JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
19 March 2003 *

In Case T-213/00,

CMA CGM, established in Marseilles (France),

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

Evergreen Marine Corp. Ltd, established in Taipei (Taiwan),

Hanjin Shipping Co. Ltd, established in Taipei,

Hapag-Lloyd Container Linie GmbH, established in Seoul,

Kawasaki Kisen Kaisha Ltd, established in Tokyo (Japan),

Malaysia International Shipping Corporation Berhad, established in Kuala Lumpur (Malaysia),

Mitsui OSK Lines Ltd, established in Tokyo,

Neptune Orient Lines Ltd, established in Singapore (Singapore),

* Language of the case: English.

Nippon Yusen Kaisha, established in Tokyo,

Orient Overseas Container Line Ltd, established in Wanchai (Hong Kong),

P & O Nedlloyd Container Line Ltd, established in London,

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

Yangming Marine Transport Corp., established in Taipei,

represented initially by J. Pheasant, C. Barlen, M. Levitt, D. Waelbroeck and U. Zinsmeister, and subsequently by J. Pheasant, M. Levitt, D. Waelbroeck and U. Zinsmeister, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented initially by P. Oliver and E. Gippini Fournier, and subsequently by P. Oliver, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision 2000/627/EC of 16 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 — Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)) (OJ 2000 L 268, p. 1),

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

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

Registrar: J. Plingers, Administrator,

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

gives the following

Judgment

Legal background

1 Council Regulation No 17 of 6 February 1962 — First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) initially applied to all activities covered by the EEC Treaty. However, given that in the context of the common transport policy, and in view of the distinctive

features of that sector, it proved necessary to lay down rules governing competition different from those laid down for other sectors of the economy, the Council adopted Regulation No 141/62 of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291).

1. *Regulation No 1017/68*

2 On 19 July 1968, the Council adopted Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302).

3 Article 1 of Council Regulation No 1017/68 provides that the regulation applies, in the field of transport by rail, road and inland waterway, to agreements, decisions and concerted practices which have as their object or effect 'the fixing of transport rates and conditions, the limitation or control of the supply of transport, the sharing of transport markets, the application of technical improvements or technical co-operation, or the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping within the meaning of Article 4 of road or inland waterway transport undertakings, and to the abuse of a dominant position on the transport market.' Pursuant to the same provision, Regulation No 1017/68 also applies 'to operations of providers of services ancillary to transport which have any of the objects or effects listed above.'

4 Article 2 of Regulation No 1017/68 provides:

'Subject to the provisions of Articles 3 to 6, the following shall be prohibited as incompatible with the common market, no prior decision to that effect being required: all agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix transport rates and conditions or any other trading conditions;

....'

5 Article 3(1) of Regulation No 1017/68, however, provides that:

'The prohibition laid down in Article 2 shall not apply to agreements, decisions or concerted practices the object and effect of which is to apply technical improvements or to achieve technical co-operation by means of:

...

(c) the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;

...

(g) the establishment of uniform rules as to the structure of tariffs and their conditions of application, provided such rules do not lay down transport rates and conditions.'

6 Article 5 of Regulation No 1017/68 provides as follows:

'The prohibition in Article 2 may be declared inapplicable with retroactive effect to:

— any agreement or category of agreement between undertakings,

— any decision or category of decision of an association of undertakings, or

— any concerted practice or category of concerted practice

which contributes towards:

— improving the quality of transport services; or

— promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation; or

— increasing the productivity of undertakings; or

— furthering technical or economic progress;

and at the same time takes fair account of the interests of transport users and neither:

(a) imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives; nor

(b) makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.'

7 Regulation No 1017/68 also lays down detailed rules for applying the substantive rules referred to above. In particular, it permits undertakings to enter into and to apply agreements without notifying them to the Commission, at the risk of their being declared inapplicable with retroactive effect by the Commission, whether acting on a complaint received or on its own initiative, but without prejudice to the possibility that those agreements may be declared lawful with retroactive effect (Article 11(4) of Regulation No 1017/68). Under Article 12 of Regulation No 1017/68, undertakings which seek application of Article 5 may, however, submit an application to that effect to the Commission.

2. *Regulation No 4056/86*

8 On 22 December 1986, the Council adopted Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles [81] and [82] of the Treaty to maritime transport (OJ 1986 L 378, p. 4).

9 Article 1(2) of Regulation No 4056/86 states that the regulation 'shall apply only to international maritime transport services from or to one or more Community ports...'.

10 Article 2(1) provides, however, that:

'The prohibition laid down in Article [81](1) of the Treaty shall not apply to agreements, decisions and concerted practices whose sole object and effect is to achieve technical improvements or cooperation by means of:

...

(c) the organisation and execution of successive or supplementary maritime transport operations and the establishment or application of inclusive rates and conditions for such operations;

...

(f) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs.'

11 In the seventh recital in the preamble to Regulation No 4056/86, the Council states that technical agreements, decisions and concerted practices may be excluded from the prohibition on restrictive practices 'on the ground that they do not, as a general rule, restrict competition'.

12 Article 3 of Regulation No 4056/86 provides, moreover, for exemption for 'agreements, decisions and concerted practices of all or part of the members of one or more liner conferences... when they have as their objective the fixing of rates and conditions of carriage'. Pursuant to Article 1(3)(b) of Regulation No 4056/86, 'liner conference' means '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'.

13 Regulation No 4056/86 allows undertakings to enter into and to apply agreements without having to notify them to the Commission, at the risk of

their being declared inapplicable with retroactive effect by the Commission, whether acting on a complaint received or on its own initiative, but without prejudice to the possibility that those agreements may be declared lawful with retroactive effect (Article 11(4) of Regulation No 4056/68). Under Article 12 of Regulation No 4056/86, undertakings which seek application of Article 81(3) of the Treaty may, however, submit an application to the Commission to that effect.

Facts

14 The applicants are shipping companies which participated in the Far East Trade Tariff Charges and Surcharges Agreement ('FETTCSA' or the 'FETTCSA agreement'). The FETTCSA is an agreement between shipping lines operating on the northern Europe/Far East trade dated 5 March 1991 which came into force on 4 June 1991 and was brought to an end on 10 May 1994. It was not notified to the Commission.

15 The FETTCSA initially brought together 14 members of the Far Eastern Freight Conference ('FEFC'), the liner conference operating between northern Europe and South-East and East Asia which was the subject of Commission Decision 94/985/EC of 21 December 1994 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/33.218 — Far Eastern Freight Conference) (OJ 1994 L 378, p. 17) and the case giving rise to the judgment of the Court of First Instance of 28 February 2002 in Case T-86/95 *Compagnie Générale Maritime and Others* v *Commission* [2002] ECR II-1011, and six shipping lines independent of the FEFC.

16 The FEFC members party to the FETTCSA were Ben Line Container Holdings Ltd, Compagnie Générale Maritime ('CGM'), East Asiatic Company, Hapag-Lloyd AG, Kawasaki Kisen Kaisha ('K Line'), A.P. Møller-Maersk Line ('Maersk'), Malaysia International Shipping Corporation Bhd ('MISC'), Mitsui

OSK Lines Ltd ('MOL'), Nedlloyd Lijnen BV ('Nedlloyd'), Neptune Orient Lines Ltd ('NOL'), Nippon Yusen Kaisha ('NYK'), Orient Overseas Container Line Ltd ('OOCL'), P & O Containers Ltd ('P&O') and Polish Ocean Line ('POL'). The independent members of the FETTCSA were Cho Yang Shipping Co. Ltd ('Cho Yang'), Deutsche Seereederei Rostock ('DSR'), Evergreen Marine Corp (Taiwan) Ltd ('Evergreen'), Hanjin Shipping Co. Ltd ('Hanjin'), Senator Linie GmbH & Co. KG ('Senator Lines') and Yangming Marine Transport Corp. ('Yangming').

17 According to section 2 of the FETTCSA, that agreement had as its purpose:

— the establishment by the parties of industrial standards for the calculation and setting of charges and surcharges by means of procedural mechanisms common to all the parties, and

— the use of a common mechanism for the calculation and setting of charges and surcharges other than sea freight and inland haulage.

18 The charges and surcharges covered by the FETTCSA supplement the sea freight charges which shipping lines charge shippers to cover certain costs, including those arising from exchange rate fluctuations or changes in fuel prices and the handling of containerised cargo at ports or terminals. It is agreed between the parties to the dispute that the charges and surcharges constitute a substantial part of the total rate for sea freight and may be up to 60% of that amount on the eastbound trade.

19 On 1 March 1991, the secretariat of the FEFC informed the Commission of a meeting that was to be held in Singapore on 5 March 1991 between representatives of the FEFC and of certain independent shipping lines with a view to concluding the FETTCSA.

20 On 25 March 1991, the secretariat of the FEFC informed the Commission that an agreement in principle 'for a common mechanism for the calculation and setting of charges and surcharges other than sea freight and inland haulage' had been reached on 5 March 1991.

21 On 15 July 1991, the European Shippers' Council ('ESC') made a formal complaint to the Commission regarding the FETTCSA agreement.

22 On 28 September 1992, the Commission informed the FETTCSA secretariat of its preliminary legal assessment of the FETTCSA agreement of 5 March 1991. The Commission expressed the view that the agreement fell within Article 81(1) EC and was not a technical agreement within the meaning of Article 2 of Regulation No 4056/86. It therefore suggested to the FETTCSA parties that they notify the agreement under Article 12 of Regulation No 4056/86.

23 On 19 April 1994, the Commission sent a statement of objections to the FETTCSA parties in which it concluded that the agreement could not be regarded as a technical agreement within the meaning of Article 2 of Regulation No 4056/86 and Article 3 of Regulation No 1017/68 and that it infringed Article 81(1) EC and Article 2 of Regulation No 1017/68 in that it contained the following agreements in restraint of trade: an agreement prohibiting discounts, an agreement on currency exchange rates, an agreement concerning the calculation of charges and surcharges and an agreement for the exchange of information. The

Commission also concluded in its statement of objections that those agreements in restraint of trade were not eligible for block exemption under Article 3 of Regulation No 4056/86, or individual exemption under Article 81(3) EC or Article 5 of Regulation No 1017/68. Since the FETTCSA had not been notified, the statement of objections also announced the Commission's intention to impose fines.

24 On 16 September 1994, the parties to the FETTCSA sent the Commission their reply to the statement of objections. Annexed to that reply was a definitive statement of commitment to the principles of competition law relevant to the case, which the parties did not dispute. At the same time the FETTCSA parties made various approaches to the Commission with a view to a possible closure of the proceeding.

25 On 24 March 1995, the Commission sent to the FETTCSA parties' representative a request for information as to the turnover figures of those parties for 1993 and 1994.

26 On 8 August 1995, the Commission informed the FETTCSA parties' representative that, because the FETTCSA parties continued to hold differing views as to the facts of the case, it intended to adopt a formal decision. In that context, the Commission asked the FETTCSA parties' representative whether the FETTCSA parties would accept the facts in the allegations made against them.

27 It is common ground that, after that last request by the Commission, no further written correspondence was exchanged between the Commission and the FETTCSA parties before 30 June 1998, when the Commission sent the FETTCSA parties' representative a further request for information as to the turnover figures of those parties for 1997.

28 On 11 October 1999, the Commission sent to the FETTCSA parties' representative a request for information as to the turnover figures for those parties for 1998.

29 On 16 May 2000 the Commission adopted, on the basis of Regulation No 17, Regulation No 1017/68 and Regulation No 4056/86, Decision 2000/627/EC relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 — Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA)) (OJ 2000 L 268, p. 1, 'the decision' or 'the contested decision').

The contested decision

30 In the contested decision, the FETTCSA parties are criticised for having entered into an agreement not to provide a discount on published rates for charges and surcharges (also referred to as 'additionals'), whether those rates were published as part of an FEFC tariff or by an individual carrier (paragraph 133 of the contested decision). According to the Commission, that agreement is recorded in the minutes of the meeting of the FETTCSA parties which took place on 9 June 1992 (paragraphs 33 to 39 of the contested decision).

31 The charges and surcharges covered by the agreement are set out in Annex II to the decision (see also paragraphs 28 to 30, 37, 42 to 53 and 126 to 130 of the decision). The principal charges and surcharges in question are the following:

— the Bunker Adjustment Factor ('BAF'): it is common ground that the BAF is a price adjustment made by a carrier to reflect the difference between the current cost of ship's fuel and a base level incorporated in the freight rate;

— the Currency Adjustment Factor ('CAF'): it is common ground that the CAF is an adjustment made to each of the currencies constituting the CAF basket, namely all those currencies in which the member companies receive revenue or pay expenses. The purpose of the CAF is to compensate for fluctuations in exchange rates between the currency in which the carrier charges shippers for the carriage and the currencies in which the carrier incurs its costs;

— Terminal Handling Charges ('THC'): Annex II to the decision describes the THC as charges paid by shippers for (a) the carrier receiving and storing containerised cargo for export or cargo for containerisation at the terminal and presenting it at the vessel for loading, (b) the carrier receiving from the vessel imported containerised cargo and arranging its storage at the terminal and movement from the terminal and (c) the documentation associated with (a) and (b) above;

— Less-than-Container-Load Service Charges ('LCLSC'): it is common ground that LCLSCs are charges paid by shippers for (a) receipt of LCL (less-than-container-load) goods for export at the container freight station by the carrier and for their subsequent storage and handling in accordance with the carrier's instructions, (b) receipt of imported LCL goods from the carrier and for their storage and handling before release to the haulier and (c) the documentation associated with (a) and (b) above.

— Detention Charges: Annex II to the decision describes these as charges imposed for cargo and/or equipment kept beyond the free time allowed for taking receipt of cargo in the port, terminal or container yard;

— Demurrage Charges: Annex II to the decision describes these as charges paid by shippers for detaining carriers' containers or chassis beyond the prescribed free time period.

32 The other charges and surcharges covered by the agreement with which the decision is concerned include the Special Equipment Premium, the War Surcharge, Non-standard Lift Charges, Option Destinations, Change of Destination, Change of Delivery Status and Packages of Value Exceeding the Carrier's Normal Bill of Lading Liability (paragraph 37 of the contested decision).

33 As regards the competition rules applicable, the decision states that the charges and surcharges in question concern maritime transport services which fall within the scope of Regulation (EEC) No 4056/86; rail, road and inland waterway transport services (or services ancillary thereto) which fall within the scope of Regulation No 1017/68 and services which fall within the scope of neither of those two regulations which therefore fall within the scope of Regulation No 17 (paragraphs 123 and 126 to 130 of the contested decision).

34 The Commission therefore explains that in the present case it applied the procedures applicable under Regulations No 17, No 1017/68 and No 4056/86 (paragraph 124 of the contested decision). Thus, it states, even if it were wrong in its identification of the regulation(s) applicable to each of the charges and surcharges, the parties have had the benefit of the procedural safeguards provided by all possibly applicable regulations (paragraph 124 of the contested decision).

35 The Commission claims that the relevant market for the purpose of assessing the agreement not to discount entered into by the FETTCSA parties (the 'agreement

in question') is that of 'scheduled maritime transport services for the transport of containerised cargo between northern Europe and the Far East' (paragraph 55 of the contested decision).

36 In its analysis of the substance, the Commission concludes that the agreement in question restricts price competition, contrary to Article 81(1)(a) EC and Article 2(a) of Regulation No 1017/68, even if the parties do not expressly agree on the level of their published prices (paragraphs 131 to 144 of the contested decision).

37 The Commission also considers that the parties' activities within the framework of the FETTCSA went beyond the activities consistent with a technical agreement within the meaning of Article 2(1) of Regulation No 4056/86 and Article 3 of Regulation No 1017/68, and that the agreement not to discount was not a technical agreement (paragraphs 145 to 161 of the contested decision).

38 As regards the application of Article 81(3) EC, the Commission concludes that the block exemption provided for in Article 3 of Regulation No 4056/86 is not applicable, since neither the FETTCSA itself nor the agreement not to discount are agreements or arrangements within the framework of which the parties operate under uniform or common rates. The parties do not therefore constitute a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86 (paragraph 162 of the contested decision).

39 On the question of individual exemption, notwithstanding the fact that no application for such exemption was made in respect of any agreement reached within the framework of the FETTCSA, the Commission goes on to consider, in

view of its obligation under Article 11(4) of Regulation No 4056/86 and Article 11(4) of Regulation No 1017/68, whether the conditions for the grant of such an exemption are met. It concludes, however, that the agreement not to discount does not satisfy the conditions laid down by Article 81(3) EC (paragraphs 163 to 174 of the contested decision) and that the FETTCSA does not satisfy the conditions laid down by Article 5 of Regulation No 1017/68 (paragraph 175 of the contested decision).

40 Since the infringement found was committed deliberately, according to the contested decision, it imposes a fine on each of the FETTCSA parties pursuant to Article 15(2) of Regulation No 17, Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86 (paragraphs 176 to 207 of the contested decision).

41 The operative part of the decision reads as follows:

'*Article 1*

The agreement not to discount from published tariffs for charges and surcharges entered into between the undertakings which were the former members of the Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) and to which this decision is addressed constituted an infringement of the provisions of Article 81(1) of the EC Treaty and Article 2 of Regulation (EEC) No 1017/68.

Article 2

The conditions of Article 81(3) of the EC Treaty and of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

Article 3

The undertakings to which this decision is addressed are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect to the infringement referred to in Article 1.

Article 4

Fines as set out below are hereby imposed on the undertakings to whom this decision is addressed.

CMA CGM SA	EUR 134 000
Hapag-Lloyd Container Linie GmbH	EUR 368 000
Kawasaki Kisen Kaisha Limited	EUR 620 000
A.P. Møller-Maersk Sealand	EUR 836 000

Malaysia International Shipping Corporation Berhad	EUR 134 000
Mitsui O.S.K. Lines Ltd	EUR 620 000
Neptune Orient Lines Ltd	EUR 368 000
Nippon Yusen Kaisha	EUR 620 000
Orient Overseas Container Line Ltd	EUR 134 000
P&O Nedlloyd Container Line Ltd	EUR 1 240 000
Cho Yang Shipping Co., Ltd	EUR 134 000
DSR-Senator Lines GmbH	EUR 368 000
Evergreen Marine Corp. (Taiwan) Ltd	EUR 368 000
Hanjin Shipping Co., Ltd	EUR 620 000
Yangming Marine Transport Corp.	EUR 368 000.'

Procedure and forms of order sought

42 By application lodged at the Registry of the Court of First Instance on 11 August 2000, the applicants brought the present action for annulment.

43 Following an application by them dated 28 March 2001, the Court of First Instance requested by letter dated 4 April 2001 that they file supplementary written observations on the relevance of the judgment of the Court of Justice of 15 February 2001 in Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101. The applicants lodged their observations with the Registry of the Court of First Instance on 25 April 2001. The Commission's observations in that regard appear in their rejoinder.

44 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to produce certain documents and to answer a number of written questions. The parties complied with those requests.

