as regards Article 85 of the Treaty since Article 5(2)(b)(i) of the 1986 Regulation allowed 100% loyalty agreements to be offered but not imposed. It also upheld the Commission's finding that the clauses included f.o.b. sales with the result that 'the seller has to bear an obligation of loyalty even when he is not responsible for shipping the goods'.[99] Finally, it found that Cewal had a blacklist of disloyal shippers which was not 'merely drawn up for statistical purposes' and that the drawing-up of such lists was not exempted 'by any provision of [the 1986 Regulation]'.[100] Consequently, it was satisfied, referring to the Court's judgment in *Hoffmann-La Roche*, that the Commission had correctly concluded 'that the practice taken as a whole had the effect of restricting users' freedom and thereby of affecting the competitive position of Cewal's only competitor on the market'.[101]

98 — Paragraph 183.
99 — Paragraph 184.
100 — Paragraph 185.
101 — Paragraph 186.

(iii) *First limb: misinterpretation of 1986 Regulation — 'imposition' of loyalty*

145. The appellants interpret the contested judgment as concluding that, in the absence of evidence of threats to or other similar pressure on shippers, the loyalty arrangements were imposed merely because of the collective dominant position of Cewal. Since conference lines almost invariably enjoy a dominant position, the 1986 Regulation should be interpreted as permitting and encouraging the use of 100% loyalty contracts in the particular circumstances of the shipping industry even to the extent of permitting enforcement of the loyalty obligation, as indicated by the tenth recital in the preamble to the 1986 Regulation, which necessitates the exchange of information about, i.e. making blacklists of, shippers. Furthermore, they dispute the finding that these terms have been imposed in the case of f.o.b. shipments.

146. I do not think it will be helpful to explore the details of this argument at any length. In my view, it is based on a fundamental error of interpretation of the Commission Decision and of the contested judgment. It fails to take account of the two crucial elements of the Decision which I have explained at paragraph 142 above. The appellants emphasise, to no useful purpose, that the literal, teleological and systematic interpretations of Article 5(2) of the 1986 Regulation show that 100% loyalty arrangements are permitted, even in the case of a dominant conference

shipping line, but this is not in doubt. The finding that the arrangements were imposed, which was upheld in the passage quoted at paragraph 144 above by the Court of First Instance, is not, as the appellants claim, derived from the fact of Cewal's dominant position. The key point is not the dominant position but the provision of 100% loyalty rebates with *no alternative* such that a shipper would lose his entire rebate for one act of 'disloyalty'. The appellants have not addressed this aspect of the reasoning. This misunderstanding of the contested judgment is sufficient to dispose of the first limb of this ground of appeal; a ground of appeal based on a mistaken interpretation of the contested judgment must be rejected. However, I will deal with two subsidiary points made under this limb.

(a) First subsidiary point — f.o.b. sales

147. As a first subsidiary challenge to the finding that loyalty arrangements were imposed, the appellants contest the finding of the Court of First Instance (paragraph 184) that the seller has to bear an obligation of loyalty even when not responsible for shipping the goods. They claim that, when goods are shipped f.o.b., the shipper is not the seller or exporter but the importer and that they had not understood that the extension of the arrangements to f.o.b. sales was part of the charge against them. This argument must be rejected for several reasons.

148. Firstly, contrary to the appellants' assertion, the inclusion of goods shipped f.o.b. was mentioned not merely once in point 85 as they claim but three times in the Decision, including in Article 2 of the operative part. Moreover, the appellants (then applicants) must have understood the phrase 'which consequently escape the control of exporters' as meaning that the extension was intended to deprive shippers of the rebate unless they ensured that importers also were loyal to the conference. None the less, their case before the Court of First Instance was that such arrangements were inevitable, not that they did not exist. Therefore, as the Commission points out, this argument is inadmissible, being raised for the first time on appeal. Secondly, the argument fails to take account of the essence of the Commission's finding as upheld by the Court of First Instance. It is not, as the appellants claim, an independent heading of abuse. It is a feature of the general conclusion that the loyalty arrangements were imposed and, moreover, of the finding that 'taken as a whole' (paragraph 186 of the contested judgment) it had the effect of restricting the freedom of users and affecting Cewal's only competi-

tor. Thirdly, these conclusions of the Court of First Instance are based on the competitive effects of these practices on the market, not on the legal enforceability ot any particular interpretation of the loyalty contracts. Therefore, in principle, the finding of the Court of First Instance is one of fact, not of law, and is not open to challenge on this appeal. I would, for these reasons, rule that this argument is inadmissible.

(b) Second subsidiary point — blacklists

149. As a second subsidiary argument the appellants contest the findings of the Court of First Instance that the maintenance by Cewal of blacklists of disloyal shippers could not be exempted by the 1986 Regulation.

150. The appellants also claim that the Court of First Instance ignored their pleadings before it that all customers who had concluded loyalty contracts despite shipping cargo with G & C still received the rebate. This was a response to the Commission's view that the maintenance in force of the blacklists (point 88 of the Decision) was in direct contradiction of Cewal's claim. The Commission contends in its response that the Court of First Instance, by referring in paragraph 185 of the contested judgment to the Zaïre Pool Committee minutes where the fact that the 'system of blacklists was working' was recorded, effectively upheld the view that it had expressed in the Decision. I agree with this interpretation of the contested judgment. I am satisfied that that Court had not only in mind the contradiction noted by the Commission in point 88 of the Decision but also the Commission's factual assessment in point 29 of the Decision, and, based on the abovementioned minutes, that shippers who used the services of G & C 'could no longer claim the benefits offered by the loyalty contract' or 'count on a normal adequate service from Cewal'. To my mind, this view is borne out by the succeeding sentence in paragraph 185 of the contested judgment where that Court held that the blacklists were not used merely 'for statistical purposes'. This is a conclusion of fact. Moreover, it does not matter if Cewal ultimately allowed the rebate to all shippers who used G & C, once it is shown that the blacklists were adopted as part of a strategy to dissuade them from doing so.

151. The appellants also claim that use of such lists cannot be regarded as abusive.

They refer to the tenth recital in the preamble to the 1986 Regulation which expressly permits conference lines to impose 'penalties on users who seek by improper means to evade the obligation of loyalty required in exchange for the rebates'. In their view, accepting a 100% loyalty clause with a conference line in order to obtain a rebate while simultaneously shipping some cargoes with independent lines would constitute such improper means. Consequently, there is nothing abusive in seeking to police the observance even of a 100% loyalty obligation. To my mind, this plea ignores key features of the blacklists noted in both the Decision and the contested judgment. The Commission clearly took the view in point 86 of the Decision that the *de facto* effect on shippers of requiring 100% loyalty was 'aggravate[d]' by the use of blacklists which 'actually impos[ed] sanctions on them linked to the supply or quality of the service'. The Commission set out, in a footnote to point 29 of the Decision, evidence of the directly exclusionary function of the blacklists. The Court of First Instance expressly upheld the finding of the Commission (summarised at paragraph 182 of the contested judgment) even to the extent of citing the footnote (paragraph 185).

152. The appellants claim that the Court of First Instance was wrong (paragraph 185 of the contested judgment) in finding that the drawing-up of blacklists '[could not] be regarded as being exempted by any provision of [the 1986 Regulation]'. However, as the Commission rightly points out in its response, the drawing up of lists of unfaithful shippers may at most be regarded as falling within the exemption of 100% loyalty arrangements under the 1986 Regulation if such arrangements do not, in the wording of the tenth recital, 'restrict unilaterally the freedom of users and consequently competition in the shipping industry'. Since I agree with the view of the Commission, endorsed by the Court of First Instance, that Cewal's loyalty arrangements were effectively imposed on shippers, I am satisfied that the Court of First Instance committed no error in law in holding that the drawing-up of such lists was not exempted by any provision of the 1986 Regulation. To my mind, the effects of a shipping conference abusively imposing loyalty arrangements are clearly capable of being reinforced by maintaining blacklists of disloyal clients since, in the absence of such lists, those clients could *de facto* if not *de jure* effectively benefit from an option as to the use, at least occasionally, of the services of independent lines. It follows, in my opinion, that the Commission and the Court of First Instance were correct to view the overall effect of the drawing-up of blacklists as contributing to the abuse flowing from the effective imposition of the loyalty contracts by Cewal members.

153. Finally, in so far as the appellants claim for the first time in their reply before

this Court that their right to be heard was breached by the Commission in respect of the potential role of blacklists in facilitating the imposition of non-financial penalties because that possibility was not mentioned in the statement of objections, the plea is inadmissible under Article 42(2) of the Rules of Procedure of the Court of Justice since it clearly constitutes a new plea in law which could have been raised before the Court of First Instance.

154. In conclusion, I would uphold the judgment of the Court of First Instance in so far as it held that the 100% loyalty contracts were imposed (paragraph 183). I also consider that both the Commission and the Court of First Instance were correct to view that behaviour 'taken as a whole' (paragraph 186) in concluding that it could not be exempt 'as regards Article 85 of the Treaty' (paragraph 183).

155. At this point it is important to distinguish those individual breaches of 'obligation' attached to the block exemption which formed the subject-matter of the Commission's recommendation (Article 5 of the Decision) pursuant to Article 7 of the 1986 Regulation, which was upheld by the Court of First Instance and which has not been challenged in this appeal.