45 The parties presented oral argument and replied to the Court's questions at the hearing on 2 May 2002.

46 The applicants claim that the Court should:

— annul the decision in its entirety, or, in the alternative, at least in so far as it was adopted under Regulations No 17 and No 1017/68;

— annul the fines imposed on them or, in the alternative, reduce the amount thereof; and

— order the Commission to pay the costs.

47 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

48 The applicants put forward six pleas in law in support of their application. The first alleges that the contested decision was adopted on an incorrect legal basis and that their rights of defence were thereby infringed. The second alleges misapplication of Article 81(1) EC and Article 2 of Regulation No 1017/68. The third alleges failure to define, or error in the definition of, the relevant markets. The fourth concerns the fines. The fifth concerns the limitation period and the last alleges infringement of the duty to state reasons for certain points arising in the other pleas.

1. *Incorrect legal basis for the contested decision and infringement of the rights of the defence in that regard*

49 The applicants allege that in so far as the contested decision was adopted on the basis of Regulations No 17 and No 1017/68, it was adopted on the wrong legal basis. They also submit that their rights of defence were infringed in that respect.

The legal basis of the contested decision

(a) Arguments of the parties

50 The applicants claim that the contested decision misconstrues the regulations on the basis of which it was adopted. They submit that the charges and surcharges with which the contested decision is concerned fall entirely within the scope of Regulation No 4056/86 and that the Commission was therefore wrong to base the decision on Regulations No 4056/86, No 1017/68 and No 17 taken together.

51 The applicants submit, first of all, that the FETTCSA was an agreement relating solely to maritime charges and surcharges and did not empower the parties to discuss charges and surcharges relating to inland operations.

52 Furthermore, the concept of 'maritime transport' to which Article 1(2) and (3) of Regulation No 4056/86 refer does not exclude the application of the regulation to certain inland operations. Thus, Article 2(1) of Regulation No 4056/86 refers to agreements relating to certain inland operations when it mentions '(a) the introduction or uniform application of standards or types in respect of... fixed installations'; '(b) the exchange or pooling for the purpose of operating transport services of... fixed installations'; and '(e) the consolidation of individual consignments'. The applicants also refer to Article 5(4) of Regulation No 4056/86, which provides that the tariffs must set out the conditions concerning loading and discharge and the exact extent of the services covered by any charge other than the maritime freight rate.

53 Consequently, the applicants claim that, except as regards the BAF, which the Commission rightly concluded falls within the scope of Regulation No 4056/86, the Commission's analysis of which regulation applies to each of the other charges and surcharges at issue is incorrect for the following reasons.

54 First, as regards the CAF, the applicants submit that the Commission was wrong to conclude that it falls within the scope of Regulations No 4056/86, No 17 and No 1017/68 because it is applied to the rates for maritime transport, port services and inland haulage respectively. The applicants emphasise that while the FETTCSA was in force they applied a CAF only to their ocean rates. They also draw attention to the fact that, by definition, a CAF can only relate to charges made in the ocean tariff currency, namely United States dollars (USD). No CAF can be applied to inland transport and port services because they are charged in the local currency and, accordingly, there are no exchange rate fluctuations to be compensated for.

55 Second, as regards THCs, the applicants allege that the Commission was wrong to conclude that they fall within the scope not of Regulation No 4056/86 but of Regulation No 17 or Regulation No 1017/68.

56 On the facts, the applicants emphasise first of all that, contrary to what was stated in the contested decision, THCs do not cover the receipt of cargo for loading into containers, the storage of containers and their removal from the terminal. Whilst the first of those operations is subject to an LCLSC, the second, after expiry of a certain period, gives rise to a demurrage charge. The applicants go on to explain that they applied THCs exclusively to operations carried out

within the port gates in relation to the loading or discharge of cargo from vessels. Moreover, the cost of inland transport is not taken into account in setting the level of THCs, nor does the level of THCs vary according to whether or not the maritime carrier also provides inland transport.

57 As to the law, the applicants maintain that, inasmuch as THCs cover activities 'related to and indispensable for' the provision of maritime transport services, it is clear from the judgment in Case T-14/93 *Union Internationale des Chemins de Fer* v *Commission* [1995] ECR II-1503 that they are governed exclusively by Regulation No 4056/86. Moreover, the Commission itself has acknowledged in parallel proceedings (Case C-339/95 *Compagnia di Navigazione Marittima*, removed from the list, and *Compagnie Générale Maritime*, cited at paragraph 15 above) that the loading and discharge of vessels is an essential and integral part of maritime transport. The contested decision is therefore vitiated by the following errors in law: firstly, it fails to identify those activities which are 'related to and indispensable for' the transport to which the THCs supposedly relate; secondly, it concludes that handling operations do not fall within the scope of Regulation No 4056/86 because they are 'not maritime transport services as such' (point 128 of the decision), whereas the levying of handling charges by a shipping line is necessarily part of the provision of maritime transport services regardless of the nature of the handling service, and thirdly, the reference to Commission Decision 98/190/EC of 14 January 1998 relating to a proceeding under Article [82] of the EC Treaty (IV/34.801 FAG — Flughafen Frankfurt/Main AG) (OJ 1998 L 72, p. 30) is misconceived in that the provision of ramp-handling services to an air carrier, which the Commission concluded fell within the scope of Regulation No 17, is distinct from the recovery of the cost of those services in the rates and charges payable by the passenger or cargo owner to the carrier.

58 Third, as regards LCLSCs, the applicants submit that the Commission was wrong to conclude that they fall within the scope of Regulations No 17 and No 1017/68 but not Regulation No 4056/86. They maintain that the Commission's analysis is vitiated by the same errors of law as vitiate its analysis of THCs. In particular, the applicants repeat that it is immaterial whether or not the operations to which

LCLSCs relate are maritime services 'as such' because they are related to and indispensable for the provision of maritime transport services. Consolidation operations are an essential part of containerised maritime transport. As the costs of handling and loading/discharging goods in the ports have, since the start of the conference system, always been covered by charges agreed between the lines and included in conference tariffs, an agreement relating to the costs of performing the equivalent activities in a container operation should be regarded as part of maritime operations falling within the scope of Regulation No 4056/86. According to the applicants, if charges for the consolidation of cargo into containers can, as the Commission acknowledges, fall within the scope of Regulation No 1017/68 when they are applied to inland transport, it ought equally to be possible for such charges to fall within the scope of Regulation No 4056/86 when they are applied to maritime transport. The applicants emphasise that Article 2(1)(e) of Regulation No 4056/86 brings within the scope of that regulation agreements between carriers concerning 'the consolidation of individual consignments'.

59 Fourth, as regards detention and demurrage charges, which the Commission viewed as being governed by Regulations No 17 and No 1017/68 but not Regulation No 4056/86, the applicants point out, first, that the contested decision confuses those two types of charge. Demurrage is a charge made to the consignee of a container when the container delivered to the port or terminal is not collected within the agreed time, whereas a detention charge is a charge made to the shipper and/or consignee of a container when the container delivered to the former's premises is not returned within the period agreed for loading or discharging operations. Those charges are not therefore charges for a service or operation performed by the carrier, but are designed to compensate for costs or losses incurred by the carrier as a result of the customer's delay in taking delivery of goods or in returning containers. It is therefore meaningless to assert, as does the Commission, that these charges do not relate to maritime transport services 'as such'. The applicants take the view that these charges are, by definition, directly related to the maritime transportation and delivery of goods and must therefore fall within the scope of Regulation No 4056/86.

60 The applicants submit that reliance on the wrong legal basis in itself justifies annulment of the contested decision — in whole or in part — regardless of any practical consequences arising from the Commission's mistake. It is clear from the judgments of the Court of Justice in Case C-22/96 *Parliament* v *Council* [1998] ECR I-3231 and Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, in which the Court annulled the directives at issue because they were adopted on the wrong legal basis, that 'practical consequences' are by no means a necessary condition for the annulment of a measure adopted on the wrong legal basis. The judgment of the Court of First Instance in *Union Internationale des Chemins de Fer* cited at paragraph 57 above, upon which the Commission relies, is irrelevant because, whilst the Court in that case referred to the adverse procedural consequences of choosing the wrong legal basis, it did not hold that such consequences were a necessary condition for the annulment of the measure vitiated by that error. Furthermore, there is no indication in the judgment of the Court of Justice on appeal in Case C-264/95 P *Commission* v *Union Internationale des Chemins de Fer* [1997] ECR I-1287) that the Court found that the Commission's choice of the wrong legal basis did not amount to an irregularity justifying annulment.

61 The applicants submit that there are, in any event, adverse practical consequences for them arising from the Commission's incorrect choice of legal basis for the contested decision.

62 First, the contested decision imposed fines on them on the basis of Regulations No 1017/68 and No 17. However, to the extent that the contested decision was wrongly adopted on the basis of those regulations, the fines it imposes have no legal basis. It is irrelevant here that the contested decision is also based on Regulation No 4056/86. If the Commission was wrong to conclude that the agreement in question fell within the scope of Regulation No 17 and/or Regulation No 1017/68, then every provision of the contested decision adopted pursuant to those regulations is without legal foundation. Consequently, those regulations provide no legal basis for the tenor of the contested decision, including the finding of infringement, the order to refrain and the imposition of

fines in respect of the charges and surcharges which the Commission wrongly found to be governed by Regulation No 17 and/or Regulation No 1017/68. The applicants submit that the fines should be annulled to that extent at least, and it is irrelevant that the Commission bases other parts of the contested decision on Regulation No 4056/86.

63 Second, if the contested decision were to become part of the *acquis communautaire*, liner shipping operators could no longer claim the benefit of the block exemption laid down by Regulation No 4056/86 for their agreements on charges and surcharges and would thus be required to notify them for individual exemption under Regulations No 17 and No 1017/68.

64 Third, because Regulations No 17, No 1017/68 and No 4056/86 are expressions of different economic policy objectives and legislative choices, it cannot be assumed that the assessment of an agreement under Regulation No 1017/68 or Regulation No 17 would involve a proper evaluation of all the factors relevant to an assessment of the agreement under Regulation No 4056/86 and of its economic and practical context.

65 For all of those reasons, the applicants claim that Articles 1 and 2 of the contested decision should be annulled in their entirety or, at the very least, to the extent that they are based on Regulations No 17 and No 1017/68. In the latter case, the applicants ask, furthermore, that the fines imposed on them by the contested decision be annulled on the ground that they were imposed pursuant to Article 15(2) of Regulation No 17 and Article 22(2) of Regulation No 1017/68, since annulment of the legal basis for the imposition of a fine must result in the annulment of that fine since it no longer has any legal basis. Given that it is clear from the contested decision that the fines were imposed pursuant to the three regulations together, and most likely in equal shares, the applicants submit that two thirds of the amount of those fines should be annulled.

66 Senator Lines alleges separately that the Commission's error in law in itself justifies annulment of the contested decision. It claims that the Commission breached the principle of the legality of sanctions set out in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('ECHR') and enshrined in Community case-law (for example, Case 117/83 *Könecke* [1984] ECR 3291).

67 The Commission contends that the applicants' arguments alleging an incorrect legal basis should be rejected.

(b) Findings of the Court

68 It should be noted at the outset that, according to the preamble, the contested decision was adopted on the basis of Regulation No 17, and in particular Article 3(1) and Article 15(2) thereof, Regulation No 1017/68, and in particular Article 11(1) and Article 22(2) thereof, and Regulation No 4056/86, in particular Article 11(1) and Article 19(2) thereof.

69 Next, the Commission states at paragraph 123 of the contested decision that '[t]he charges and surcharges which are covered by the FETTCSA concern maritime transport services which fall within the scope of Regulation (EEC) No 4056/86, rail, road and inland waterway transport services (or services ancillary thereto) which fall within the scope of Regulation (EEC) No 1017/68 and services which fall within the scope of neither of those two regulations which therefore fall within the scope of Regulation No 17'.

70 Lastly, the Commission examines at paragraphs 125 to 130 of the contested decision the extent to which the various relevant regulations apply to the main charges and surcharges. The Commission's findings in that respect are as follows:

— 'The BAF relates to maritime transport, and therefore a restrictive agreement as to BAFs falls within the scope of application of Regulation (EEC) No 4056/86' (paragraph 126).

— 'To the extent that a CAF is applied to the price of each of maritime transport, port services, and inland transport, a restrictive agreement as to a CAF falls within the scope of application of respectively Regulation (EEC) No 4056/86, Regulation No 17 and Regulation (EEC) No 1017/68' (paragraph 127).

— '... a restrictive agreement as to THCs falls at least partly within the scope of application of Regulation No 17 and not Regulation (EEC) No 4056/86. To the extent that an agreement as to a THC has as its object or effect the fixing of rates and conditions for inland transport, Regulation (EEC) No 1017/68 and not Regulation No 17 will be applicable' (paragraph 128).

— '... a restrictive agreement as to [LCLSCs] falls within the scope of application of Regulation No 17 and not Regulation (EEC) No 4056/86. To the extent that an agreement as to an [LCLSC] has as its object or effect the fixing of rates and conditions for inland transport, Regulation (EEC) No 1017/68 and not Regulation No 17 will be applicable' (paragraph 129).

— '... a restrictive agreement as to [detention and demurrage charges] falls within the scope of application of Regulation No 17 and not Regulation (EEC) No 4056/86. To the extent that an agreement as to detention or demurrage charges has as its object or effect the fixing of rates and conditions for inland transport, Regulation (EEC) No 1017/68 and not Regulation No 17 will be applicable' (paragraph 130).

71 The applicants submit that the contested decision should be based solely on Regulation No 4056/86, and not on that regulation and Regulations No 17 and No 1017/68 taken together, because each of the charges and surcharges referred to above falls within the scope of Regulation No 4056/86 alone. The applicants claim that the mistaken reference to Regulations No 17 and No 1017/68 as legal bases for the contested decision necessitates the annulment of that decision.

72 In order to identify the regulation applicable to the charges and surcharges covered by the agreement which is the subject of the contested decision, it is necessary to ascertain which regulation is applicable to the services which are subject to those charges and surcharges. The charges and surcharges fall within the scope of the regulations applicable to the services subject to those charges and surcharges. The Commission was therefore right to find, at paragraph 123 of the contested decision, that the charges and surcharges which concern maritime transport services fall within the scope of Regulation No 4056/86, those which concern rail, road and inland waterway transport services or services ancillary thereto fall within the scope of Regulation No 1017/68 and those which concern services falling within neither of those two regulations fall within the scope of Regulation No 17.

73 In order to identify the regulation applicable to the services subject to the charges and surcharges in question, it is necessary to examine those services in the light of the provisions defining the scope of the various regulations concerned (*Compagnie Générale Maritime*, cited at paragraph 15 above, paragraph 260).

74 In the present case, since the applicants allege that all the charges and surcharges covered by the agreement in question fall wholly within the scope of Regulation No 4056/86 and not Regulations No 17 and No 1017/68, it is necessary to determine to what extent the contested decision excludes the application of Regulation No 4056/86 to the charges and surcharges in question and then to consider whether by excluding its application to them the Commission erred in law.

75 So far as concerns the applicability of Regulation No 4056/86 to the charges and surcharges in question, it should be noted, first, that it is agreed between the parties that the BAF falls within the scope of that regulation.

76 Next, with regard to CAFs, paragraph 127 of the contested decision refers to the potential application of Regulations No 17 and No 1017/68 to the extent that a CAF applies to the price of port services and inland transport services respectively, but the Commission also concludes in that paragraph that a CAF falls within the scope of Regulation No 4056/86 to the extent that it applies to maritime transport rates. It follows that, even though the Commission assumed that the applicable regulation might vary depending on the case, it intimated clearly that Regulation No 4056/86 could apply to CAFs. Consequently, without it being necessary to consider the applicants' criticisms concerning the incorrect application of Regulations No 17 and No 1017/68 to CAFs, the Court finds that any error committed by the Commission on this point is not such as to vitiate the contested decision.

77 Lastly, contrary to the Commission's claim with regard to THCs, it cannot be inferred from the statement at paragraph 128 of the contested decision that a restrictive agreement on such charges falls 'at least partly within the scope of application of Regulation No 17 and not Regulation (EEC) No 4056/86' that the decision confirms the partial application of Regulation No 4056/86 to those additionals. It is apparent from that passage that the phrase 'in part' does not

refer to the application of Regulation No 4056/86, but to that of Regulation No 17. That is confirmed by the next sentence in the paragraph, which states that, to the extent that an agreement as to a THC has as its object or effect the fixing of rates and conditions for inland transport, 'Regulation (EEC) No 1017/68 and not Regulation No 17 will be applicable'.

78 It is thus apparent from paragraphs 126 to 130 of the contested decision that the Commission only excluded the application of Regulation No 4056/86 in the case of THCs, LCLSCs and detention and demurrage charges.

79 It is necessary therefore to decide whether by excluding the application of Regulation No 4056/86 to those charges and surcharges the Commission erred in law.

80 The Court would recall in this regard that the choice of the legal basis for a measure should not depend simply on an institution's view as to the aim pursued but must be based on objective factors which are amenable to judicial review (Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11, and Case T-106/96 *Wirtschaftsvereinigung Stahl* v *Commission* [1999] ECR II-2155, paragraph 109). Moreover, it is settled case-law that under Article 253 EC the Commission has a duty to give reasons for individual decisions so as to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged and the Community judicature to review the legality of the decision; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, in particular, Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

81 In the present case, it should be noted at the outset that it is apparent from paragraph 125 of the contested decision that the Commission did not define the

regulation which was applicable to all the charges and surcharges covered by the agreement in question, but only that applicable to the main ones. As stated above, the decision identifies the applicable regulation with regard to only six of the charges and surcharges covered by the agreement in question, namely BAFs, CAFs, THCs, LCLSCs, detention charges and demurrage charges. According to the contested decision, the agreement in question, which infringes Article 81(1) EC, prohibits discounting not merely on the six charges and surcharges just mentioned, but on all of the charges and surcharges imposed by the applicants on the trades between northern Europe and the Far East. Paragraph 28 of the contested decision and paragraph 29, which refers to Annex II thereof, make it clear that the agreement also covers other charges and surcharges, such as the special equipment premium, war surcharges, and additional charges for optional destinations, change of destination, change of delivery status and packages of value exceeding the carrier's normal bill of lading liability.

82 Whilst the contested decision sets out in Annex II the purpose of each of the charges and surcharges referred to above, it does not identify the regulations applicable to some of them. It is apparent from paragraphs 126 to 130 of the contested decision that in the case of the six charges and surcharges referred to therein several regulations may apply, either individually or cumulatively.

83 Next, with regard to THCs, LCLSCs and detention and demurrage charges the contested decision merely indicates that Regulation No 4056/86 does not apply because the services covered by those additionals are not maritime transport services as such. All it says is that the first two concern handling services within the port or terminal and the next two concern operations equivalent to cargo-storage and equipment-hire services respectively.