156. The imposition of the 100% loyalty contracts, as the Commission found in Article 2 of the Decision, went beyond Article 5(2) of the 1986 Regulation. Loyalty arrangements are permitted as part of a scheme of either immediate or deferred rebates. As is clear from the 10th recital in the preamble to the 1986 Regulation they are 'permitted only in accordance with rules which do not restrict unilaterally the freedom of users and consequently competition in the shipping industry'. In so far as the same recital contemplates the imposition of 'penalties on users who seek by improper means to evade the obligation of loyalty', it is clear that the latter is to be the *quid pro quo* 'for the rebates, reduced freight rates or commission granted to them by the conference'. It is emphatically not permitted to use the rebates for the purpose of excluding competitors from the market, a central purpose which, as I have already pointed out, lay at the heart of the finding by the Commission of all three types of abuse. This purpose is most eloquently attested by the extract from the minutes of the Zaïre Pool Committee quoted at the second footnote to point 29 of the Decision and which spoke of '... the defensive strategy [which] should be based on deterring the customers by instituting a blacklist of unfaithful shippers/consignees whose other northbound shipments by conferences' vessels would no longer benefit from normal adequate conference treatment'. The imposition of the loyalty agreements could, thus, not benefit from any exemption by virtue of the 1986 Regulation.

(iv) *Second limb: the Commission cannot fine before withdrawing exemption*

157. The appellants claim that, if their loyalty arrangements were 'imposed' within the meaning of Article 5(2)(b)(i) of the 1986 Regulation, that conduct would merely have constituted the breach of an 'obligation ... attached to the exemption provided for in Article 3'. In that event, the Commission should follow the procedure set out in Article 7(1). Thus, it would be obliged to withdraw the benefit of the block exemption under Article 3 before imposing any fines. In the appellants' opinion, the Court of First Instance has ignored the distinction between breach of a 'condition' which automatically renders inapplicable the benefit of that block exemption and the breach of an 'obligation'. They claim that the 1986 Regulation was a measure adopted under Article 87(2)(c) of the Treaty to define the scope of application of both Articles 85 and 86 in the maritime transport sector, and that two types of abuse are effectively recognised by it: abuses which result from conduct in respect of which liner conferences enjoy the benefit of the block exemption and other abuses. In the former case, Article 8(2) of the Regulation obliges the Commission to withdraw that exemption before imposing any fines.

158. The Commission points out that Article 8(1) of the 1986 Regulation prohibits 'the abuse of a dominant position within the meaning of Article 86 of the Treaty ... no prior decision to that effect being required'. It follows that Article 8(2) of the 1986 Regulation should be interpreted as giving a discretion as to what measures the Commission may take whenever prima facie exempt conduct is found to be abusive. [102] Alternatively, the Commission repeats the view expressed in point 87 of the Decision that, even if the Cewal members' conduct in respect of their loyalty contracts were 'covered by the block exemption in Article 6 of [the 1986 Regulation]', [103] notwithstanding the breaches of various 'obligations' imposed by Article 5(2) of the 1986 Regulation, that regulation could 'not stand in the way of the applicability of Article 86 of the Treaty to agreements and practices authorised by a block exemption' so as to 'prevent Article 86 from being applied'. It relies therefore on the well-established principle, confirmed by the Court of First Instance, that there can be no concurrent exemption under Articles 85 and 86.

159. The view taken by the Court of First Instance that the 1986 Regulation cannot be viewed as conferring an exemption in respect of conduct that infringes Article 86 of the Treaty or Article 8(1) of the 1986

102 — In this respect, the Commission's representative stressed at the hearing that it would regard withdrawal of the benefit of a block exemption as the 'nuclear option' and the imposition of fines as less serious.

103 — It has been assumed in the pleadings both before the Court of First Instance and this Court, despite the Commission's reference to 'the block exemption in *Article 6* of [the 1986 Regulation]' (emphasis added), that no distinction should be drawn between the exemption under Articles 3 and 6 of the Regulation in so far as the Commission's powers under Article 8(2) of the Regulation are concerned.

Regulation is manifestly correct. The Court held in *Ahmed Saeed*, 'no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position ...'. [104] As the Commission rightly points out in its rejoinder, this principle has recently been unequivocally confirmed by *British Gypsum*, [105] where the Court endorsed the view expressed by its Advocate General that Article 85(3) of the Treaty does not operate as a 'concurrent exemption from the prohibition of abuse of a dominant position'; thus, even if Cewal's loyalty arrangements benefited from the block exemption, they would enjoy no protection from the immediate application of Article 86 of the Treaty. [106]

160. In so far as the appellants contend that the fact that the exemption at issue in the present case is conferred by a Council regulation adopted pursuant to Article 87(2)(c) of the Treaty may affect the application of the above principle, their view is misconceived. The 1986 Regulation is based on both Articles 84(2) and 87 of the Treaty. As regards the former, the Court held in *Commission* v *France* [107] that, far from excluding the application of the Treaty to sea (and air) transport, the only effect of Article 84(2) was that the special Treaty provisions concerning transport would not automatically apply to them and, consequently, that they remained 'on the same basis as the other modes of transport, subject to the general rules of the Treaty', [108] which, of course, include its competition rules. [109] It emerges clearly from the Court's judgment in *Ahmed Saeed*, where it declared, notwithstanding the absence of the enactment of any regulations under Article 87, that 'the prohibition laid down in Article 86 of the Treaty is fully applicable to the whole of the air transport sector', [110] that the purpose of Article 87, and particularly the power conferred upon the Council under its paragraph 2(c) 'to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 85 and 86', is not to permit the Council to determine the substantive scope of the application of Article 86 but, rather, to allow it prescribe the detailed procedural rules for applying those competition rules. In my opinion, it is clear from a perusal of the 1986 Regulation that this is precisely the objective which has been pursued by the Council.

161. I now turn to consider whether, as the appellants contend, the Commission was precluded from imposing fines for abuse of

104 — Loc. cit., footnote 20 above, paragraph 32.

105 — Loc. cit., footnote 47 above.

106 — See paragraph 67 of the Opinion of Advocate General Léger, whose reasoning in this respect was, *inter alia*, expressly adopted by the Court in paragraph 11 of its judgment. The Advocate General based his view on paragraph 25 of the judgment of the Court of First Instance in Case T-51/89 *Tetra Pak* v *Commission* [1990] ECR II-309 (hereinafter '*Tetra Pak I*').

107 — Case 167/73 [1974] ECR 359.

108 — Ibid., paragraph 32. This view was subsequently confirmed by the Court in Joined Cases 209/84 to 213/84 *Ministère Public* v *Asjes* (hereinafter '*Nouvelles Frontières*') [1986] ECR 1425; see, in particular, paragraph 42.

109 — *Nouvelles Frontières*, paragraph 45.

110 — Loc. cit., paragraph 33.

a dominant position without proceeding to withdraw the exemption enjoyed by Cewal pursuant to Article 3.

162. It is important to recall the character of the abuse found against the appellants, namely the imposition of 100% loyalty rebates (including application to f.o.b. sales), with no alternative to 100%, enforced by the maintenance of blacklists *'in order to eliminate the principal independent competitor'* (emphasis added) of Cewal.

163. In my view this behaviour was not and could not be exempted from the application of Article 86. Furthermore, in so far as that is relevant, it could not be described as a breach of a simple obligation under Article 5 of the Regulation of the order of those breaches covered in paragraph 178 of the contested judgment. It is straining language to say that the prohibition of the unilateral imposition of 100% loyalty arrangements describes an obligation. It is a description of what is not permitted by Article 5(2)(b)(i).

164. However, Article 8, both in its direct and clear wording and its structure provides its own answer to the appellants' claim. Article 8(1) is so explicit in its statement that 'no prior decision [is] required' for the prohibition of abuse of a dominant position that very clear language would be needed to contradict it. Furthermore, this plain wording is fully in harmony with the principles regarding the effectiveness of Article 86 and the impossibility of exemption.

165. Nor does Article 8(2) of the 1986 Regulation contradict or qualify Article 8(1) in any way. It permits 'the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons ...' to take the distinct step of withdrawing an exemption which is expressly conferred by Article 3. It imposes no restrictions on the powers of the Commission to impose fines in the circumstances outlined in particular in Article 19(2) of the 1986 Regulation. The abuse found against the appellants relates to abusive *imposition* of 100% loyalty contracts and not to the enjoyment of the exemption conferred by Article 3. I can see no reason for concluding that the condemnation of the first should depend on the extreme step of withdrawing the second.

166. I would dismiss the ground of appeal related to the imposition of the 100% loyalty contracts in its entirety.

VI — The fines

A — *Introduction*

167. The appellants raise, in the alternative, a large number of pleas under different headings regarding the decision of the Court of First Instance substantially to uphold the fines imposed on them. Since by far the largest fine was imposed on CMB (see paragraphs 3 and 4 above), not all of the pleas made by that appellant are also made by Dafra.

B — *The jurisdiction of the Court*

168. The appellants contend that, in quashing the contested judgment, the Court may, pursuant to its power under the first paragraph of Article 54 of the Statute to 'give final judgment in the matter, where the state of the proceedings so permits ...', exercise the unlimited jurisdiction with regard to the fines concerned granted by Article 172 of the Treaty and Article 21 of the 1986 Regulation. If the Court follows my recommendation to dismiss all the grounds of appeal regarding the issues of abuse, it should none the less, in my opinion, also quash the fine in its entirety based on one of the grounds advanced.