84 It should be noted, however, that those statements of a general nature do not explain precisely why, given the terms of Article 1(1) and (2) of Regulation No 4056/86, the charges and surcharges in question do not fall within the scope of that regulation as defined by those provisions. At paragraph 142 of the contested decision, the Commission itself states that port services, land transport services and stevedoring services are services ancillary to maritime transport. In those circumstances, it was all the more incumbent upon the Commission to explain in the contested decision why such services ancillary to maritime transport, services which are moreover invoiced by the maritime carrier as part of the maritime tariff, do not constitute maritime transport services falling within Regulation No 4056/86.

85 Given the failure to state in the contested decision the legal basis adopted for certain charges and surcharges covered by the agreement in question and the reasons justifying the non-application of Regulation No 4056/86 to THCs, LCLSCs, detention and demurrage charges, the Court cannot rule out the possibility that, in the contested decision, the Commission incorrectly applied Regulations No 17 and No 1017/68 to the charges and surcharges covered by the agreement. However, it is not necessary to rule on that question at this stage: it must first be determined whether the Commission's alleged error in choosing the legal basis had any adverse consequences for the applicants. In the circumstances of the present case, since the contested decision rests on three legal bases, one of which is not challenged by the applicants, it is only if there are such adverse consequences for the applicants that the error made by the Commission would be such as to justify the annulment of the contested decision (see, to that effect, *Union Internationale des Chemins de Fer*, cited at paragraph 57 above, paragraph 58).

86 Paragraph 124 of the contested decision indicates that in the present case the Commission applied cumulatively the procedures in force under Regulations No 17, No 1017/68 and No 4056/86. It is not disputed that before adopting the contested decision the Commission complied with all the procedural formalities laid down by Regulations No 17, No 1017/68 and No 4056/68. In particular, the Commission consulted the three consultative committees on agreements and

dominant positions established by Regulations No 17, No 1017/68 and No 4056/86 and waited at least 20 days after those committees had given their opinion, as required by Article 17 of Regulation No 1017/68. Consequently, the Commission was right to find at paragraph 124 of the contested decision that, even it were wrong in its identification of the regulation(s) applicable to each of the charges and surcharges, the parties have had the benefit of the procedural safeguards provided by all possibly applicable regulations. To that extent the mistaken reference to Regulations No 17 and No 1017/68 as the legal bases for the contested decision does not appear to be such as to have caused the applicants any prejudice.

87 The applicants claim, however, that the incorrect legal basis adopted by the Commission brought about three types of adverse consequence for them which warrant annulment of the contested decision.

88 First, the contested decision imposes fines on them on the basis of Regulations No 17 and No 1017/68. Since the Commission only has power to impose fines on the basis of regulations implementing Article 81 EC and not directly on the basis of that latter provision, and since it mistakenly bases the infringement on those regulations, the fines it imposes are, at least to the extent of two thirds of their amount, without any legal basis.

89 The applicants' argument is founded on the premiss that the contested decision should be regarded as a bundle of individual decisions, each of which addresses one of the charges or surcharges in issue. In those circumstances, each decision incorrectly founded on Regulation No 17 or No 1017/68 is without legal basis in so far as it imposes fines and, consequently, ought to be annulled.

90 However, there is no support for that argument in the contested decision.

91 In the first place it is stated, in particular at paragraph 133 of the decision, that the applicants infringed Article 81 EC not by reason of the existence of several separate agreements the purpose of each of which is to prohibit discounts on a particular charge or surcharge, but because of the existence of a single agreement seeking to prohibit discounts on every charge or surcharge invoiced by the shipping companies party to the FETTCSA. Paragraphs 35 and 36 of the contested decision indicate that that agreement is recorded in a single document, namely the minutes of a meeting of the FETTCSA parties held on 9 June 1992.

92 Secondly, fines were imposed for the infringement recorded in the contested decision because of the purpose of the agreement in question, which was to restrict competition, regardless of its effects on the prices of the services subject to the charges and surcharges in question. In particular, it is apparent from paragraphs 176 and 179 of the contested decision that the fines were imposed on the basis of the three regulations taken together. At the hearing the applicants conceded that they were unable to find the least evidence or information in the contested decision to support the breakdown of the amount of the fine on the basis of the effect of the agreement in question on each of the services falling within the relevant regulations.

93 Thirdly, the contested decision was adopted following a single administrative proceeding which complied with the requirements laid down by each of the three regulations applicable. In particular, there is no dispute that each of the three consultative committees set up by Regulations No 17, No 1017/68 and No 4056/86 was consulted in relation to all of the charges and surcharges with which the contested decision is concerned.

94 In those circumstances, since the applicants themselves admit that Regulation No 4056/86 constitutes an appropriate legal basis for the contested decision, it is plain that even if certain charges and surcharges covered by the contested decision did not fall within Regulations No 17 and No 1017/68, Article 19(2) of Regulation No 4056/86 is a sufficient basis for the Commission's power to impose all the fines sanctioning the conclusion of the agreement in question.

95 Second, the applicants observe that if the contested decision were to become part of the *acquis communautaire*, liner shipping operators could no longer claim the benefit of the block exemption provided for in Regulation No 4056/86 for their agreements on charges and surcharges and would thus be required to notify them for individual exemption under Regulations No 17 and No 1017/68.

96 It should be remembered, however, that the parties are in agreement that the FETTCSA is not a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86 and that the shipping companies party to the agreement cannot therefore claim the benefit of the block exemption in Article 3 of that regulation for certain agreements setting rates. Consequently, contrary to the applicants' argument, the contested decision cannot be destined to become part of the *acquis communautaire* capable of being applied as such to liner conferences. Regardless of the content of the Commission's findings at paragraphs 123 to 130 of the contested decision with regard to the application of Regulation No 4056/86 to the charges and surcharges covered by the agreement, it suffices to note, without it being necessary to rule on the merits of those findings, that the applicants remain free not to notify the Commission of agreements they enter into within liner conferences setting the amount of charges and surcharges if they consider that they fall within the block exemption provided for in Article 3 of Regulation No 4056/86. Moreover, they retain the right in any event to challenge before the Court any future assessment which the Commission might make in that regard.

97 Third and finally, the applicants maintain that because Regulations No 17, No 1017/68 and No 4056/86 are expressions of different economic policy objectives and legislative choices, it cannot be assumed that the assessment of an agreement under Regulation No 17 or Regulation No 1017/68 involves a proper evaluation of all the factors relevant to an assessment of the agreement under Regulation No 4056/86 and of its economic and practical context.

98 It is correct that Regulation No 4056/86 was adopted, in the words of the fifth recital in the preamble, in order to take account of the need on the one hand to lay down implementing rules enabling the Commission to ensure that competition is not unduly distorted within the common market and on the other hand to avoid excessive regulation of the sector. Thus, the Court has already held that Article 3 of Regulation No 4056/86 provides for a wholly exceptional block exemption in favour of horizontal agreements fixing prices for maritime transport services concluded between the members of a liner conference because of the stabilising role of such agreements (*Compagnie Générale Maritime*, cited at paragraph 15 above, paragraph 254). In those circumstances, it cannot therefore be excluded in principle, as the applicants rightly claim, that the assessment of an agreement or practice under Regulation No 4056/86 might differ, at least in certain respects, from that under Regulations No 17 and No 1017/68.

99 In the present case, however, whilst the applicants raise the possibility that their agreement might have been assessed differently if that examination had been made on the basis of Regulation No 4056/86 alone, they do not specify how that assessment might have differed and they put forward no evidence in support of their allegation.

100 Moreover, in the present case, the infringement established in the contested decision consists of an agreement prohibiting discounts on the charges and surcharges agreed between the members of the FEFC liner conference and

independent lines. For the reasons which will be set out when addressing the allegation that Article 81(1) EC and Article 2 of Regulation No 1017/68 were misapplied, such an agreement must be regarded as a horizontal price-fixing agreement. It will be recalled that horizontal price-fixing agreements, apart from being expressly prohibited by Article 81(1)(a) EC and Article 2(a) of Regulation No 1017/68, are clear infringements of Community competition law (Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 265, and Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109). The same is true in the case of Regulation No 4056/86 because, since the price-fixing agreement was concluded between the members of a liner conference and independent lines, it restricts effective competition from non-conference shipping lines whereas, according to the eighth recital in the preamble to Regulation No 4056/86, the existence of effective competition from non-conference scheduled services is one of the main justifications for the block exemption provided for in Article 3 of that regulation. Thus, under Article 7(2)(b)(i) of Regulation No 4056/86 acts of conferences resulting in the elimination of actual or potential competition from non-conference parties may justify withdrawal of the block exemption by the Commission.

101 The Court therefore considers that the applicants have not shown how reliance on Regulations No 17 and No 1017/68 rather than on Regulation No 4056/86 as the legal basis for the contested decision with regard to some of the charges and surcharges was capable of producing a different assessment of the agreement in question.

102 It follows that the applicants have not established the existence of any of the adverse consequences alleged by them.

103 Consequently, without it being necessary to consider whether the Commission erred in law in basing the contested decision on Regulations No 17 and No 1017/68, the applicants' plea in law alleging an incorrect legal basis must be

rejected, because the alleged error did not deprive the applicants of the procedural guarantees laid down by the relevant rules of procedure and did not have any adverse effect on their legal position.

Infringement of the rights of the defence

(a) Arguments of the parties

104 The applicants claim that at no time during the course of the administrative procedure did the Commission undertake a detailed analysis of which regulations were applicable to the various charges and surcharges with which the contested decision is concerned.

105 They argue that the Commission's initial view was that the FETTCSA fell entirely within the scope of Regulation No 4056/86. Accordingly, in its letter of 28 September 1992, the Commission informed the parties that, unless they notified the FETTCSA for individual exemption pursuant to Regulation No 4056/86, the applicants were at risk of being fined. The Commission subsequently altered its position in the statement of objections of 19 April 1994, in which it asserted that the charges and surcharges covered by the FETTCSA were governed by Regulations No 4056/86, No 1017/68 and No 17, without indicating which regulation applied to each of the various charges and surcharges in respect of which they are alleged not to have permitted discounts. It was not until the contested decision that the Commission specifically considered for the first time (at paragraphs 123 to 130) which of the regulations applied to each of the charges and surcharges.

106 Consequently, the applicants submit, their rights of defence were infringed in that they were not given a chance to comment upon or challenge the reasons for which

the Commission based its decision on Regulations No 17, No 1017/68 and No 4056/86. It is clear from case-law that the statement of objections must contain not only the principal points of fact but also the principal points of law upon which it is based and which are necessary in order for the reasoning which led the Commission to its decision to be understood (Case 24/62 *Germany* v *Commission* [1963] ECR 129 and Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661).

107 Senator Lines points out separately that it is clear from the case-law of the European Commission on Human Rights concerning Article 6(3) of the ECHR that an accused person has the right to be informed not only of the grounds for the accusation, that is, the acts with which he is charged and on which his indictment is based, but also of the nature of the accusation, that is to say the legal classification of the act in question. In the present case, however, the Commission did not set out all the legal arguments on which it proposed to base its decision.

108 The Commission contends that the complaint alleging infringement of the rights of the defence should be rejected.

(b) Findings of the Court

109 It should be noted that, according to settled case-law, the statement of objections must be couched in terms which, even if succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings and associations of undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision (see, *inter alia*,

Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63, and Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 83). Furthermore, it is settled case-law that that obligation is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the complaints and only takes into consideration facts on which the persons concerned have had the opportunity of making known their views (*ACF Chemiefarma* v *Commission*, cited at paragraph 106 above, paragraphs 26 and 94).

110 In the present case, it should be noted, first, that whilst in the contested decision the Commission withdrew three of the four complaints previously envisaged, it is accepted that it did not introduce any others and that it did not rely on any evidence other than that referred to in the statement of objections, namely the minutes of the meeting of 9 June 1992. Moreover, the applicants do not deny that they were informed by the statement of objections of the infringement recorded in the contested decision, namely the conclusion of an agreement not to discount from the published rates for the charges and surcharges. That infringement is mentioned, *inter alia*, at paragraphs 20 to 24, 47, 78 to 81, 119, 124 and 128 of the statement of objections. In those circumstances, there can be no dispute that the statement of objections properly informed the applicants of the conduct called in question by the Commission.

111 Next, as regards more particularly the choice of legal basis, it should be noted that paragraph 5 of the statement of objections expressly states that, in the Commission's view, the FETTCSA falls within the scope of Regulations No 4056/86, No 1017/68 and No 17. Moreover, the Commission explains at paragraph 97 of the statement of objections that the charges and surcharges in question concern maritime transport services falling within the scope of Regulation No 4056/86, inland transport services falling within Regulation No 1017/68 and port services falling within Regulation No 17. Paragraph 123 is the equivalent paragraph in the contested decision. Lastly, paragraphs 144 to 149 of the statement of objections envisage the application of Articles 2, 3 and 5 of Regulation No 1017/68 and Regulation No 17 to the charges and surcharges in

question. Paragraphs 144, 161 and 163 to 175 are the equivalent paragraphs in the contested decision. The Court therefore finds that the statement of objections clearly indicated the legal bases upon which the Commission proposed to adopt the contested decision.

112 The applicants submit, however, that in the statement of objections the Commission did not carry out a detailed assessment of the regulations applicable to the various charges and surcharges with which the contested decision is concerned. They therefore criticise the Commission for the novel character of paragraphs 125 to 130 of the contested decision, which set out the extent to which Regulations No 17, No 1017/68 and No 4056/86 apply to the charges and surcharges in question, as compared with the statement of objections.

113 It should be noted, however, that paragraphs 125 to 130 of the contested decision were specifically inserted in the contested decision following the applicants' observation in the response to the statement of objections that, in the absence of identification in the statement of objections of the services covered by each regulation, they were unable to challenge the Commission's reasoning on that point. Taking account of an argument put forward by an undertaking during the administrative procedure, without it having been given the opportunity to express an opinion in that respect before the adoption of the final decision, cannot *per se* constitute an infringement of defence rights (Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraph 34, confirmed by the order of the Court in Case C-497/99 P *Irish Sugar* v *Commission* [2001] ECR I-5333, paragraph 24).

114 Moreover, the applicants do not explain how the reasoning which led the Commission to apply the relevant regulations to each of the main charges and surcharges in question provided them with grounds for complaint. First, it has already been stated above that where there is a clear infringement of the Community competition rules, the legal basis chosen by the Commission for its decision can have no effect on the assessment of the agreement in the light of

Article 81 EC. Second, the applicants themselves consider that Regulation No 4056/86 constitutes an appropriate legal basis for the contested decision. It has been held that that regulation provides a sufficient basis for the Commission's complaints. In that context, the reasoning which led the Commission to apply Regulations No 17 and No 1017/68 cannot provide them with grounds for complaint. On the contrary, it has already been established above that reliance on Regulations No 17 and No 1017/68 resulted in the Commission granting the applicants additional procedural guarantees since the three consultative committees set up by Regulations No 17, No 1017/68 and No 4056/86 were consulted and the Commission allowed a period of at least 20 days to expire after those consultations before adopting the contested decision. Third and finally, since the applicants were informed of the legal bases upon which the Commission proposed to rest its decision, there was nothing preventing them from challenging, in their response to the statement of objections, the choice of Regulations No 17 and No 1017/68 as the legal bases for the Commission's intervention. It is thus clear that the explanations in the contested decision relating to the legal basis are not related to any new complaint, since they do not concern any conduct other than that in respect of which the undertakings had already submitted observations (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *LVM and Others* v *Commission* [2002] ECR I-8375, paragraph 103).

115 Consequently, the applicants' complaint alleging infringement of the rights of the defence is unfounded.

Conclusion

116 It follows from the foregoing that the plea in law alleging error in the legal basis of the contested decision and infringement of the rights of the defence in that regard must be rejected in its entirety.

2. *The pleas in law alleging misapplication of Article 81(1) EC and Article 2 of Regulation No 1017/68 and failure to state reasons on that point*

Arguments of the parties

117 The applicants allege that the Commission misconstrued Article 81(1) EC and Article 2 of Regulation No 1017/68 in holding in Article 1 of the contested decision that the FETTCSA parties had infringed those provisions by entering into 'an agreement not to discount from published tariffs for charges and surcharges'.

118 First of all, the applicants maintain that the Commission erred in law in inferring from the minutes of the meeting of 9 June 1992 that the FETTCSA parties had entered into an agreement not to grant discounts from the charges and surcharges quoted in their tariffs. The applicants accept that the wording of the minutes lends itself to such an interpretation. However, they allege that the purpose of the agreement referred to in the minutes was simply that each shipping line party to the agreement should undertake to abandon the system of all-in tariffs and henceforth itemise separately each applicable charge and surcharge when making pricing proposals to shippers and in invoices. The objective of the FETTCSA parties in entering into the agreement was therefore not to prohibit the discounting of charges and surcharges, but to enable shippers to compare the constituents of different all-in tariffs, in particular as regards the amount of charges and surcharges of each shipping line.

119 The applicants say that that interpretation is supported by several factors.

120 First, that is the plain meaning of the text of the minutes, in that it makes express reference to the fact that certain contracts had previously been negotiated on a net all-in basis, meaning that the tariffs offered to shippers were not broken down into their constituent parts. That shows that the purpose of the agreement entered into by the FETTCSA parties at the 9 June 1992 meeting was simply to itemise separately, in their pricing proposals to shippers and in their invoices, the various applicable additionals.

121 Second, from its knowledge of the maritime transport sector, the Commission could not have been unaware of the concern of maritime carriers at the time that quoting all-in tariffs might lead to below-cost pricing. It was against that background that, on 1 January 1990, the members of the FEFC introduced a new five-part tariff, NT 90, in which additionals are clearly broken down and quoted separately from sea freight and inland freight. The Commission recognised the benefits of such provisions in Decision 94/985. Furthermore, the question of all-in tariffs and prevention of below-cost pricing was also addressed in discussions held with the Commission in the context of proceedings relating to the Trans-Atlantic Agreement (order of the President of the Court of First Instance of 22 November 1995 in Case T-395/94 R II *Atlantic Container Line and Others* v *Commission* [1995] ECR II-2893) and the Trans-Atlantic Conference Agreement (Case IV/37.396).

122 Third, the letter of 19 October 1992 from the FETTCSA secretariat to the Commission explained in detail that a new five-part tariff had been introduced by the FEFC in 1990 in order to increase transparency by identifying clearly and separately the various constituents of the freight tariff.

123 Fourth and finally, the very purpose of the FETTCSA was, according to the terms of the agreement of 5 March 1991, to remove any arbitrariness in charges and surcharges and to establish or apply uniform rules concerning the structure and

conditions governing the application of transport tariffs. According to the applicants, the agreement's purpose was therefore to establish not common rates, but a common methodology for the calculation of charges and surcharges.