169. As regards the appellants' alternative pleas in respect of the fines, it is appropriate first to stress that it is the Court of First Instance which now enjoys the 'unlimited jurisdiction' envisaged by Article 172 of the Treaty and granted under Article 21 of the 1986 Regulation, in respect of fines imposed pursuant to that regulation, initially to the Court. This jurisdiction has been given to that Court pursuant to Article 168a of the Treaty and Article 3(1)(c) of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities. [111] Next, it should be recalled that this Court's jurisdiction to review the findings made by the Court of First Instance in exercise of that jurisdiction is clearly limited, by both Article 168a of the Treaty and Article 51 of the Statute, to considering any errors of law that might have been made in upholding or annulling the Commission's findings in respect of fines. Thus, in *Ferriere Nord* v *Commission*, the Court held, in response to a plea that the fine in that case was unjust, that, in ruling on questions of law, it would not 'substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed

111 — OJ 1988 L 319, p. 1.

on undertakings for infringements of Community law'. [112] In addition, it held that its jurisdiction was limited to considering 'whether the Court of First Instance [had] responded to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine abolished or reduced'. [113]

170. In the event of the Court finding, however, that an error of law affecting in part only the contested judgment occurred, the further question of the extent or nature of this Court's residual jurisdiction would arise. Under the first paragraph of Article 54 of the Statute, the Court, if it decides that an appeal is well founded, must quash the decision of the Court of First Instance but, in addition, it 'may itself give final judgment in the matter, where the state of the proceedings so permits'. It follows, in my view, that, if those circumstances arise, the unlimited jurisdiction envisaged by Article 172 of the Treaty with regard to fines, originally granted to the Court, but transferred to the Court of First Instance, is revived. Thus, if the Court of First Instance errs in law in exercising its jurisdiction under Article 172 of the Treaty, it is essential that this Court, both in the interests of procedural economy and the rights of the appellants, where it is satisfied that it is appropriate for it to decide the case itself, be empowered to exercise an unlimited jurisdiction over fines.

112 — Case C-219/95 P [1997] ECR I-4411 (hereinafter '*Ferriere Nord*'), paragraph 31.

113 — Ibid.

C — *The appellants' pleas*

171. The following pleas are advanced jointly by the appellants:

(i) They complain that the nature (or gravity) of the infringements was not such as could have been described as serious or even intentional;

(ii) They complain that the Commission in imposing the fine on them instead of on Cewal breached their right to a fair hearing;

(iii) For varying reasons, they assert that the fines were based on an erroneous assessment of the degree of their involvement in the trade on the Cewal route;

(iv) They complain that their cooperation with the Commission was not taken into account as a mitigating factor;

(v) They assert that the relatively short duration of the infringements was not properly considered;

(vi) They contend that, contrary to the view of the Commission, the impugned conduct did not permit them to maintain a high market share;

(vii) They complain that insufficient consideration was given to the novelty of the infringements as a mitigating factor;

(viii) Finally, they maintain that the regulatory context of Ogefrem should also have been considered.

Furthermore, CMB also asserts that the fine imposed on it was unprecedentedly high and that it was improperly imposed so as to strike a political balance with the fine imposed in a different Commission decision on a different conference line. Finally, the appellants, in what is in effect an autonomous plea, argue that the interest rate (13.25%) imposed in Article 7 of the Decision in the event of the fines not being paid within three months of the notification of the Decision was excessively high.

D — *Analysis*

172. Since I agree with the Commission that many of the arguments employed by the appellants in respect of the various pleas in respect of fines essentially seek to revisit findings of fact by the Court of First Instance or are manifestly unfounded, I will not consider all of these points in detail.

(i) Breach of the right to a fair hearing

173. The appellants assert that the Court of First Instance has erred in law in upholding the entitlement of the Commission to impose fines on them notwithstanding that the statement of objections only threatened to impose fines on Cewal but not on any of its members. At paragraph 232 of its judgment, that Court held as follows:

'Secondly, as regards the calculation of the fine, the Court finds that, since the conference does not have legal personality, the Commission was entitled to impose a fine on the members of Cewal, rather than on the conference itself. In this regard, it should be stressed that, in addition to Cewal, each of the members of the con-

ference was an addressee of the statement of objections. In those circumstances and having regard to the fact that Cewal had no legal personality, the Court considers that, even if the statement of objections referred only to the possibility of imposing a fine on Cewal in respect of the abusive practices, the applicants could not have been unaware that they ran the risk of a fine being imposed upon them, rather than on the conference.'

174. The appellants contend that if the Commission were not minded to impose fines on Cewal because it lacked legal personality, it should have told them that the fines would be imposed on them. They point to the following prejudice which, in their opinion, flowed from this omission:

— if the fine had been imposed on Cewal it could only have been based on Cewal's turnover and not on that of its members; the former, being based solely on the Zaïrean routes, was lower than the latter;

— while the fine would ultimately have been paid by the members of Cewal individually, their contributions would have been in accordance with their share in the pool; [114]

— CMB was not on notice that it would be singled out for a disproportionate share of the fine by reason of its especially active role in the abuses.