124 The applicants take the view that, in light of those factors, the minutes of the meeting of 9 June 1992 do not provide sufficient proof of the Commission's allegation of the existence of an agreement contrary to Article 81(1) EC and Article 2 of Regulation No 1017/68. Inasmuch as the minutes in issue lend themselves to several interpretations, and since the alternative interpretation of the FETTCSA parties is a plausible one, the Commission's interpretation cannot be sustained in the absence of a firm, precise and consistent body of evidence (Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679 and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, the '*Woodpulp*' case). The Commission does not provide that evidence. Furthermore, it is clear from the judgment of the Court of First Instance in Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383 that, in the absence of direct documentary evidence, it is for the Commission to establish the existence of a concurrence of wills concerning the alleged infringement.

125 Lastly, the applicants maintain that, in any event, since the contested decision merely states, at paragraph 36, that 'in view of the wording of the minutes, the Commission is unconvinced by the parties' interpretation of the agreement', it is vitiated by an inadequate statement of reasons.

126 The applicants' second argument is that the Commission erred in law in concluding that an agreement prohibiting discounting has the object of appreciably restricting competition within the meaning of Article 81(1) EC and Article 2 of Regulation No 1017/68.

127 The applicants emphasise that the FETTCSA parties did not agree on the amount of the charges and surcharges. According to the applicants, notwithstanding the agreement of 9 June 1992, the independent lines remained free to publish their own tariffs in competition with the tariffs published by the FEFC members. Furthermore, the Commission has not proved that the FETTCSA parties agreed not to reduce the level of their charges and surcharges. Consequently, the agreement in question is not a classic price-fixing agreement. In the applicants' view, it was therefore for the Commission to show that the parties to the agreement in question genuinely intended to restrict competition or that the agreement in question had such an effect.

128 The applicants' third argument is that paragraphs 136 and 137 of the contested decision apparently envisaged that an agreement to stop charging net all-in rates in favour of rates broken down into their constituent parts in order to provide clarity to shippers appreciably restricts competition within the meaning of Article 81(1) EC and Article 2 of Regulation No 1017/68.

129 According to the applicants, far from restricting competition, such an agreement enables shippers to identify more effectively the most competitive carrier as regards both sea and inland freight. In any event, the applicants submit that the contested decision contains insufficient reasoning for the Commission's view that an agreement to abandon net all-in rates is contrary to Community competition law.

130 The Commission contends that the Court should reject the arguments advanced by the applicants in support of this plea in law in their entirety.

Findings of the Court

(a) Evidence of infringement and the contested decision's statement of reasons on that point

131 In order to determine whether the Commission proved the existence of the alleged infringement to the required legal standard in the present case, it is necessary first to identify precisely the extent of the infringement found in the contested decision together with the evidence relied on by the Commission in support of that finding and then to consider whether that evidence sufficed to enable the Commission to make a finding of infringement.

132 As regards first the extent of the infringement, Article 1 of the contested decision indicates that the Commission found that the applicants infringed Article 81(1) EC and Article 2 of Regulation (EEC) No 1017/68 by entering into an agreement within the framework of the FETTCSA not to give discounts on the charges and surcharges. Since the FETTCSA initially brought together members of the FEFC and independent lines, the Commission explains at paragraph 17 of the contested decision that:

'The members of the FEFC also agree on the levels of charges and surcharges that were the subject of the FETTCSA. This decision deals only with the extension to the independent lines of the FEFC lines' decision, in relation to charges and surcharges, not to grant discounts. To the extent that the FEFC's charges and surcharges relate to maritime transport services, they fall within the block exemption for liner conferences'.

133 Second, with regard to the evidence of the agreement in question, it is apparent from the contested decision that the Commission considers that that agreement is evidenced in writing by the minutes of the meeting between the FETTCSA parties on 9 June 1992. Those minutes, which are set out at paragraph 35 of the contested decision, state that:

'Under the provisions of the FETTCSA the timing of the imposition of charges and surcharges should be agreed. The Chairman stated that he had to report under the terms of the FETTCSA that the principals of FEFC lines had decided that all additionals including CAF/BAF etc, would be charged in full as per the FEFC tariff with effect from 1 July 1992. It was appreciated that some deals had been arranged on a net all-in basis which unfortunately took time to change but any new deals would include all additionals. It was proposed that all parties to the FETTCSA charged additionals in full as per their own individual tariffs for the eastbound and westbound trades.

This was agreed by the FETTCSA lines present without dissent.'

134 The Commission states at paragraph 36 that it infers from those minutes that 'those FETTCSA lines present at the meeting (i.e. all those who were party to the FETTCSA other than Ben Line Container Holdings and POL) agreed that, with effect from 1 July 1992, they would no longer grant discounts off the rates for "additionals" as quoted in their tariffs.'

135 Furthermore, at paragraph 135 of the contested decision, the Commission admits it is not putting forward 'evidence relating to actual price levels'. It points out,

however, that 'it is sufficient for the application of Article 81(1) that an agreement has the object of restricting competition' and that '[i]t is not necessary to show that such an agreement was put into effect'.

136 It follows that the only evidence relied on by the Commission to prove the existence of the agreement between the applicants not to grant discounts on charges and surcharges is the minutes of the meeting of the FETTCSA parties on 9 June 1992. It is therefore necessary to consider whether, in relying on that document alone, the Commission demonstrated the existence of that agreement to the required legal standard.

137 It should be noted at the outset that the applicants challenge neither the fact that a meeting of the FETTCSA principals took place on 9 June 1992 nor the content and wording of the minutes of that meeting.

138 It is apparent from the second paragraph read together with the last sentence of the first paragraph of those minutes that the FETTCSA parties present at the meeting of 9 June 1992 adopted unanimously the proposal that 'all parties to the FETTCSA charged additionals in full as per their own individual tariffs for the eastbound and westbound trades'.

139 Furthermore, it is clear from those minutes that that proposal follows the decision of the FEFC principals, reported by the FETTCSA chairman, that 'all additionals... would be charged in full as per the FEFC tariff with effect from 1 July 1992'. The minutes further state in that regard that whilst contracts entered into by the FEFC members on a net all-in basis could not be changed in the short term 'any new deals would include all additionals'.

140 It is therefore apparent from the express wording of the minutes of the FETTCSA meeting of 9 June 1992 that they report the existence of an agreement between the FETTCSA parties to invoice for the charges and surcharges in full and that that agreement follows an identical agreement entered into previously within the FEFC between the principals of the FEFC member lines.

141 In those circumstances, the Commission was entitled to treat the minutes of the FETTCSA meeting of 9 June 1992 as direct documentary evidence of the common will of the FETTCSA parties to invoice their customers for charges and surcharges in full and thus to extend to the FETTCSA parties which were not members of the FEFC an identical decision adopted by the FEFC within the framework of that liner conference. The applicants themselves, both in their response to the statement of objections and in their written pleadings lodged with the Court, have expressly accepted that the wording of the minutes in question lends itself to the Commission's interpretation.

142 They consider, however, that, in the light of the explanations they put forward during the administrative procedure, the minutes of the FETTCSA meeting of 9 June 1992 do not provide sufficient proof of the infringement alleged in the contested decision. In their response to the statement of objections, they explained that the purpose of the agreement evidenced by the minutes was not to prohibit the discounting of charges and surcharges but to abandon the system of net all-in tariffs and to itemise separately each applicable charge and surcharge when making pricing proposals to shippers and in invoices. The applicants repeated those explanations in their written pleadings lodged with the Court as well as at the hearing.

143 In support of their interpretation, the applicants point first to the fact that the minutes of the FETTCSA meeting of 9 June 1992 refer expressly to agreements made on a net all-in basis.

144 The third sentence of the first paragraph of the minutes of the FETTCSA meeting of 9 June 1992 does indeed refer to the system of all-in tariffs in order to establish that existing contracts arranged on that basis could not be changed in the short term, notwithstanding the decision of the principals of the FEFC lines to invoice charges and surcharges in full with effect from 1 July 1992.

145 However, the applicants cannot rely merely on that reference to agreements arranged on a net all-in basis in support of their contention that the minutes of the FETTCSA meeting of 9 June 1992 evidence not an agreement to invoice for charges and surcharges in full but an agreement to abandon net all-in tariffs. Far from stating that the FETTCSA parties had decided to itemise 'separately' the charges and surcharges in question, the minutes set out three times in the same paragraph the idea that the additionals should thenceforth be charged without discounts. It is stated in those minutes that 'all additionals... would be charged in full', that 'any new deals would include all additionals' and that it was proposed that 'all parties to the FETTCSA charged additionals in full'. Whilst the phrase 'in full' might be interpreted widely to refer to the obligation to itemise 'separately' the additionals, in the sense that all additionals must be itemised in full in the tariff, the reference to the 'charging' for additionals shows that all additionals must be charged for. The use of the term 'charging' is therefore difficult to reconcile with the wide interpretation advocated by the applicants and tends, on the contrary, to confirm the existence of an agreement prohibiting discounts on those additionals.

146 The applicants' interpretation of the minutes would be more plausible if, notwithstanding the plain meaning of its terms, the decision of the FEFC principals referred to by the FETTCSA chairman during the meeting of 9 June 1992 provided not for the invoicing of charges and surcharges in full but for the abandonment of net all-in tariffs. Inasmuch as the contested decision establishes

that, by the agreement in question entered into by the FETTCSA, the applicants extended an identical decision previously adopted by the FEFC to the independent members of the FETTCSA, the scope and content of the latter constitutes in fact further evidence as to the interpretation of the agreement in question.

147 However, neither during the administrative procedure nor during the proceedings before the Court have the applicants sought to deny that the FEFC members had adopted a decision to invoice for the charges and surcharges in full with effect from 1 July 1992. On the contrary, in reply to a written question from the Court, they produced documents attesting to the existence of such a decision.

148 On the Court's initiative, the applicants were invited to produce for the hearing all documents relating to the FEFC decision providing, according to the minutes of the meeting of 9 June 1992 set out at paragraph 35 of the contested decision, that 'all additionals including CAF/BAF etc, would be charged in full as per the FEFC tariff with effect from 1 July 1992'.

149 In response, the applicants first explained that the enquiries that they had made had not enabled them to identify any document at all relating, in their words, to 'the decision apparently taken' by the FEFC to invoice for the charges and surcharges in full. Shortly before the hearing, however, they produced a letter dated 28 April 1992 from the FEFC chairman addressed to certain members of the FEFC. That letter clearly states that 'in Hong Kong Principals affirmed strongly that they would all apply forthwith additionals (THC, CAF, BAF, etc.) in full...' before concluding, with regard to the eastbound trade, that 'the focus of

present attention is the extent to which additionals can be reinstated and rates improved on 1 July which has been targeted as a key date' and proposing the following programme for the next meeting of the conference committee:

'The simple agenda for this Principals' meeting would be to debate and agree methods of achieving trust between the lines in order to:

...

(b) impose all additionals'.

150 The applicants also produced the minutes for that meeting, which took place in London on 8 June 1992, between the FEFC principals. Paragraph 1 of that document states that:

'1. The Chairman opened the Meeting by referring to his letter of 28 April [1992] in which he had outlined the disappointing situation in the trade despite the discussions which had taken place earlier in the year when initiatives had been agreed that all additionals would be charged and a rate restoration programme would be followed'.

151 After noting the lack of trust between the member lines of the FEFC, the document states at paragraphs 8.1 and 9.3 that the FEFC principals had agreed on an action plan which was incorporated in two 'Declarations of Commitment'.

152 The first of those declarations, which concerns the eastbound trade, states that:

'The following commitment was entered into and agreed without reservation by the Principals of the undersigned FEFC Member Lines at the FEFC Principals' Meeting held in London on 8 June 1992:

1. In respect of the Eastbound trade from North Europe to the Far East:

...

(b) All additionals including CAF and BAF, etc. to be charged with effect from 1st July 1992 and there will be no commensurate reductions in sea freight.'

153 The second declaration, concerning the westbound trade, states that:

'The following commitment was entered into and agreed without reservation by the Principals of the undersigned FEFC Member Lines at the FEFC Principals' Meeting held in London today:

1. Asia Westbound Rate Agreement

(a) All additionals including CAF and BAF etc. to be charged.

(b) No further reduction in rates with effect from today's date.'

154 Given that those FEFC declarations were adopted at a meeting on 8 June 1992, the day before the FETTCSA meeting of 9 June 1992 which is the subject of the minutes set out at paragraph 35 of the contested decision, it is plain that those declarations contain the decision of the principal FEFC lines which, according to those minutes, was reported on 9 June 1992 by the FETTCSA chairman to the applicants before submitting to them the proposal to charge in full for the additionals on the basis of their own tariffs for the eastbound and westbound trades. Moreover, the applicants themselves conceded in their replies to the Court that:

'In view of the proximity in time of this meeting to that of the FETTCSA parties on 9 June 1992 and the similarity of the relevant wording in the FEFC Notes and the FETTCSA minutes respectively, it would appear that this is the agreement of the FEFC Principals to which reference is made in the notes of the FETTCSA meeting of that date'.

155 The inevitable conclusion is that neither the FEFC declarations annexed to the minutes of the meeting of 8 June 1992 nor the letter of the FEFC chairman of 28 April 1992 provide for the abandonment by the FEFC members of net all-in agreements. On the contrary, it is clear from the terms used in those documents and from the context in which they were drafted that the FEFC principals agreed to invoice for the charges and surcharges in full with effect from 1 July 1992 in order to restore 'trust' between the members of the conference and to combat the diminution of rates.

156 To the extent that it is not in dispute that the minutes of the FETTCSA meeting of 9 June 1992 evidence an agreement between the FETTCSA parties seeking to

extend to the latter an identical decision adopted previously by the FEFC members, the documents referred to above therefore corroborate the Commission's interpretation to the effect that the FETTCSA parties agreed to invoice for the charges and surcharges in full.

157 In their replies to the Court's questions, the applicants claimed, however, that neither the minutes of the FEFC meeting of 8 June 1992 nor the letter of the FEFC chairman of 28 April 1992 refer to the FETTCSA or the FETTCSA meeting of 9 June 1992. That is irrelevant, however, since the minutes of the FETTCSA meeting for their part refer to the previous decision of the FEFC.

158 The applicants also claimed that the contents of an internal memorandum of Hapag-Lloyd of 21 June 1991 reflect clearly what could be agreed by the FETTCSA. The memorandum states, in particular, that the FETTCSA 'will create a common mechanism for the calculation and the establishing of those charges'. A document of that nature does not, however, undermine the foregoing conclusions. First, it is an internal document drafted unilaterally by one of the applicants. Second, it predates the minutes of the meeting of 9 June 1992 by almost a year. The applicants cannot therefore rely on that document as support for a favourable interpretation of those minutes. In any event, it is apparent from the wording of the Hapag-Lloyd memorandum that it refers not to the agreement not to discount from the charges and surcharges, but to the FETTCSA agreement entered into on 5 March 1991, which is not the subject of the finding of infringement in Article 1 of the contested decision.

159 The result is therefore that, far from supporting the applicants' alternative explanations seeking to show that the agreement in question sought merely the abandonment of net all-in tariffs, the documents produced by the applicants in reply to the Court's questions confirm that by the agreement in question the

FETTCSA parties agreed to invoice for the charges and surcharges in full and thus to extend the identical agreement entered into by the FEFC members to their relations.

160 It is necessary, however, to consider whether the other factors relied on by the applicants alter that finding.

161 The applicants submit in support of their alternative thesis, secondly, that the Commission was informed of the significance of the problem of the harmful effects on tariffs of net all-in rates, illustrated by the adoption by the FEFC members of the NT 90 tariff which introduces a five-part tariff separately identifying each additional.

162 However, the circumstance that the FEFC may have adopted a tariff such as the NT 90 tariff providing for the breakdown of charges and surcharges as a way of remedying the damaging effects of net all-in rates in no way eliminates the possibility that the FEFC members could have decided, in the framework of the FETTCSA, to enter into an agreement other than the NT 90 tariff seeking to prohibit discounts on charges and surcharges.

163 Moreover, as already stated, it is apparent from the documents produced by the applicants in reply to a question of the Court that the minutes of the meeting of 9 June 1992 refer not to the NT 90 tariff, which entered into force on 1 January 1990, but to a decision adopted by the FEFC on 8 June 1992 for FEFC members to invoice for charges and surcharges in full with effect from 1 July 1992.

164 The applicants claim, thirdly, that the purpose of the FETTCSA was to establish not common rates, but a common method for the calculation of additionals.

165 However, the stated objective of the FETTCSA is manifestly irrelevant since the alleged infringement does not involve the FETTCSA agreement as such, but a separate agreement concluded within it at a later stage.

166 Fourthly and finally, the applicants claim that they explained the operation of the new FEFC tariff to the Commission in a letter of 19 October 1992 concerning the FETTCSA.

167 The explanations given to the Commission with regard to the new FEFC tariff are irrelevant, however, since they concern the scope of the FETTCSA agreement and not the agreement in question. Moreover, those explanations were given before the Commission formulated the complaint against the agreement in question.

168 For those reasons, the Court finds that the applicants have not adduced sufficient evidence to alter the plain meaning of the terms of the minutes of FETTCSA meeting of 9 June 1992 and its interpretation by the Commission in the contested decision. On the contrary, the FEFC documents which they produced in reply to a written question from the Court confirm that interpretation.

169 Without it being necessary to consider why, during the administrative procedure, the Commission did not seek to obtain those documents even though the only evidence to support the infringement refers to them, the Commission may be

considered to have proved the alleged infringement to the required legal standard by relying solely on the wording of the minutes of the meeting of the FETTCSA parties which took place on 9 June 1992.

170 In those circumstances there was no failure to state reasons when the Commission also rejected the alternative interpretation of the minutes proposed by the applicants by stating merely, at paragraph 36 of the contested decision and in similar terms at paragraph 136, that it was 'unconvinced by the parties' interpretation of the agreement'.

(b) The restrictive nature of the agreement in question

171 It is not in dispute that the infringement established by the Commission in the contested decision concerns an agreement by which the applicants, within the FETTCSA, decided to invoice in full for the charges and surcharges the amount of which they set themselves as part of their own tariffs, namely, for the FETTCSA parties which are not members of the FEFC, their individual tariffs and, for the FETTCSA parties which are FEFC members, the conference tariff.

172 In the contested decision it is stated, particularly in paragraph 131, that the Commission considers that by the agreement the applicants have agreed not to discount from published tariffs for charges and surcharges. It concludes at paragraph 133 that '[a]n agreement not to discount off published prices restricts price competition, contrary to Article 81(1)(a), even if the parties to such an agreement do not expressly agree on the level of their published prices'.

173 The applicants allege, first, that the agreement with which the contested decision is concerned does not restrict competition to an appreciable extent and therefore does not fall within the prohibition laid down by Article 81(1) EC or Article 2 of Regulation No 1017/68 because it does not prevent the parties to the agreement from altering the amount of the charges and surcharges to be invoiced and, in particular, from reducing the amount so as to compete on price.

174 That argument cannot succeed. Article 81(1)(a) EC expressly prohibits all agreements between undertakings which have as their object the prevention, restriction or distortion of competition within the common market, and in particular those which 'directly or indirectly fix... selling prices or any other trading conditions'. Article 2(a) of Regulation No 1017/68 lays down an identical prohibition with regard to price-fixing agreements in the transport sector.