The appellants conclude that the Commission failed to respect the basic requirement of a statement of objections that it inform the parties of the objections raised against them, and, in particular, as to which of them will bear the financial burden of the fine imposed. [115]

175. The Commission does not claim that the members of Cewal were put on notice of fines but maintains that it should have been clear to the appellants 'that throughout the statement of objections, "Cewal" was intended to refer to the group of undertakings making up the conference', since a list of its members was annexed to the statement of objections. It also claims that the Court of First Instance was correct to hold that it would have made no sense to impose a fine on Cewal as it had no legal personality. The Commission contends that it was 'implausible' that they should be 'unsophisticated enough to be surprised by the imposition of a fine ...'. In addition, the Commission maintains that, because it was envisaged that fines would be imposed on members of Cewal in respect of the infrin-

114 — In its appeal, CMB points out that the fine imposed on it could not therefore have amounted to 95% of the total.

115 — They cite, *inter alia*, Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49 and T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211.

gements of Article 85 alleged in the statement of objections, Cewal members were put on notice that individual fines would be imposed on them.

176. In my opinion, the Court of First Instance was wrong to assume that the Commission was entitled to impose a fine on the members of Cewal because Cewal lacked legal personality and because they were each addressees of the statement of objections. This error of law flows from its mistake in assuming that the applicants could not have been unaware that they ran the risk of being fined.

177. It is common case that a copy of the statement of objections was sent to the appellants, albeit only three months after it was sent to Cewal. The real issue, however, is whether the appellants were properly put on notice, by the copy of the statement of objections which they eventually received along with a cover letter which added nothing to the contents of that statement, that they could individually be subjected to fines which the statement expressly envisaged imposing only on Cewal, with all the consequences that would follow in respect of the calculation of the amount of the fines.

178. In the first place, I do not find it acceptable that the Commission should make presumptions concerning such an important matter. The Court has consistently held that 'the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure'. [116] The essential procedural safeguard provided by the statement of objections is 'an application of the fundamental principle of Community law which requires the right to a fair hearing be observed in all proceedings'. [117] Even if not criminal in nature, [118] fines have a punitive function. It follows that the Commission has a strict obligation to notify undertakings clearly that they may be subjected to fines.

179. Secondly, it should be remembered that Article 19(2) of the 1986 Regulation, like its counterpart in Article 15(2) of Regulation No 17/62, empowers the Commission to impose fines both on undertakings and 'associations of undertakings'. A liner conference, such as Cewal, is clearly such an association. Equally, it is clear that the Treaty competition articles generally apply to associations of undertakings [119] and that they are explicitly subjected to the investigating powers of the Commission,

116 — Joined Cases 100/80 and 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraph 14.

117 — Ibid., paragraph 10.

118 — See, in this respect, Article 19(4) of the 1986 Regulation.

119 — See, for example, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 20.

including fining. [120] The Commission gave as one of its reasons for fining the members of Cewal that the latter did not have legal personality. It has not said, nor has the Court of First Instance, that fines could not be imposed on unincorporated associations, as, of course, they can. [121] From the point of view of the members of Cewal, it is sufficient to say that there was no reason not to take the statement of objections at its face value as expressing an intention to fine Cewal and I see no reason to dispense the Commission from what I regard as a strict obligation. In *AWS Benelux* v *Commission*, the Court of First Instance annulled fines, where 'the Commission, despite thus being ... challenged [during the administrative proceedings] did not clarify its position on the question of liability for the alleged infringement', [122] even if its judgment was based on a finding of defective reasoning in the decision rather than infringement of the rights of the defence.

180. Thirdly, the failure to notify the individual members of Cewal of this exposure to fines is not a merely formal defect. CMB, in particular, is in a position to point to concrete prejudice. The appellants have pointed out in their reply, without being contradicted on this point by the Commission, that, if the turnover of Cewal members on the routes in question (ECU 22 171 million in 1991) were taken as the relevant turnover figure for the purposes of calculating the maximum amount of the fine (10%) that could be imposed pursuant to Article 19(2) of the 1986 Regulation, the total fine would have been very much lower. In fact they would hardly have exceeded one-quarter of the actual amount. In so far as the Commission intended to allocate fines on the basis of individual responsibility, those undertakings should, at the very least, have been notified that they, as distinct from Cewal, were liable to be fined.

181. Since a fundamental requirement has been infringed by the Commission, I recommend that the judgment of the Court of First Instance upholding the Decision, in so far as the fines imposed on the appellants are concerned, be set aside and,

120 — See Article 18(1) of the 1986 Regulation and, for example, Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraphs 253 and 254. In this respect, see also the recent Commission Communication, 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty'; OJ 1998 C 9, p. 3, at point 5(c) in particular.

121 — In *IAZ* v *Commission*, loc. cit., footnote 119 above, the Court held that a non-profit making association (ANSEAU), which comprised 31 Belgian water-supply undertakings and whose task was 'to safeguard the common interests of those undertakings' ([1983] ECR 3369, p. 3374) could, in fact, be fined in respect of recommendations issued with a view to ensuring that its member undertakings only connected 'approved' washing machines to the water network. Indeed, the principal fine was imposed on the association. In Case 246/86 *Belasco* v *Commission* [1989] ECR 2117, Belasco, an association of Belgian roofing felt manufacturers and seven of its member undertakings were fined for implementing an agreement regarding price lists and sales conditions. Belasco was fined ECU 15 000 by reference to its annual turnover; see paragraphs 65 and 66.

122 — Loc. cit., footnote 115 above, paragraph 27.

furthermore, the Decision quashed in respect of those fines.

(ii) Other pleas

182. Apart from the foregoing, the appellants have presented a large number of points of appeal regarding the fines imposed under various headings. These involve for much the greater part a repetition of arguments presented before the Court of First Instance and detailed arguments on the facts. To deal with all of these points exhaustively would enormously lengthen this already lengthy Opinion. Having accepted the force of the argument of the appellants under the second heading, I believe that I can dispense with a point by point explanation of each of the other points, especially since, having examined them, I am satisfied that, without exception, they are devoid of merit.

183. The correct approach is, in my view, to consider any identifiable error of law in the contested judgment. Otherwise the Court should apply the test laid down in *Ferriere Nord.*[123] It is not required to repeat the assessment of each of their points in detail.

123 — Loc. cit., footnote 112 above.

184. It should satisfy itself that the Court of First Instance has adopted the role of unlimited review assigned to it by the Treaty and given adequate consideration to all the points of fact and law raised in contesting the fines. It seems clear to me, from paragraphs 208 to 251 of the contested judgment, that the Court of First Instance carefully reviewed to an adequate standard the imposition, the level and the allocation of the fines. I propose to deal very briefly with only two issues, gravity and novelty which have been recognised as having, respectively, aggravating or mitigating effects on the imposition of fines. For the rest, the arguments are very largely concerned with discretionary imposition of fines based on evaluation of facts (e.g. alleged discrimination in allocation of fines to individual Cewal members).

185. Firstly, the appellants challenge the finding that the infringements were of a particularly serious nature. The contested judgment rightly rejected this argument (paragraph 231) on the basis that the 'practices were implemented in order to drive out the only competitor on the market'. The appellants do not contest the deliberateness of their behaviour, but rely once more on the supposed non-abusive character of the pressure on Ogefrem, the fighting ships practice and the loyalty rebates. In my view this ground of appeal is without merit.

186. Secondly, the appellants claim that the Court of First Instance failed to give due

weight to the supposed novelty of each of the heads of abuse in respects which arise in connection with the substantive arguments under each heading. These include in particular: the Ogefrem abuse being the first case of abuse taking the form of pressure on a foreign government; the 'fighting ships' abuse involving an extension of the understanding of predatory pricing; the loyalty rebates involving a novel problem of interpretation of the 1986 Regulation.

187. In respect of the novelty issue, the Court of First Instance rightly stresses that 'the aim of the abusive practices at issue, namely to drive the only competitor out of the market, is not in any way novel in competition law' (paragraph 248). This conclusion has not been shown to be wrong in law. I think that the Court of First Instance, having asserted its own 'unlimited jurisdiction', responded to the arguments to a sufficient legal standard. What is more, I believe that that Court was correct to discount any elements of novelty relating to the individual heads of abuse in the light of their manifest exclusionary and anti-competitive purpose. [124]

188. I have had some hesitation about the further conclusion of the Court of First Instance (paragraph 248) that no novelty value should be allowed to the concept of a collective dominant position. The decision of the Commission in '*Italian Flat Glass*' [125] cited to discount its novelty was published well after the bulk of the abusive practices at issue in the case. On the other hand, the hope or assumption of a group of undertakings engaged in predatory exclusionary behaviour that Community law might not be applied to them collectively is of small weight set against the egregious character of the abusive activity at issue. Accordingly, I do not think that the Court of First Instance erred in law in this respect and I would reject this ground of appeal.

(iii) The interest rate

189. The appellants appeal against the rejection by the Court of First Instance of their claim that the Commission had erred, in Article 7 of the Decision, in fixing the interest rate that was to be paid in respect of delayed payment of the fines imposed in the Decision by reference to that 'charged by the European Monetary Cooperation Fund on its ECU operations on the first working day of the month in which [the] Decision was adopted, plus 3.5 percentage

124 — I would draw particular support for this conclusion from *Tetra Pak II*, loc. cit., footnote 56 above. It concerned the application of Article 86 to abuses committed by a dominant undertaking on a related market on which it held a leading but not dominant position. Tetra Pak claimed that the novelty of this application constituted a mitigating factor. The Court, however, upheld the rejection of this argument by the Court of First Instance, the latter having correctly based its decision on the fact that Tetra Pak 'could not have been unaware ... that the practices in question contravened the rules in the Treaty', and because of 'the manifest nature and particular gravity of the restrictions on competition resulting from the abuses in question'; *Tetra Pak II*, paragraph 48.