175 An agreement such as that in the present case which prohibits the applicants from granting their customers discounts on the published rates of charges and surcharges has as its object the restriction of competition by indirectly fixing prices within the meaning of Article 81(1)(a) EC or Article 2(a) of Regulation No 1017/68 since, by means of that agreement, the FETTCSA parties have mutually deprived themselves of the freedom to grant their customers discounts on the published tariffs (see, to that effect, Case 73/74 *Fabricants de papiers peints and Others* v *Commission* [1975] ECR 1491, paragraph 10, and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraphs 84 to 86).

176 It is apparent in this regard from the Court file that, prior to the conclusion of the agreement in question, the applicants competed on the invoicing of the charges and surcharges, with some of them agreeing not to charge for those additionals in full, and that the agreement in question was reached precisely so as to eliminate that source of competition. Thus, in a letter of 28 April 1992 produced by the applicants in reply to a written question from the Court, the FEFC chairman explains clearly that 'there has been a marked deterioration both in terms of

reductions in sea freight levels and in non-collection of additionals', before proposing that the FEFC principals invoice for the charges and surcharges in full. Those statements made within the context of the FEFC, expressing that conference's intention to restrict competition, are relevant to the present case for the purposes of assessing the restrictive object of the agreement in question concluded within the FETTCSA. Most of the FETTCSA parties were members of the FEFC and the purpose of the agreement in question, as established above, was to extend an identical decision adopted by the FEFC to the FETTCSA parties. It follows that the purpose of the agreement in question was clearly anti-competitive.

177 Contrary to the applicants' argument, the fact that that agreement does not prohibit the applicants from altering individually, in the case of the independent lines, or collectively, in the case of the FEFC members, the tariff for the additionals or the freight rate does not mean that the restriction of competition in question is not appreciable.

178 It is common ground that the charges and surcharges in question may represent a significant part of the total cost of transport. Thus, the applicants admitted in a letter of 19 October 1992 from the FETTCSA secretariat to the Commission that the charges and surcharges in relation to the eastbound trade could reach 60% of the total cost of transport. At paragraph 134 of the contested decision, the Commission stated that '[t]he ocean freight and inland haulage may be less than half of the price paid by the shipper in question, in which case the scope for discounting in relation to the overall price is reduced.' In those circumstances, therefore, by prohibiting the applicants from granting discounts on the charges and surcharges, the agreement in question seeks to deprive them of a significant part of their freedom to set prices.

179 The Commission further stated at paragraph 92 of the contested decision, without being contradicted on that point by the applicants, that the FETTCSA parties controlled at the time of the facts in question approximately 86% of all eastbound liner traffic from northern Europe to the Far East.

180 Lastly, account should be taken of the fact that, in the present case, the price competition between the applicants is already greatly reduced given that, under the system of block exemption under Regulation No 4056/86, the FETTCSA parties which are members of the FEFC apply a uniform or common freight rate as members of a liner conference within the meaning of Article 1(3)(b) of that regulation. In that context, the additional restriction on competition arising from the agreement in question is all the more appreciable since it prevents the maintenance of effective competition in particular on the part of the non-conference shipping lines. According to the eighth recital in the preamble to Regulation No 4056/86, the existence of such competition is one of the main justifications for the block exemption laid down for liner conferences, and acts of those conferences restricting that competition are, under Article 7(2)(b)(i) of that regulation, liable to result in withdrawal of that exemption.

181 The Commission was therefore entitled to find at paragraph 134 of the contested decision that '[a]n agreement between the parties not to grant discounts from published levels significantly reduces the ability of lines to compete with regard to the final price charged to shippers' and that '[t]his amounts to a significant restriction of price competition'.

182 In those circumstances, the fact that the FETTCSA parties were not given the opportunity to be heard as to the amount of the charges and surcharges has no bearing on the application of Article 81(1) EC or Article 2 of Regulation No 1017/68.

183 Since the object of the agreement in question was to restrict competition and that restriction was appreciable the Commission does not, contrary to the applicants' further submission, have to prove intention on the part of the parties to restrict competition or the anti-competitive effects of the agreement. According to settled case-law, an agreement which has as its object the restriction of competition falls within Article 81(1) EC, and there is no need to take account of its effects (see,

inter alia, Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 30, confirmed in Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 14 and 15). Consequently, an agreement may infringe Article 81(1) EC or Article 2 of Regulation No 1017/68 even if its terms have not been observed in practice (Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 15).

184 The Commission was therefore entitled to find, at paragraph 133 of the contested decision, that '[a]n agreement not to discount off published prices restricts price competition, contrary to Article 81(1)(a), even if the parties to such an agreement do not expressly agree on the level of their published prices'.

185 It follows that the applicants' arguments challenging the appreciable nature of the restriction of competition in question must be rejected.

(c) The agreement to abandon net all-in tariffs

186 In order to assess the merits of the argument that an agreement to abandon net all-in tariffs does not restrict competition to an appreciable extent, it is necessary to consider whether the contested decision establishes in its operative part that the FETTCSA parties infringed Article 81(1) EC or Article 2 of Regulation No 1017/68 by entering into such an agreement or whether such a finding is the essential basis of the operative part of the contested decision. According to case-law, regardless of the grounds on which an act adversely affecting a person's legal interests is based, only its operative part is capable of producing legal effects and, as a consequence, of adversely affecting such interests. As regards the assessments made by the Commission in the recitals to the decision at issue, they

are not in themselves capable of forming the subject of an application for annulment unless, as grounds of an act adversely affecting a person's interests, they constitute the essential basis for its operative part (Case T-138/89 *NBV and NVB* v *Commission* [1992] II-2181, paragraph 31).

187 In the present case it is clear from the operative part of the contested decision, in particular Article 1, that the Commission considers that there is an infringement of Article 81(1) EC only as regards '[t]he agreement not to discount from published tariffs for charges and surcharges entered into between the undertakings which were the former members of the [FETTCSA]'. According to the contested decision that agreement is evidenced by the minutes of the meeting of the FETTCSA parties which took place on 9 June 1992.

188 By contrast, the operative part of the contested decision does not establish any infringement on the basis that the FETTCSA parties entered into an agreement to abandon net all-in tariffs. As has already been stated above, it was the applicants who claimed, during the administrative procedure, that the objective of the FETTCSA parties was to bring to an end the practice of net all-in tariffs in the interests of transparency with regard to the shippers, and that the minutes of the meeting of 9 June 1992 ought to be interpreted accordingly.

189 It is in reply to that argument that the Commission states at paragraph 136 of the contested decision that 'the fact that there were such "net all-in" rates, which the parties admit to agreeing that they would avoid offering in the future, is itself evidence that competition over the level of charges and surcharges existed' and, at paragraph 137, that '[f]urthermore, an agreement not to charge "net all-in" rates has the effect of increasing price transparency to the detriment of competition' since '[i]t is less easy effectively to monitor a competitor's pricing when it offers "all-in" rates than when it offers rates broken down into their component parts'.

190 In those paragraphs the Commission thus points out to the applicants that even if it accepts their alternative explanation with regard to the import of the minutes of the meeting of the FETTCSA parties of 9 June 1992, the agreement that they would have thus reached, namely to abandon net all-in tariffs, would nevertheless have had some adverse effect on price competition.

191 However, the Commission does not conclude at paragraphs 136 and 137 of the contested decision that an agreement to abandon net all-in tariffs infringes Article 81(1) EC or Article 2 of Regulation No 1017/68; it merely notes that such an agreement increases transparency to the detriment of competition by making it easier to monitor competitors' prices. Furthermore, it is clear from paragraphs 36 and 136 of the contested decision that the Commission rejects the alternative explanation put forward by the applicants. Consequently, since the Commission did not find that the applicants had entered into an agreement to abandon net all-in tariffs, it could not find that there had been an infringement on that basis.

192 In any event, the Commission's findings at paragraphs 136 and 137 make no criticism of the applicants. First, as has already been stated, they do not appear in the operative part of the contested decision. Second, they do not constitute the essential basis of the operative part. Since the Commission found, at paragraph 134, that the agreement in question not to grant discounts from published levels significantly reduces the ability of lines to compete with regard to the final price charged to shippers and that this amounts to a significant restriction of price competition, it could not but conclude that the object of that agreement was to restrict competition within the meaning of Article 81(1) EC or Article 2 of Regulation No 1017/68, regardless of the assessment it made concerning a possible agreement to abandon net all-in tariffs, the existence of which it does not accept in any case.

193 It follows that the findings at paragraphs 136 and 137 of the contested decision, even if they do not correspond to the applicants' argument, are not capable as

such of giving rise to legal effects and therefore of adversely affecting the applicants' interests. Consequently, in so far as it seeks annulment of the contested decision as prohibiting an agreement to abandon net all-in tariffs, the application must be rejected as inadmissible.

Conclusion

194 For all of the above reasons, the applicants' pleas in law alleging infringement of Article 81(1) EC or Article 2 of Regulation No 1017/68 and failure to state reasons in that regard must be rejected.

3. *The pleas in law alleging failure to define, or error in the definition of, the relevant markets and failure to state reasons in that regard*

Arguments of the parties

195 The applicants argue that the contested decision contains insufficient reasoning in that, after noting that the agreement not to grant discounts on charges and surcharges concerned port services, which fall within the scope of Regulation No 17, and inland transport services, which fall within the scope of Regulation No 1017/68, the Commission concluded that that agreement was contrary to Article 81(1) EC and Article 2 of Regulation No 1017/68 and could not benefit from application of Article 81(3) EC or Article 5 of Regulation No 1017/68, without defining the markets for services to which Regulations No 17 and

No 1017/68 apply. Paragraphs 55 to 122 of the contested decision did no more than define the market for scheduled containerised maritime transport services between northern Europe and the Far East.

196 First of all, the applicants allege that, in the absence of any definition of the markets for the services covered by Regulations No 17 and No 1017/68, the Commission has not carried out the assessments which are necessary preconditions for the application of Article 81(1) EC and Article 2 of Regulation No 1017/68 to services covered by Regulations Nos 17 and 1017/68 respectively. The contested decision therefore contains insufficient reasoning in so far as it notes that the agreement not to grant discounts on charges and surcharges relating to inland transport services and port services constitutes an appreciable restriction of competition in those markets or has an appreciable effect on trade between Member States.

197 In response to the Commission's argument that it follows from the judgment in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141) that, where the restriction on competition is obvious, it does not need to define the market in question, the applicants submit that the infringement alleged in the present case is not obvious since it is based on a single ambiguous document which, at most, relates to an unimplemented agreement with no proven effects. The Commission was, therefore, under a legal obligation to define the markets concerned by the agreement in question, which it indeed did exhaustively for the market for maritime transport services.

198 Second, the applicants argue that the contested decision also contains insufficient reasoning in that it does not set out the reasons for which the agreement in question fails to satisfy the conditions for application of Article 5 of Regulation No 1017/68 or Article 81(3) EC. According to the applicants, the conclusions drawn by the Commission when it examined the applicability of Article 81 EC and Regulation No 4056/86 to the agreement in question in so far as it relates to maritime transport services cannot simply be transposed as such to other undefined markets of which neither market shares nor other conditions of competition have been considered at all.

199 The applicants also complain that the Commission failed to fulfil its duty to consider whether the agreement not to grant discounts on charges and surcharges relating to inland transport services might be eligible for individual exemption under Article 11(4) of Regulation No 1017/68. Paragraph 175 of the contested decision envisages that possibility only with regard to the FETTCSA itself but not with regard to the agreement on discounting entered into within the framework of FETTCSA, which is the subject-matter of the contested decision.

200 The Commission contends that the applicants' pleas in law should be rejected as unfounded.

Findings of the Court

201 As regards the merits of these pleas in law alleging failure to define, or error in the definition of, the relevant markets and failure to state reasons in that regard, it should be observed at the outset that, in paragraph 55 of the contested decision, the Commission finds that the relevant market for the purpose of considering the agreement not to grant discounts on charges and surcharges is that of scheduled maritime transport services for the transport of containerised cargo between northern Europe and the Far East. In that regard the Commission explained in detail, at paragraphs 56 to 122 of the contested decision, why certain alternative modes of transport were not substitutable for scheduled maritime transport services for the transport of containerised cargo and the conditions of competition in the market for those services. Furthermore, paragraphs 126 to 130 and Annex II to the contested decision describe the charges and surcharges which were the subject of the agreement in question.

202 It is also to be noted that when it came to the legal assessment of the agreement, the Commission found, at paragraphs 123 to 130 of the contested decision, that

the charges and surcharges covered by the agreement in question concern maritime transport services which fall within Regulation No 4056/86, inland transport services which fall within Regulation No 1017/68 and port services which fall within Regulation No 17. The Commission found next, at paragraphs 131 to 144 of the contested decision, that the applicants had infringed Article 81(1)(a) EC and Article 2 of Regulation No 1017/68 by agreeing not to grant discounts on published tariffs for the charges and surcharges in question. With regard to the application of the latter provision, the Commission states at paragraph 144 of the contested decision that '[t]he reasons given in paragraphs 132 to 143 as to the applicability of Article 81(1)... apply equally to the applicability of Article 2 of Regulation (EEC) No 1017/68'. Lastly, at paragraphs 162 to 175 of the contested decision, the Commission found that the agreement in question did not satisfy the conditions under Article 81(3) EC and Article 5 of Regulation No 1017/68 for the grant of individual exemption. As to the application of the latter provision, the contested decision states at paragraph 175 that '[t]he reasons given in paragraphs 163 to 174 as to why the FETTCSA does not qualify for exemption under Article 81(3) apply equally to the question of individual exemption pursuant to Article 5 of Regulation (EEC) No 1017/68.'

203 It is therefore apparent from the contested decision that the Commission applied Article 81 EC and Article 2 of Regulation No 1017/68 to the agreement in question in so far as it covers the charges and surcharges applied to port services falling within Regulation No 17 and inland transport services falling within Regulation No 1017/68 without having first defined the markets for those services, but by relying on the factors set out in paragraphs 132 to 143 of the contested decision concerning the analysis of the agreement's restriction of competition, and in paragraphs 163 to 174 thereof concerning the analysis of the conditions for the grant of individual exemption.

204 It is therefore for the Court to consider whether, as the applicants allege, having applied Regulations No 17 and No 1017/68 to the agreement in question, the Commission was required first to define the markets for the services falling within

those regulations in order to find that Article 81 EC and Article 2 of Regulation No 1017/68 applied to that agreement or whether it was entitled to rely on the factors set out in paragraphs 132 to 143 and 163 to 174 of the contested decision for that purpose.

205 It should be noted at the outset in this regard that whilst they consider that the Commission should have defined the markets for the services falling within Regulations No 17 and No 1017/68, the applicants do not challenge the description and definition of the market for the services in question set out at paragraphs 55 to 122. As the Commission rightly pointed out, it follows that the applicants admit, impliedly but clearly, that the Commission correctly defined the market for maritime transport services in question and that it was entitled to treat that market as the relevant market for the purposes of assessing the agreement in question in the light of Community competition law.

206 Next, for the purposes of applying Article 81 EC, the reason for defining the relevant market, if at all, is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 74, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1093). Consequently, there is an obligation on the Commission to define the relevant market in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (*European Night Services and Others* v *Commission*, cited at paragraph 197 above, paragraphs 93 to 95 and 103, and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230).

207 Lastly, according to settled case-law, an agreement escapes the prohibition laid down in Article 81(1) EC if it restricts competition or affects trade between Member States only insignificantly (see, *inter alia*, Case 56/65 *Société Technique Minière* [1966] ECR 235, Case 5/69 *Völk* [1969] ECR 295, paragraph 7, and Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 12 and 17).

208 In the light of that case-law, it is therefore necessary to determine whether in the present case the Commission was able, without defining the relevant market or markets, to find that the agreement in question restricted competition and was liable appreciably to affect trade between Member States in maritime transport services, inland transport services and port services provided as part of maritime transport of containerised cargo between northern Europe and the Far East.

209 First, regarding the restriction of competition, as has just been established in relation to the plea alleging misapplication of Article 81(1) EC and Article 2 of Regulation No 1017/68, the Commission was entitled to find at paragraph 133 of the contested decision that the agreement in question not to give discounts on charges and surcharges had as its object the restriction of price competition. It is common ground that that agreement was entered into by shipping lines which are in direct competition on the market for the maritime transport of containerised cargo between northern Europe and the Far East.

210 It will be recalled that horizontal price-fixing agreements, apart from being expressly prohibited by Article 81(1)(a) EC and Article 2(a) of Regulation No 1017/68, are clear infringements of Community competition law (*Montedipe* v *Commission*, cited at paragraph 100 above, paragraph 265, and *Tréfilunion* v *Commission*, cited at paragraph 100 above, paragraph 109). The same is true under Regulation No 4056/86 because, since the price-fixing agreement in question was concluded between the members of a liner conference and independent lines, it restricts effective competition from non-conference shipping

lines, whereas according to the eighth recital in the preamble to Regulation No 4056/86 the existence of effective competition from non-conference scheduled services is one of the main justifications for the block exemption laid down by Article 3 of that regulation. Thus, under Article 7(2)(b)(i) of Regulation No 4056/86 acts of conferences resulting in the elimination of actual or potential competition from non-conference parties may justify withdrawal of the block exemption by the Commission. Consequently, it must be considered to be established that the agreement in question constitutes a clear infringement of Community competition law.

211 It is also common ground, as is stated in paragraph 133 of the contested decision, that the charges and surcharges are a potentially significant part of the overall price for the maritime transport of containerised cargo between northern Europe and the Far East. The Commission thus stated at paragraph 32 of the contested decision, without being contradicted by the applicants, that the charges and surcharges which are the subject of the agreement in question may constitute as much as 60% of the total tariff for the maritime transport of containerised cargo on the eastbound trade. Consequently, as has been stated already in addressing the plea alleging misapplication of Article 81(1) EC and Article 2 of Regulation No 1017/68, the Commission was entitled to find, at paragraph 134 of the contested decision, that since the ocean freight and inland haulage can represent less than half of the rate paid by the shipper, the agreement in question significantly reduces the ability of the shipping lines to compete on the final price charged to shippers, which amounts to a significant restriction of price competition.

212 Lastly, the Commission pointed out at paragraph 92 of the contested decision, without being contradicted on the point by the applicants, that in 1991 the applicants controlled approximately 86% of all scheduled eastbound liner traffic between northern Europe and the Far East.

213 In those circumstances, even if paragraphs 132 to 143 of the contested decision do not expressly identify the nature of the services in respect of which price competition is liable to be restricted by the agreement in question, the Commission was entitled, in the light of the foregoing, to find that that agreement had as its object an appreciable restriction of competition, whether for the supply of maritime transport services or for the supply of inland transport services and port services as part of the maritime transport of containerised cargo between northern Europe and the Far East.