125 — Commission Decision 89/93/EEC of 7 December 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.906, flat glass); OJ 1989 L 33, p. 44.

points, i.e. 13.25%'. In their view the rate is abnormally high. They argued before the Court of First Instance that, having regard to interest rates (presumably for deposits) obtainable for ECU at the material time, the application of the interest rate applied by the Court would have been more appropriate. That Court found (paragraph 250) that 'the applicants [had] not adduced any evidence such as to show that the Commission made any error ...'.

190. I am not satisfied that this approach addressed to a sufficient legal standard the arguments advanced by the applicants in so far as concerns the additional three-and-a-half percentage points. The Commission clearly enjoys a margin of appreciation in setting the appropriate rate of interest. An appropriate interest rate ensures that undertakings do not indulge in more delaying tactics. On the other hand, the rate set should not be so high as effectively to oblige undertakings to pay fines even if they are of the view that they have good legal grounds for challenging the validity of the Commission decision. [126] I think that the Commission is entitled to adopt a point of reference in fixing the rate of default interest higher to an extent necessary to discourage dilatory behaviour from the average applicable market borrowing rate. However, the addition of three-and-a-half percentage points to an already high rate, without any explanation, is not acceptable.

191. In upholding the Commission decision on this point, without inquiring whether the Commission had any legal or other persuasive reason for applying this additional amount, I am satisfied that the Court of First Instance has erred in law and its decision in this respect should be set aside.

E — *Summary of recommendations*

192. For the reasons which I have discussed (paragraphs 173 to 181), I am of the view that the fines imposed on CMB and Dafra pursuant to Article 6 of the Decision should be annulled since the Court of First Instance was wrong to dismiss the plea that the Commission had failed to respect the appellants' right to a fair hearing in respect of the imposition of those fines. Furthermore, although I would reject all of the other pleas made in respect of the fines, I am satisfied that the Court of First Instance also erred in law in upholding the level of the interest rate imposed by Article 7 of the Decision in respect of the tardy payment of the fines imposed.

126 — In Case 107/82 *AEG* v *Commission* [1983] ECR 3151, the Court rejected (paragraph 141) the argument of the applicant that 'there was no legal basis in Community law for any requirement to pay default interest' and held that such interest was necessary to discourage 'manifestly unfounded actions with the sole object of delaying payment of the fine'. See also Case T-275/94 *CB* v *Commission* [1995] ECR II-2169, paragraphs 48 and 49.

VII — The ECHR

193. The appellants also claim, under two autonomous grounds of appeal, that the 'numerous uncertainties and changes in the accusations' against them, of which, they assert, both the Court of First Instance and the Commission are guilty in this case, as well as the former's reliance on what they describe as novel abuses, amount to a failure on the part of that Court to respect the principles recognised by Articles 6(3) and 7(1) of the ECHR. [127]

194. For the reasons which I have already given in sections V and VI above rejecting the various infringements of the right to a fair hearing alleged by the appellants, I do not accept that (other than in respect of the failure of the Commission to give notice of its intention to impose fines on the members of Cewal) either the Commission or the Court of First Instance has contravened the obligation — which I would accept flows as much from the general principles of Community law as from Article 6(3) of the ECHR — that a party accused of conduct which, although not of a criminal character, potentially exposes him to penalties, must be informed clearly of the nature of the accusation(s) made against him.

195. As regards the principle of *nullum crimen, nulla poena sine lege*, I am satisfied, for the reasons given in section VI above for rejecting the appellants' various contentions that the abusive characterisation of their conduct was novel and could not, therefore, reasonably have been anticipated by them, that no breach of that principle and consequently of Article 7(1) of the ECHR by the Court of First Instance has occurred.

VIII — Costs

196. In the present case, since the appellants should, in my opinion, fail in all of their submissions regarding the correctness of the Court of First Instance's decision to uphold the Decision as well as in most of their pleas regarding the fines, I would, for the purposes of Articles 69 and 122 of the Rules of Procedure of the Court of Justice, regard them as being effectively the unsuccessful parties and, accordingly, recommend to the Court that they be obliged to pay both the respondent's costs and those of the intervener.

127 — Article 6(3) provides, in relevant part, that 'everyone charged with a criminal offence' has the right 'to be informed promptly ... of the nature and cause of the accusation against him', while, under Article 7(1), 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed ...'.

IX — Conclusion

197. In the light of all of the foregoing, I recommend, first, that the Court:

— set aside the judgment of the Court of First Instance in so far as it upheld the fines imposed on the appellants as well as the accompanying rate of default interest;

— annul Articles 6 and 7 of Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty in so far as those Articles concern the appellants;

For the rest, I would recommend that the Court:

— dismiss the appeals in their entirety;

— order the appellants to pay the costs of the respondent and of Grimaldi and Cobelfret, the intervener.