214 Furthermore, since the Commission concluded, at paragraph 134 of the contested decision, that the agreement significantly reduces the ability of the shipping lines to compete on the final rate charged to shippers because the ocean freight and inland haulage can represent less than half of the rate paid by the shipper, it found, impliedly but clearly, that the agreement had as its object the restriction of price competition in respect of all of the services charged for by the shipping lines, including inland transport services and port services provided as part of the maritime transport of containerised cargo between northern Europe and the Far East. That conclusion is further supported by the fact that, at paragraph 142, the contested decision expressly states that the effect of the agreement in question on the supply of maritime transport services 'is likely to have had a consequential effect on the supply of services ancillary to the supply of maritime transport services. Such services include the services of freight forwarders, port services, land transport services, and stevedoring services', as a result of the alteration in the flow of transport services between the Member States brought about by the agreement in question. Even if that finding was made in the context of the assessment of the effect on trade between Member States, the contested decision should be read as a whole. Accordingly, the consideration underpinning the finding at paragraph 142, namely the alteration in the flow of transport services brought about by the agreement in question, also serves to establish that that agreement restricts competition in the field of inland transport services and port services provided as part of the maritime transport of containerised cargo.

215 Consequently, without defining all the markets for the services in question, the Commission was entitled to find that the agreement in question had as its object

the restriction of competition for scheduled maritime transport services, inland transport services and port services provided as part of the maritime transport of containerised cargo between northern Europe and the Far East and that that restriction of competition was appreciable. In particular, with regard to the application of Article 2 of Regulation No 1017/68, the Commission was entitled to refer, at paragraph 144, to the analysis set out at paragraphs 132 to 143 of the contested decision.

216 It is also apparent from the foregoing that paragraphs 132 to 143, and in particular paragraph 142, of the contested decision contain a sufficient statement of reasons for the Commission's findings on that point.

217 That is all the more so in the present case because when the contested decision was adopted the applicants' activities had already formed the subject of numerous procedures applying Article 81 EC. In particular, it is apparent from Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1), Decision 94/985, Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles [81] and [82] of the EC Treaty (IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1) and Commission Decision 1999/485/EC of 30 April 1999 relating to a proceeding pursuant to Article [81] of the EC Treaty (IV/34.250 — Europe Asia Trades Agreement) (OJ 1999 L 193, p. 23) that the services supplied by the applicants and the relevant conditions of competition are amply set out there in that regard. In those circumstances the contested decision was adopted in a context with which the applicants were familiar and which enabled them to understand the scope of that decision (see, to that effect, Case C-294/95 P *Ojha* v *Commission* [1996] ECR I-5863, paragraphs 34 to 37, Joined Cases T-78/96 and T-170/96 *W* v *Commission* [1998] ECR-SC I-A-239 and II-745, paragraph 141, and Case T-54/99 *max.mobil Telekommunication* v *Commission* [2002] ECR II-313, paragraph 79). Consequently, the plea alleging failure to state reasons for the contested decision as regards the definition of the relevant markets for the purposes of determining whether there was a restriction of competition cannot be upheld.

218 Second, as regards the effect on trade between Member States, as has just been stated above, the contested decision expressly states at paragraph 142 that the effect of the agreement in question on the supply of maritime transport services is likely to have had a consequential effect on the supply of services ancillary to the supply of maritime transport services, including in particular the services of freight forwarders, port services, land transport services and stevedoring services supplied as part of the maritime transport of containerised cargo between northern Europe and the Far East. The contested decision therefore indicates explicitly that the Commission examined the potential effects of the agreement in question on trade between Member States in maritime transport services, inland transport services and port services.

219 Whilst it is true that the Commission did not define the market for all the services in question, the agreement in question is an agreement between shipping lines, several of which are established in the Community, concerning the terms of sale of scheduled transport services, maritime and inland, of containerised cargo to shippers established in different Member States of the Community. As has just been established, the Commission rightly demonstrated in the contested decision that such an agreement had as its object the restriction of price competition between those lines with regard to all services offered by them. Moreover, it has also been established that such an agreement constitutes a clear infringement of Community competition law.

220 In those circumstances, the contested decision demonstrates to the required legal standard that the agreement in question is capable *per se* of affecting trade between Member States to an appreciable extent, not only in maritime transport services, but also in the other services to which the charges and surcharges in question apply, namely inland transport services and port services provided as part of the maritime transport of containerised cargo.

221 Consequently, the prior definition of the relevant markets for services was not necessary in the present case in order to establish that the agreement in question

was liable appreciably to affect trade between Member States in maritime transport services, inland transport services and port services provided as part of the maritime transport of containerised cargo.

222 It also follows from the foregoing that paragraphs 140 to 143 of the contested decision contain a sufficient statement of reasons for the Commission's findings concerning the definition of the relevant markets for the purposes of assessing the effect on trade between Member States, particularly, for the reasons set out at paragraph 217 above, in view of the fact that the contested decision was adopted in a context with which the applicants were familiar and which enabled them to understand the scope of that decision.

223 For all those reasons, and having regard to the nature of the infringement in question and the facts of the case, the Commission did not need to define all the relevant markets for services before applying Article 81(1) EC and Article 2 of Regulation No 1017/68 in this case.

224 The applicants also submit that the prior definition of all markets for the services in question was necessary for the purposes of applying Article 81(3) EC and Article 5 of Regulation No 1017/68 with a view to granting individual exemption.

225 However, it is apparent from the case-law referred to above that the sole reason for defining the relevant market is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (*SPO and Others* v *Commission*, cited at paragraph 206 above, paragraph 74, and *Cimenteries CBR and Others* v *Commission*, cited at paragraph 206 above, paragraph 1093).

226 By contrast, the precise definition of all the relevant markets is not necessarily indispensable in determining whether an agreement satisfies the four conditions for the grant of individual exemption laid down by Article 81(3) EC and Article 5 of Regulation No 1017/68. Whilst it is true that, in determining whether the fourth condition laid down by Article 81(3)(b) EC and Article 5(b) of Regulation No 1017/68 is met, the Commission must examine whether the agreement in question is liable to eliminate competition in respect of either a substantial part of the products in question or the transport market concerned, depending on the applicable provisions, it is settled case-law that the four conditions for granting exemption are cumulative (see, in particular, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299) and therefore non-fulfilment of only one of those conditions suffices to make it necessary to refuse exemption (*SPO and Others* v *Commission*, cited at paragraph 206 above, paragraph 267).

227 Consequently, since in the present case the Commission established, at paragraphs 162 to 174 of the contested decision, that the first three conditions for the grant of individual exemption are not satisfied and that it is not necessary to rule on the fourth condition, the Commission was under no obligation to define in advance all the relevant markets in order to determine whether the agreement in question qualified for individual exemption under Article 81(3) EC or Article 5 of Regulation No 1017/68. In order to determine whether the first three conditions are satisfied it is necessary to have regard to the benefits redounding from the agreement, not specifically on the relevant market, but for any market on which the agreement in question might have beneficial effects. Thus, both Article 81(3) EC and Article 5 of Regulation No 1017/68 envisage the possibility of exemption for, amongst others, agreements which contribute to promoting technical or economic progress, without requiring a specific link with the relevant market (*Compagnie Générale Maritime*, cited at paragraph 15 above, paragraph 343).

228 Furthermore, as is apparent from paragraph 169 of the contested decision, the Commission considered that the first three conditions for the grant of an exemption were not met in the present case essentially because the agreement in

question was liable to bring about greater transparency between suppliers and consumers, which was of no benefit to the latter because it was accompanied by a weakening of price competition. As has just been pointed out above, that last finding applies not only to the maritime transport services in question but also to inland transport services and port services provided as part of the maritime transport of containerised cargo.

229 Consequently, the Commission was entitled, without defining in advance all the markets for the relevant services, to find that the conditions for exemption were not met by the agreement in question. In particular, with regard to the application of Article 5 of Regulation No 1017/68, the Commission was entitled to refer, at paragraph 175, to the analysis set out at paragraphs 163 to 174 of the contested decision.

230 It also follows from the foregoing that paragraphs 163 to 175 of the contested decision contain a sufficient statement of reasons as to the definition of the relevant markets for the purposes of assessing the conditions for the grant of an exemption. That is all the more so, in the present case, for the reasons set out at paragraph 216 above, since the contested decision was adopted in a context with which the applicants were familiar and which enabled them to understand the scope of that decision. Consequently, the applicants' complaint of failure to state reasons in the contested decision on that point cannot be upheld.

231 Finally, still concerning the conditions for the grant of an exemption, the applicants allege that the Commission infringed Article 11(4) of Regulation No 1017/68 by failing to consider whether the agreement not to grant discounts on charges and surcharges relating to inland transport services provided within the framework of the maritime transport of containerised cargo might qualify for individual exemption.

232 It is true that, at paragraph 175 of the contested decision, the Commission merely excludes individual exemption for the FETTCSA itself under Article 5 of Regulation No 1017/68, without referring expressly to the agreement in question.

233 However, as the Commission rightly points out, paragraph 175 of the contested decision should be interpreted in the context and light of that decision. As has already been held in the context of the plea alleging misapplication of Article 81(1) EC and Article 2 of Regulation No 1017/68, it is apparent from Article 1 of the contested decision that the decision does not establish any infringement on the basis of the conclusion of the FETTCSA, but establishes one on the basis of the conclusion of the agreement in question. Since the contested decision did not find that the FETTCSA agreement laying down rules and the use of a common mechanism for the calculation and setting of charges and surcharges itself constituted an infringement of Article 81(1) EC or Article 2 of Regulation No 1017/68, it could not envisage the grant of an exemption in favour of the FETTCSA agreement. Furthermore, in the analysis of the agreement in question with regard to Article 5 of Regulation No 1017/68, paragraph 175 refers to paragraphs 163 to 174, which address expressly the possibility of exemption for the agreement in question.

234 Consequently, the applicants' argument on this point must be rejected.

235 For all those reasons, the pleas alleging failure to define, or error in the definition of, the markets and failure to state reasons in that regard must be rejected as unfounded in their entirety.

4. *The pleas in law concerning the amount of the fines and failure to state reasons in that regard*

236 In the first part of these pleas, the applicants claim that the fines imposed by the Commission are excessive in relation to the gravity and duration of the infringement and in view of certain mitigating factors, their cooperation with the Commission and the duration of the Commission's procedure. Senator Lines claims separately a legitimate expectation based on the conduct of the Commission, the fact that it derived no benefit from the infringement and the fact that the fine imposed affects its economic capacity, given that it was making a loss. The applicants further consider that the contested decision contains an inadequate statement of reasons with regard to some of those points.

237 In the second part of these pleas the applicants claim that there is no statement of reasons for the method used by the Commission to calculate the amount of the fines and that the method is discriminatory and incoherent. They therefore ask the Court to annul the fines or at least reduce them to such level as it considers appropriate in all the circumstances of the case.

238 Lastly, by the third part of these pleas, P&O Nedlloyd Container Line Ltd ('P&O Nedlloyd') complains that the Commission failed, when fixing the amount of the fines, to take account of the merger between P&O and Nedlloyd which took place in the meantime.

239 Before addressing those arguments, it is first necessary to specify the legal context in which the fines in the present case were imposed on the applicants.

Preliminary observations on the legal context in which the fines were imposed on the applicants

240 According to paragraphs 176 to 207 of the contested decision, the Commission imposed the fines on all the applicants on the basis of an infringement of Article 81(1) EC and Article 2 of Regulation No 1017/68. It is apparent from paragraph 179 of the contested decision that those fines were imposed under Article 15(2) of Regulation No 17, Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86.

241 It should be noted that, even if the contested decision does not refer expressly to the 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, 'the Guidelines'), it is apparent from paragraphs 176 to 207 of the decision that the Commission calculated the amount of the fines imposed on the applicants by applying the method set out in the Guidelines. The Commission confirmed that to be the case in the contested decision in reply to a written question from the Court.

242 Although the Guidelines formally apply only to fines imposed under Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, in view of the fact that the relevant provisions appear in identical terms in Regulations No 4056/86 and No 1017/68 the Commission may rely on the Guidelines by analogy when calculating fines imposed under Regulations No 4056/86 and No 1017/68. Moreover, the Court has already confirmed that the case-law relating to Article 15(2) of Regulation No 17 was applicable to Article 19(2) of Regulation No 4056/86 since their wording is identical (Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* ('*CEWAL*') [1996] ECR II-1201, paragraph 233).

243 According to the method set out in the Guidelines, the Commission is to take as the starting point in calculating the amount of the fines to be imposed on the undertakings in question an amount determined according to the gravity of the infringement. In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market where this can be measured and the size of the relevant geographic market (first paragraph of Section 1.A). Within that framework, infringements are to be put into one of three categories: 'minor infringements', for which the likely fines are between ECU 1 000 and ECU 1 000 000, 'serious infringements', for which the likely fines are between ECU 1 million and ECU 20 million, and 'very serious infringements', for which the likely fines are above ECU 20 million (first to third indents of Section 1.A). Within each of those categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines makes it possible to differ the treatment of undertakings according to the nature of the infringement committed (third paragraph of Section 1.A). It is also necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (fourth paragraph of Section 1.A).

244 Account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law (fifth paragraph of Section 1.A).

245 According to the Commission, it may be necessary in some cases to apply weightings to the amounts determined within each of the three categories as defined in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type. Consequently, it may be necessary to adapt the general starting point of the amount taken as the basis according to the specific nature of each undertaking ('the specific starting point') (sixth paragraph of Section 1.A).

246 As regards the factor of the duration of the infringement, the Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the amount determined for gravity should not be increased, infringements of medium duration (in general, one to five years), for which the amount determined for gravity may be increased by up to 50%, and infringements of long duration (in general, more than five years), for which the amount determined for gravity may be increased by 10% per year (first to third indents of the first paragraph of Section 1.B).

247 The Guidelines then set out, by way of example, a list of aggravating and attenuating circumstances which may be taken into consideration in order to increase or reduce the basic amount and refer to the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the Notice on cooperation') (paragraphs 2 and 3).

248 By way of general comment, the Guidelines state that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not, in any case, exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17 (Section 5(a)). The Guidelines further provide that, depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as the specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and that the fines should be adjusted accordingly (Section 5(b)).

249 In the present case, at paragraph 181 of the contested decision, the Commission found, with regard to the gravity of the infringement, that since the infringement concerned a horizontal agreement aiming to restrict price competition between conferences and independent lines, it was 'particularly serious in the liner shipping sector where the existence of actual and potential competition from

non-conference lines is one of the principal justifications for the group exemption.' However, having regard to the fact that an agreement not to discount is less serious than an agreement fixing the general level of prices and given the lack of proof with regard to the effects of the infringement on price levels, the Commission considered that the infringement should be regarded as 'serious' and that 'the basic level of fine [should] be set at the very lowest end of the scale of fines appropriate for a serious infringement'. In applying those factors, the Commission set a basic level of fine for the largest of the FETTCSA parties, namely Maersk, at EUR 1 300 000.

250 The Commission states at paragraphs 182 and 183 of the contested decision that in order to take account of the effective capacity of the undertakings concerned to cause significant damage and the need to ensure that the amount of the fine had a sufficiently deterrent effect, and in view of the considerable differences in size between the FETTCSA parties, it divided the applicants into different groups on the basis of their worldwide turnover in respect of transport services relating to the carriage of containerised cargo where the services supplied included a maritime element. In Table 5 at paragraph 183 of the contested decision, the Commission identified four groups on the basis of the size of the undertaking relative to the undertaking having the highest turnover, in this case Maersk. Those four groups comprise the 'large carrier', the 'medium to large carriers', the 'small to medium carriers' and the 'small carriers'. In Table 6 at paragraph 186 of the contested decision, the Commission applied a basic amount to those categories of, respectively, EUR 1 300 000, EUR 1 000 000, EUR 650 000 and EUR 325 000. Pursuant to paragraphs 187 to 195 and Table 7 at paragraph 206 of the contested decision, those basic amounts were then reduced by 20%, 10% and EUR 100 000 for each undertaking to take account, respectively, of mitigating circumstances, cooperation on the part of the applicants and the duration of the administrative procedure before the Commission.

251 It is in that context that it is necessary to assess whether, as the applicants allege, the fines imposed under Article 4 of the contested decision are excessive and wrongly calculated.

252 It should be noted that, according to the case-law, the Commission has a margin of discretion when fixing the amount of each fine and cannot be considered bound to apply a precise mathematical formula for that purpose (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59). Under Article 17 of Regulation No 17, Article 24 of Regulation No 1017/68 and Article 21 of Regulation No 4056/86, the Court has unlimited jurisdiction within the meaning of Article 229 EC to review decisions whereby the Commission has fixed a fine and may consequently cancel, reduce or increase the fine imposed.

Part one: the excessive amount of the fines

253 In seeking to show that the amount of the fines was excessive, the applicants put forward, either jointly or individually, a number of complaints and arguments concerning the gravity of the infringement, the duration of the infringement, the existence of mitigating factors, cooperation with the Commission, the duration of the procedure before the Commission, legitimate expectations based on the Commission's conduct, the absence of advantages derived from the infringement and their financial situations.

(a) The gravity of the infringement

Arguments of the parties

254 The applicants submit that the Commission erred in law in finding that the agreement in question amounts to a 'serious' infringement within the meaning of the Guidelines. They allege that a horizontal agreement may be classified as a

minor infringement for the purposes of the Guidelines where, in contrast to infringements which are 'more rigorously applied', they have a 'limited market impact' (Section 1.A of the Guidelines). That is so in the present case because the agreement was never implemented. The applicants emphasise in this regard that, under the FETTCSA, the parties thereto could choose whether or not to put into effect the agreements between them. Moreover, the Commission has no evidence that the agreement was put into effect or that it had any effect on the market, particularly in terms of price competition between the shipping lines.

255 The applicants also complain that the Commission gave no adequate reasons for its decision to impose upon the largest FETTCSA line, Maersk, a fine the basic amount of which was EUR 1 300 000, despite having concluded, at paragraph 181 of the contested decision, that it was appropriate to set the basic level of fine 'at the very lowest end of the scale of fines appropriate for a serious infringement'. Under the Guidelines, the lowest basic level of fine for a serious infringement is EUR 1 million. Thus, if the Court upholds the Commission's assessment of the infringement in question as serious, the basic amount of the fine imposed on Maersk cannot exceed EUR 1 million.

256 The Commission maintains that the contested decision rightly concluded that the infringement in question was 'serious', since it related to prices, the undertakings concerned had a high market share and the agreement entailed extending to independent companies measures adopted by a liner conference.

257 In response to the applicants' argument based on the wording of the Guidelines, the Commission emphasises that their terms must be interpreted flexibly, since they are not rigid statutory provisions but, rather, general indications.

258 The applicants' point that the agreement in question was never put into effect and never produced anti-competitive effects on the relevant market is immaterial since the agreement was a horizontal agreement concerning prices which, by its nature, must be regarded as a serious infringement. For the same reason it is irrelevant that compliance with the FETTCSA was purely voluntary.

259 With regard to the allegation of failure to state reasons, the Commission explained in reply to a written question from the Court that the Guidelines state that serious infringements should receive a fine of between EUR 1 million and EUR 20 million. In the present case, given the lack of proof with regard to the effects of the infringement on price levels, the Commission considered it appropriate to set the basic amount of the fine at the bottom of the scale applicable for serious infringements.

260 The Commission claims that, in order to follow scrupulously the Guidelines and the practice adopted in applying them, it was appropriate to set the basic amount of the fines imposed on the 'large carrier' and the 'medium to large carriers' at a level not less than the minimum laid down by the Guidelines for serious infringements, namely EUR 1 million. Moreover, given the considerable difference in size between the largest undertaking in the 'medium to large carriers' category and the sole undertaking in the 'large carrier' category, the Commission explains that it was appropriate to set the basic amount of the fine imposed on the latter at a slightly higher level, namely EUR 1 300 000. Lastly, in order not to penalise the smallest FETTCSA parties the basic amount of the fines for the 'small to medium carriers' and 'small carriers' categories was set at a level below that laid down by the Guidelines.

Findings of the Court

261 As regards the first complaint, concerning the nature of the infringement, which the contested decision describes as serious, it is apparent from the discussion of

the plea alleging misapplication of Article 81(1) EC and Article 2 of Regulation No 1017/68 that the agreement in question not to give discounts on charges and surcharges appreciably restricts price competition between shipping lines which are in direct competition on the market for the maritime transport of containerised cargo between northern Europe and the Far East.

262 Horizontal price agreements have always been regarded as particularly injurious under Community competition law (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 103). The Guidelines are therefore right to classify such infringements as 'very serious'.

263 In the present case, the seriousness of the infringement is also reinforced by the fact that because the price-fixing agreement in question was concluded between the members of a liner conference and independent lines it restricts effective competition from non-conference shipping lines, whereas according to the eighth recital of the preamble to Regulation No 4056/86 the existence of effective competition from non-conference scheduled services is one of the main justifications for the block exemption laid down by Article 3 of that regulation.

264 In those circumstances, the classification of the agreement in question as a serious infringement, because of the lack of proof with regard to the effects of the infringement on price levels and the probable short duration of the potential harmful effects of the infringement, is already less strict by comparison with the criteria laid down for fixing the amount of fines in cases of horizontal agreements on prices.

265 The Commission cannot therefore be criticised for finding, at paragraph 181 of the contested decision, that having regard to those factors the infringement recorded in that decision was serious.

266 As for the applicants' contention that at the first indent of section 1.A of the Guidelines the Commission accepts that minor infringements may include horizontal restrictions 'with a limited market impact', it suffices to state that the Guidelines provide expressly in this context that minor infringements are 'usually of a vertical nature' and concern 'a substantial but relatively limited part of the Community market'. In the present case, since the agreement in question is a horizontal agreement between shipping lines, several of which are established in the Community, not to grant discounts on charges and surcharges to shippers established principally in different Member States of the Community, that agreement cannot be treated as falling within the category of minor infringements within the meaning of the Guidelines.

267 Therefore, the applicants' first complaint must be rejected.

268 As to the second complaint, alleging failure to state reasons, it should be noted that at paragraph 181 of the contested decision the Commission finds that it is appropriate, for the reasons given at paragraph 264 above, that 'the basic level of fine [should] be set at the very lowest end of the scale of fines appropriate for a serious infringement'. In the next sentence of that paragraph, the Commission states that '[i]n the circumstances of this case it is appropriate to set a basic level of fine for the largest of the FETTCSA parties at EUR 1 300 000.'

269 It is not in dispute that in the decision the Commission calculated the basic amounts of the fines imposed on the applicants by applying the method set out in the Guidelines, which it moreover confirmed expressly in reply to a written question from the Court. Furthermore, the Guidelines state explicitly that for serious infringements the lowest amount of fine which may be imposed is EUR 1 million. It is also agreed that in this case that corresponds to the basic amount under the Guidelines (gravity + duration), given the absence of a coefficient for the duration of the infringement.

270 In those circumstances, it is necessary to determine whether, as the applicants allege, the contested decision is vitiated by a failure to state reasons in that, at paragraph 181, the Commission applied in the case of Maersk a higher basic amount than the lowest amount laid down by the guidelines for serious infringements, whilst it stated in the same paragraph that it was appropriate that the basic level of fine be set at the very lowest end of the scale of fines appropriate for serious infringements.

271 It should be noted in this regard that once the Commission decides to apply in a particular case the method laid down by the Guidelines it is required, in the light of the undertaking entered into when those Guidelines were published, to adopt that method when calculating the amount of the fines, and where it departs from those Guidelines in any particular regard it must set out expressly the reasons justifying such a departure. It is therefore necessary to consider whether the contested decision contains such a statement of reasons in this instance.

272 It is clear, however, that, apart from the phrase '[i]n the circumstances of the case' which appears at paragraph 181, the contested decision contains no explanation as to why it was appropriate to take a basic amount of EUR 1 300 000 for Maersk rather than EUR 1 million, the lowest amount laid down by the Guidelines for serious infringements. It is clear from that paragraph of the contested decision that the phrase '[i]n the circumstances of the case' which appears there refers not to the circumstances justifying the application of a basic amount higher than the minimum laid down by the Guidelines, but to the circumstances justifying the Commission's finding that, notwithstanding the fact that it concerns a horizontal price agreement, a type of agreement which normally constitutes a 'very serious' infringement, the agreement should only be categorised as a 'serious' infringement.

273 At the hearing, the Commission explained in reply to a question from the Court that it had considered that it was appropriate in the present case for the basic amount of the fines for the 'large carrier' and 'medium to large carriers'

categories to be not less than the minimum laid down by the Guidelines for serious infringements, namely EUR 1 million, and that, given the considerable difference in size between the largest undertaking in the 'medium to large carriers' and the sole undertaking in the 'large carrier' category, the basic amount of the fines for the latter should be set at a slightly higher level, namely EUR 1 300 000.

274 The merits of that explanation do not need to be considered, as it was first formulated at the hearing and does not appear in the contested decision, which, incidentally, the Commission conceded at the hearing in response to a question from the Court.

275 In those circumstances, there is an inadequate statement of reasons for the decision to impose on Maersk a fine the basic amount of which exceeded that laid down by the Guidelines. Therefore the applicants' second complaint must be upheld.

(b) The duration of the infringement

Arguments of the parties

276 The applicants claim that the Commission erred in law and in fact in concluding that the agreement in question was of three months' duration, from 9 June 1992, the date on which the agreement was concluded, to 8 September 1992, the date of the last meeting, when in fact the agreement was never put into effect. They point

out that, in applying the Guidelines for an infringement of one year's duration to an infringement that was never committed the Commission was applying the Guidelines strictly even though it accepts that they should be applied flexibly, taking into account the circumstances of each case.

277 The applicants submit that for those reasons the basic amount of the fine imposed on the largest of the FETTCSA parties should have been no higher than EUR 1 million, and in view of the absence of proof that the agreement was put into effect might even have been purely 'symbolic' (EUR 1 000) or 'nominal' (EUR 10 000). In the alternative, even if it were to be proved that the agreement was in effect for three months, the fine imposed on the largest party should, the applicants submit, be no higher than EUR 250 000 (the *pro rata* amount for a quarter of a year), given the lack of proof of any effects of that agreement on the market.

278 The Commission contends that the applicants' arguments as to the duration of the infringement are unfounded.

Findings of the Court

279 The applicants complain in essence that the Commission found that the infringement was of three months' duration, whereas the agreement in question was never implemented.

280 However, since the Commission has not proved the effects of the agreement in question and it was under no obligation to do so, and since the agreement had as its object the restriction of competition, whether or not it was implemented is

irrelevant as regards the duration of the infringement. In order to calculate the duration of an infringement the object of which is to restrict competition it is necessary merely to calculate the period during which the agreement existed, that is, the time between the date on which it was entered into and the date on which it was terminated.

281 In this case the Commission found, at paragraph 180, that the agreement not to grant discounts on charges and surcharges was entered into on 9 June 1992, which was the date of the minutes proving the infringement. It accepted in the same paragraph that even though the FETTCSA agreement was not formally terminated until 26 May 1994, the agreement in question ended on 28 September 1992, the date on which the Commission sent the letter setting out its preliminary legal assessment of the FETTCSA, shortly after the last FETTCSA meeting on 8 September 1992.

282 Consequently, regardless of whether the appropriate date was 8 or 28 September 1992, the Commission was entitled to find that the duration of the agreement in question was three months.

283 In any event, contrary to the applicants' submission, the Commission cannot be criticised for not having reduced the basic amount of the fine because of the very short duration of the infringement. The fact that the duration of the infringement was short does not in the least affect its gravity, which arises from its nature, in this case a horizontal price restriction. The Commission was therefore right to find, in accordance with the first indent of the first paragraph of section 1.B of the Guidelines, that the very short duration of the infringement, less than one year, meant merely that no additional amount should be imposed on the amount calculated by reference to the gravity of the infringement.

284 Consequently, the applicants' arguments as to the duration of the infringement must be rejected.

(c) Mitigating circumstances

Arguments of the parties

285 The applicants submit that the Commission erred in law in failing to take into account the non-implementation of the agreement in question as a mitigating circumstance, even though the Guidelines list that factor as an example thereof.

286 The Commission contends that the applicants' argument should be rejected.

Findings of the Court

287 At paragraph 188 of the contested decision, the Commission agreed to reduce the amount of the fines by 20% for mitigating factors because of the presumed termination of the agreement after the applicants received the Commission's letter of 28 September 1992.

288 That being the case, the Commission took account of one of the factors which, under the Guidelines, justifies a reduction of the basic amount for mitigating circumstances, namely the 'termination of the infringement as soon as the Commission intervenes' (third indent of the first paragraph of section 3 of the Guidelines).

289 Under the second indent of the first paragraph of section 3 of the Guidelines, however, the non-implementation in practice of the offending agreements or practices is also mentioned specifically by the Commission as a mitigating circumstance which may justify a reduction of the basic amount of the fines.

290 Moreover, it is not in dispute that the Commission has adduced no evidence in this case as to the implementation of the agreement in question.

291 It is therefore necessary to consider whether that factor was taken into account by the Commission in calculating the amount of the fines.

292 Paragraph 181 of the contested decision indicates that in assessing the gravity of the infringement the Commission classified the infringement as serious, even though horizontal price agreements are normally regarded as very serious infringements, on account of the fact that it had no evidence of the effects of the infringement on the level of prices. It should be noted that the effect of classifying the agreement as very serious would, under the Guidelines, have been that the starting point for calculating the amount of the fine on the basis of gravity would in principle have exceeded EUR 20 million, whereas the classification of the infringement in this case as serious meant that the basic amount of the fine imposed by the contested decision on the largest of the FETTCSA parties was EUR 1 300 000.

293 In those circumstances, the Commission took due account of the non-implementation of the agreement in calculating the amount of the fines. It is irrelevant in this regard that that factor was not specifically considered in the part of the decision concerning the assessment of the mitigating circumstances but at the

stage of considering the gravity of the infringement since, in any event, the consideration of that factor in calculating the amount of the fines resulted in the reduction of the basic amount of the fines, in accordance with the second indent of the first paragraph of section 3 of the Guidelines.

294 Consequently, the Commission did not err in its application of the Guidelines.

(d) Cooperation

Arguments of the parties

295 The applicants submit that the Commission failed to take adequate account of the fact that the parties cooperated with the Commission from the time when the FETTCSA agreement was concluded and well before the statement of objections was adopted. According to the applicants, that cooperation justifies a reduction of the amount of the fine of well in excess of 10% pursuant to the Notice on cooperation.

296 The applicants also submit that the Commission ought to have taken account of the parties' cooperation beyond the scope of the Notice on cooperation, and in particular the fact that the parties approached the Commission immediately after receiving the statement of objections and on a further two occasions in order to find a basis on which the Commission might terminate the procedure, for example, by a commitment of the parties to certain legal principles. The applicants take the view that those factors warrant a reduction of the amount of the fines of well in excess of 20%.

297 The Commission takes the view that the applicants are not entitled to an additional reduction of the fine on the basis of cooperation.

Findings of the Court

298 First, as regards the Commission's application of the Notice on cooperation, it should be observed that in it the Commission defined the conditions in which undertakings which cooperate with it during its investigation into a cartel may be exempt from a fine or receive a reduction in the fine which they would otherwise have had to pay (Section A 3 of the Notice on cooperation).

299 Thus, the Commission states that a reduction of between 10% and 50% may be accorded where, before a statement of objections is sent, an undertaking provides the Commission with information, documents and other evidence which materially contribute to establishing the existence of the infringement or where, after receiving a statement of objections, an undertaking informs the Commission that it does not contest the substance of the facts on which the Commission bases its allegations (Section D 2 of the Notice on cooperation).

300 In the present case, the applicants consider that the Commission applied the Notice on cooperation wrongly, failing to have sufficient regard to the fact that they cooperated with the Commission before the FETTCSA agreement was concluded and well before the adoption of the statement of objections.

301 However, in the operative part, the contested decision makes a finding of infringement of Article 81(1) EC and Article 2 of Regulation No 1017/68 solely in respect of the agreement not to discount from the charges and surcharges. It

does not make a finding of infringement in respect of the FETTCSA agreement as such or the other activities of the applicants in the context of that agreement.

302 To that extent, the fact that, at an advanced stage of the proceeding, the applicants informed the Commission of the conclusion of the FETTCSA agreement is irrelevant for the purposes of assessing the extent of their cooperation in the present case, which concerns solely the agreement not to discount. The fact that, at paragraph 190, the Commission took account of the applicants' initiatives with regard to the FETTCSA agreement therefore already constitutes a more favourable treatment than that to which the Notice on cooperation refers.

303 Furthermore, it is apparent from the Court file that the minutes of the meeting of 9 June 1992 which the Commission took as evidence to the required legal standard of the existence of the agreement not to discount from the charges and surcharges was only notified to the Commission in response to the request for information dated 14 July 1992. Cooperation in an investigation which does not go beyond that which undertakings are required to provide under Article 11(4) and (5) of Regulation No 17 does not justify a reduction in the fine (Case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 283).

304 Moreover, in the course of the administrative proceeding before the Commission the applicants persistently denied the existence of the agreement alleged in the statement of objections. It should be emphasised that where an undertaking contests the allegations of fact on which the Commission bases its complaints, it does not facilitate the Commission's task of finding infringements of the Community competition rules and bringing them to an end (*Mo och Domsjö* v *Commission*, cited at paragraph 109 above, paragraphs 395 and 396).

305 In those circumstances, the Commission did not err in law or in fact in its application of the Notice on cooperation in the present case.

306 Second, with regard to the fact that after the statement of objections was sent the FETTCSA parties twice submitted the same statement of acceptance of certain legal principles, a fact which in their view constitutes cooperation beyond the scope of the Notice on cooperation, that cannot serve to justify an additional reduction of the fine on the basis of cooperation with the Commission. Since the FETTCSA parties continued to challenge the facts alleged against them, that statement could not facilitate the Commission's task of establishing the infringement since the legal principles admitted by the FETTCSA parties related to facts the existence of which they denied. Thus, the admission at paragraph 4 of that statement that an agreement between members of a liner conference and independent lines prohibiting discounts is liable to infringe Article 81(1) EC was pointless in the circumstances, as the applicants themselves admitted at the hearing in reply to a question from the Court.

307 In those circumstances, the statement of principle relied on by the applicants was not an act of cooperation such as to justify a reduction of the fine since it was of no effect whatsoever.

308 Consequently, the Commission was entitled to disregard that statement in considering whether to grant an additional reduction of the amount of the fines on the basis of cooperation.

(e) Reasonable length of the proceedings

Arguments of the parties

309 The applicants allege that the Commission erred in law by reducing the amount of the fines on account of delay by only EUR 100 000, even though the duration of the procedure in the present case was clearly excessive. The applicants do not share the Commission's view on this point, which is that lapse of time is a reason not to impose a fine only if the limitation period laid down by Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) is exceeded.

310 The applicants emphasise, in particular, that the stage of the procedure at which there was, in this case, excessive and unreasonable delay was the period between the parties' reply to the statement of objections on 16 September 1994 and the adoption of the decision on 16 May 2000. The applicants claim that that was unduly long in view of the importance of the case, its complexity, the conduct of the parties and the conduct of the Commission. Against that background, the applicants observe in particular that:

— the case was of considerable importance to them because it exposed them to the risk of fines;

— the case was not, on the other hand, of any great complexity in that the Commission was merely required to examine the minutes of three meetings and, furthermore, did not fundamentally alter its analysis of what constituted

a technical agreement as expressed in its letter of 28 September 1992 and in its statement of objections;

— the parties cooperated closely with the Commission from an early stage in the procedure;

— the Commission gives no reasons to explain the delay in the procedure, for which it is entirely responsible.

311 The applicants submit that those factors justify a reduction of the fines of considerably more than EUR 100 000, especially in view of Commission Decision 2000/117/EC of 26 October 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty (Case IV/33.884 — Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie (FEG and TU) (OJ 2000 L 39, p. 1), in which the Commission agreed to reduce the fine by EUR 100 000 on account of the unreasonable length of the procedure, even though the delay was also attributable to the parties, which is not so in the present case.

312 The applicants also state that a reduction is called for even if the breach of the principle of reasonable duration in this case entails no infringement of the rights of the defence, a requirement which applies only to the annulment of a decision, not to the reduction of the fines.

313 Senator Lines alleges separately that the unreasonable length of the procedure justifies the annulment or reduction of the amount of the fines imposed by the Commission, on the basis, *inter alia*, of Article 6 of the ECHR.

314 It alleges, in particular, that the unreasonable length of the procedure affected its ability to defend itself properly in that the relevant documents and the staff responsible at the material time are no longer with the company. It points out, in this connection, that under the German Commercial Code the obligation to preserve commercial records subsists for only six years.

315 It is immaterial that it did not seek to call witnesses to the facts pertaining at the time of the Commission's administrative procedure. The parties are in fact never barred from raising before the Court arguments not raised during the administrative procedure. Senator Lines also observes that its conduct during the administrative procedure was influenced by the fact that the Commission appeared to have no intention of imposing fines. Lastly, calling witnesses is all the more necessary in the present case where, as is clear from the contested decision, the Commission relies on a single document, the wording of which is ambiguous.

316 The Commission considers that the applicants' arguments alleging unreasonable delay must be rejected as unfounded.

Findings of the Court

317 It is apparent from the case-law that the Commission must act within a reasonable time when it adopts decisions following administrative proceedings relating to competition policy and that that is a general principle of Community law related to the principle of sound administration (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 56, and Case T-127/98 *UPS Europe* v *Commission* [1999] ECR II-2633, paragraph 37). Thus, the Court of First Instance has already held that the Commission may not

defer defining its position indefinitely and that in the interests of legal certainty and of ensuring adequate judicial protection the Commission is required to adopt a decision or to send a formal letter, if such a letter has been requested, within a reasonable time (*SCK and FNK* v *Commission*, paragraph 55).

318 Whether the time taken for a procedure is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* ('*PVC II*') [1999] ECR II-931, paragraph 126).

319 The Commission found, at paragraph 180 of the contested decision, that the infringement came to an end on 28 September 1992. On completion of the investigation, it sent the applicants a statement of objections dated 19 April 1994. The applicants replied to that statement of objections on 16 September 1994. Since the contested decision was adopted on 16 May 2000, 68 months elapsed between the applicants' response to the statement of objections and the adoption of the contested decision. It is common ground between the parties that during that period the Commission took no step in the investigation apart from sending, on 24 March 1995, 30 June 1998 and 11 October 1999, requests merely for information as to the applicants' turnover.

320 In reply to a question from the Court at the hearing, the Commission's representative explained that the delay in adopting the contested decision was due to a shortage of staff. It conceded in any event, at paragraph 45 of the defence, that 'the procedure was unduly drawn out'. The Commission also admitted, at paragraph 195 of the contested decision, that 'the duration of the proceedings in the present case has been considerable'.

321 However, even though, having regard to the context of the case, what is at stake for the undertakings concerned and its degree of complexity, the duration of the procedure in the present case appears, at least at first sight, to have been unreasonable, the applicants rely on infringement of the principle of reasonable duration not in order to have the contested decision annulled, but merely in support of their claim for annulment or reduction of the fines imposed by the contested decision. Whilst unreasonable length of the procedure, particularly where it infringes the rights of defence of the parties concerned, justifies the annulment of a decision establishing an infringement of the rules of competition, the same does not apply where what is disputed is the amount of the fines imposed by that decision, since the Commission's power to impose fines is governed by Regulation No 2988/74, which lays down a limitation period for that purpose.

322 The second recital in the preamble to Regulation No 2988/74 states that the limitation period was introduced to ensure legal certainty. According to that recital, 'for the matter to be covered fully, it is necessary that provision for limitation be made not only as regards the power to impose fines or penalties, but also as regards the power to enforce decisions imposing fines, penalties or periodic penalty payments;... such provisions should specify the length of limitation periods, the date on which time starts to run and the events which have the effect of interrupting or suspending the limitation period;... in this respect the interests of undertakings and associations of undertakings on the one hand, and the requirements imposed by administrative practice, on the other hand, should be taken into account'.

323 Thus, with regard to the power to impose fines, Article 1(1)(b) of Regulation No 2988/74 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of the Community competition rules. Pursuant to Article 1(2) of that regulation, the period begins to run on the day on which the infringement is committed, or, in the case of continuing or repeated infringements, on the day on which it ends. It may, however, be interrupted or suspended, pursuant to Articles 2 and 3 respectively of Regulation No 2988/74. Article 2(3) of Regulation No 2988/74 provides that each

interruption starts time running afresh. However, the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty.

324 It follows that Regulation No 2988/74 established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to impose fines on undertakings which are the subject of procedures under the Community competition rules. In particular, Article 2(3) of Regulation No 2988/74 provides that the limitation period expires in any event after 10 years where it is interrupted pursuant to Article 2(1) of that regulation, so that the Commission cannot put off a decision on fines indefinitely without incurring the risk of the limitation period expiring. In the light of those rules, there is no room for consideration of the Commission's duty to exercise its power to impose fines within a reasonable period (see, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 46 to 49; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraphs 20 to 22, and Joined Cases C-74/00 P and C-75/00 P *Falck* v *Commission* [2002] ECR I-7869, paragraphs 139 to 141).

325 The fact that the Commission nevertheless decided, at paragraph 195 of the contested decision, to reduce the amount of the fine by EUR 100 000 on the ground that it considered itself to be bound by the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time does not undermine that conclusion. Even if the Commission was not required to reduce the fines because of the length of the procedure, it was able, in the exercise of its discretion in fixing the fines, to make such a reduction on grounds of fairness.

326 In those circumstances, the applicants' argument alleging unreasonable length of the procedure must be rejected.

(f) Legitimate expectations

Arguments of the parties

327 Senator Lines submits on its own behalf that the adoption of the contested decision more than six years after the statement of objections was sent constitutes a breach of the principle of the protection of legitimate expectations. It emphasises the fact that the Commission suddenly changed its opinion after giving the FETTCSA parties to understand that it was minded to bring the administrative procedure to a close, in particular if they could agree to abide by certain legal principles relevant to the case. Senator Lines also stresses that the Commission remained inactive for a long time after sending the statement of objections. It maintains that it is a principle of Community law that institutions are bound by their own declarations as to the conduct they will adopt in the future, inasmuch as these declarations may give rise to legitimate expectations on the part of the economic operators concerned (Case 81/72 *Commission* v *Council* [1973] ECR 575, paragraph 10, and Joined Cases 63/84 and 147/84 *Finsider* v *Commission* [1985] ECR 2857, paragraphs 20 and 21). It is also clear from the case-law of the Court of Justice that the passage of time may give rise to legitimate expectations (Case 223/85 *RSV* v *Commission* [1987] ECR 4617).

328 According to Senator Lines, the legitimate expectation generated by the Commission's conduct ought to preclude it from imposing fines in the present case (see Case 344/85 *Ferriere San Carlo* v *Commission* [1987] ECR 4435, paragraph 13).

329 Senator Lines adds that, for the reasons already explained, the Commission's conduct has also made it difficult for it to defend itself properly.

330 The Commission contends that that applicant's arguments should be rejected.

Findings of the Court

331 It is apparent from the file that as early as 28 September 1992 the Commission expressly informed the FETTCSA parties of the risk that fines would be imposed on them if they did not notify their agreement with a view to obtaining exemption. In spite of that warning, the applicants expressly informed the Commission in their letter of 19 October 1992 that they would not notify their agreement. Moreover, at paragraphs 157 and 158 of the statement of objections of 19 April 1994, the Commission expressly informed the applicants of its intention to impose fines on them in respect of the infringements arising from the conclusion, within the framework of the FETTCSA, of certain restrictive agreements, including the agreement in question not to discount from the charges and surcharges.

332 In those circumstances, the applicant cannot reasonably argue that the Commission changed its opinion and that the decision to impose fines upon it infringed its legitimate expectation as to the outcome of the proceeding.

333 That is not altered by the fact that after the statement of objections was sent the applicants twice submitted proposals to the Commission, by letters of 26 October 1994 and 28 July 1995, with a view to reaching an amicable settlement. On the contrary those overtures, which were an attempt to escape fines, show that the applicants, including Senator Lines, were aware of the risk that they might be fined.

334 In any event, at no time could the Commission have given the impression that it was minded to close its investigation informally on the basis of their proposals. In its letter of 4 November 1994, the Commission clearly states that it cannot take a view on those proposals until it has finished considering the response to the statement of objections. Similarly, in its letter of 8 August 1995, the Commission expressly states that it is not able to close the file without adopting a formal decision unless the FETTCSA parties admit the facts alleged against them. It is not in dispute that the applicants never took up that offer. Moreover, in the present action they dispute in their entirety the facts alleged against them by the Commission in the contested decision.

335 At the very most, it is apparent from an internal memorandum of the applicants' legal adviser dated 17 May 1994 following a meeting with Commission staff on 16 May 1994 that the latter considered the option of not adopting a formal decision or not imposing fines. However, in addition to the fact that since that document was drafted by the applicants' counsel and thus, given its unilateral status, is to be treated with circumspection, it mentions the fact that the Commission could give no firm undertaking in that regard. Furthermore, the content of that memorandum could not give rise to any legitimate expectation on the part of Senator Lines since the Commission subsequently rejected their suggestions for an amicable settlement on two occasions, in the letters referred to above.

336 Senator Lines has thus failed to adduce any evidence to show that the Commission gave it specific assurances leading it to entertain reasonable expectations that the procedure would be closed without fines being imposed on it (see, to that effect, Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 231).

337 Consequently, the complaint alleging breach of legitimate expectations must be rejected.

(g) No advantage derived from the infringement

Arguments of the parties

338 Senator Lines submits, on its own behalf, that when deciding on the amount of the fine the Commission failed to take account of its financial situation. It emphasises that during the period of the alleged infringement it suffered substantial losses, amounting to USD 55 million, from all of the company's business and more than USD 15 million from its business in the relevant market. To that extent, it was unable to derive any economic advantage whatsoever from the infringement and, as a result, the Commission ought not to have imposed a fine or ought to have reduced its amount.

339 The Commission contends that the Court should reject the argument of that applicant.

Findings of the Court

340 Whilst the amount of the fine imposed must be in proportion to the duration of the infringement and to the other factors capable of affecting the assessment of the gravity of the infringement, including the profit which the undertaking concerned was able to derive from those practices (Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127), the fact that an undertaking did not benefit from an infringement cannot, according to the case-law, preclude the imposition of a fine, since otherwise it would cease to have a deterrent effect (*Ferriere Nord* v *Commission*, cited at paragraph 183 above, paragraph 53).

341 It follows that, contrary to Senator Lines' argument, the Commission is not required, in order to fix fines, to establish that the infringement brought about an unlawful advantage for the undertakings concerned, or to take into consideration any lack of benefit from the infringement (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 206 above, paragraph 4881).

342 It is true that in the Guidelines the Commission states at section 5(b) that, depending on the circumstances, account should be taken in setting the amount of the fine of any economic or financial benefit derived by the authors of the infringement. It refers in that regard to its Twenty-first Report on Competition Policy, in which it states that '[w]herever the Commission can ascertain the level of this ill-gotten gain, even if it cannot do so precisely, the calculation of the fine may have this as its starting point' (paragraph 139).Thus, where such an assessment is objectively possible, the Commission explains in the Guidelines (fifth indent of the first paragraph of section 2) that it will, on the ground of aggravating circumstances, increase the penalty in order to exceed the amount of the gains improperly made as a result of the infringement.

343 It has already been held that such indications do not, however, mean that the Commission has now taken it upon itself to establish in every case, for the purpose of determining the fine, the financial advantage linked to the infringement found to have been committed. It only shows its intention to take that factor more into account and to use it as a basis for calculating fines, where it is able to assess it, even if it cannot do so precisely (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 206 above, paragraph 4885).

344 It is apparent in the present case, from paragraphs 181 to 186 of the contested decision, that the Commission calculated the fines on the basis of the nature of the infringement, and adjusted them in accordance with the differences in size between the FETTCSA parties determined on the basis of their worldwide turnover in the market for maritime liner transport.

345 On the other hand, it does not follow from the contested decision that the Commission considered that the gravity of the infringement was exacerbated by the presence of an advantage derived from the agreement in question. On the contrary, at paragraph 181, the Commission downgraded the infringement in question from 'very serious' to 'serious' on the ground that it had found no evidence of the effects of the infringement on prices and that, in any event, any harmful effects of the infringement were likely to have been short-lived.

346 In those circumstances, the applicants' complaints alleging failure to take account of the benefit derived from the infringement in setting the fines must be rejected.

(h) Senator Lines' financial situation and ability to pay

Arguments of the parties

347 Senator Lines claims separately that the Commission failed to have regard to the fact that it was making a loss. In addition to the losses already mentioned, which it continues to incur, Senator Lines claims that it has not been the sole owner of any vessels since the end of 1996. That, according to Community case-law, is an important criterion in the evaluation of the effective economic capacity of a shipping line and should be taken into account when fixing the fine.

348 Senator Lines submits that its position is similar to that of Compagnie maritime zaïroise ('CMZ') which was the subject of Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles [81] (IV/32.448

and IV/32.450: Cewal, Cowac and Ukwal) and [82] (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (OJ 1993 L 34, p. 20), which was not fined by the Commission for that reason. It is irrelevant in that context that Senator Lines uses vessels which it does not own as that was also true of CMZ. Furthermore, CMZ had a larger share of the CEWAL conference revenues than Senator Lines had of the FEFC conference revenues.

349 Senator Lines further submits that the fine imposed on it in the contested decision is likely to compromise its ability to pay. The Commission failed to take account of its actual financial situation, even though the company's losses for 1999 exceeded DEM 100 million.

350 The Commission considers that the applicant's arguments as to the state of its finances should be rejected as unfounded.

Findings of the Court

351 First, as regards the financial situation of Senator Lines it should be noted that, according to firmly settled case-law, the Commission is in no way required when determining the fine to take account of an undertaking's financial losses since recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings least well adapted to the conditions of the market (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 55; Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 76; Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 630, and Case T-175/95 *BASF* v *Commission* [1999] ECR II-1581, paragraph 158).

352 Depending on the circumstances, the Commission may of course take the view that it is appropriate not to impose a fine or to reduce its amount on account of the financial difficulties faced by the undertaking concerned (*Thyssen Stahl* v *Commission*, cited at paragraph 351 above, paragraph 628). The Commission thus states, at section 5(b) of the Guidelines, that account may be taken of the specific economic context, the specific characteristics of the undertakings in question and their real ability to pay in a specific context, and that the fines should be adjusted accordingly. Since that was not the case here, in the light of the case-law just cited the applicant cannot complain that the Commission failed to have regard to its financial losses in order to reduce the amount of the fine.

353 As for the applicant's contention that its financial situation in this case was similar to that of the shipping line CMZ which was the subject of Decision 93/82, it should be remembered that the fact that the Commission has found in previous decisions that certain factors constituted mitigating circumstances for the purpose of determining the amount of the fine does not mean that it is obliged to do so in subsequent decisions as well (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 368).

354 Therefore, without its being necessary to consider the merits of the comparison drawn by the applicant with an earlier case dealt with by the Commission, the Court finds that that institution was entitled in the exercise of its discretion to find that there was no need in the present case to take account of Senator Lines' financial difficulties.

355 Second, with regard to Senator Lines' ability to pay, it suffices to observe that the Commission produced in an annex to the defence documents showing that in 1999, notwithstanding accumulated losses, Senator Lines had a turnover of USD 1 000 million, and that that was not contested by the applicant. It goes without saying that an undertaking with such a turnover is able to pay the fine of EUR 368 000 imposed by the contested decision.

356 For all of those reasons, Senator Lines' argument alleging failure to take account of its financial situation and its ability to pay must therefore be rejected.

Part two: the division of the applicants into groups for the purposes of setting the fines and failure to state reasons in that regard

(a) Arguments of the parties

357 The applicants submit that the Commission's division of the FETTCSA parties into four groups for the purposes of calculating the fines is contrary to the principles of individual assessment, non-discrimination and transparency and lacks a sufficient statement of reasons.

358 They submit that the method employed by the Commission is contrary to the principle of individual assessment, in that it resulted in the Commission setting the level of fine by group, without taking into account the individual size of each undertaking within the group. The applicants also emphasise the fact that the method adopted by the Commission took no account of factors other than turnover in fixing the fines, and thus excluded other relevant factors.

359 As regards the principle of non-discrimination, the applicants point out that carriers of very different sizes are grouped together by the Commission and that the shipping lines at the top and bottom of adjacent groups, which are similar in

size, are treated differently whilst lines at the top and bottom of any single group which are different in size are treated similarly.

360 As regards the principle of transparency, the applicants observe that the Commission explains neither why it considered it appropriate to divide the FETTCSA parties into four groups, nor the criterion by which it defined those groups. Nor does it explain why, having set the level of the basic amount of the fine for the 'large carrier' group at EUR 1.3 million, it sets the basic amount for the three other groups at EUR 1 million, EUR 650 000 and EUR 325 000 respectively (paragraph 186 and Table 6 of the contested decision).

361 Lastly, as regards the duty to state reasons, the applicants allege that the Commission failed to give an adequate statement of its reason for dividing the FETTCSA parties into four groups. Since the Commission calculated the relative size of each of the FETTCSA parties by reference to Maersk's size in 1994, it ought to have fixed the fine imposed on each of the FETTCSA parties by reference to their relative size and not divide them into four groups on an arbitrary basis. Furthermore, whilst the classification in the contested decision is intended to take account of the harm caused by and benefits deriving from the agreement in question, the Commission failed to identify the harm or the benefits.

362 The applicant NYK argues separately that the Commission erred in law in taking into account in fixing the fine imposed on it by the contested decision its worldwide liner shipping turnover rather than its size on the geographic market in question.

363 NYK maintains that, on the basis of its turnover on the relevant geographic market, it was not the second but the fifth largest of the shipping lines concerned, with a relative size of 43.6% of that of Maersk, not 58%. It also points out that it was only the sixth largest of the lines in question in terms of containers carried westbound and the seventh largest in terms of containers carried eastbound.

364 NYK therefore submits that the Commission unduly penalised it for having a large turnover on trades that have no connection with Europe. In so doing, the Commission wholly disregarded the principle that fines should not be based upon a simple calculation of total turnover (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825).

365 In response to the Commission's arguments, NYK denies that the method it proposes would still lead to its being classed in the second group of 'medium to large carriers'. Had the Commission used turnover from liner shipping in the relevant geographic market to calculate the size of each of the addressees of the contested decision, that would have resulted in changes in the relative size of each of them, not just NYK. Furthermore, in the absence of any explanation from the Commission as to the way in which the four groups of undertakings were defined, it is not certain that the Commission would have used the same categories or that it would have placed NYK in the 'medium to large carriers' group had the method suggested by NYK been adopted.

366 The applicants submit that they should not be fined in so far as the fines were calculated on the basis of that method.

367 In the alternative, the applicants submit that the fines should, at the very least, be reduced significantly. They argue that, if the Court upholds the Commission's position that larger fines should be imposed on the larger FETTCSA parties than on the smaller ones and finds that the basic amount imposed on the largest FETTCSA party should be between EUR 250 000 and EUR 1 million, rather than EUR 250 000 or less, it should reset the level of fines in accordance with, first, the new basic amount of the fine imposed on Maersk (EUR 1 million), and second, the relative size of the FETTCSA parties as calculated by the Commission at Table 5 in the contested decision, rather than in accordance with the Commission's division of the FETTCSA parties into four groups.

368 The Commission submits that, under the new method set out in the Guidelines, fines are no longer set as a percentage of the turnover of the undertakings concerned but are derived from an absolute figure chosen according to the gravity of the infringement. That approach allows a large number of factors to be taken into account, such as the benefit derived from and harm caused by the infringement, so as to make the fine an effective deterrent, even for small undertakings.

369 The Commission also states that, because this is a horizontal price restriction, it is not required to prove actual harm or actual benefit to the parties concerned.

370 It would therefore be wrong to calculate the fines in a purely mathematical way solely on the basis of the turnover figures of each of the undertakings concerned. In this connection, the Commission points out that the applicants' arguments contradict NYK's argument that the Commission attached undue weight to turnover in calculating the fines.

371 The Commission takes the view that the classification contained in the contested decision (paragraph 183, Table 5) reflects the size of the lines in question on the market in 1994 on the basis of their respective market shares. The division of the undertakings into four groups was necessary so as to take account of the effective capacity of each of them to cause significant damage and to make the fine a sufficient deterrent. In view of that objective, and given the impossibility of using an arithmetic formula, the Commission submits that the criterion it adopts for dividing the undertakings into groups lies within its discretion.

372 In reply to NYK's allegations, the Commission states that it calculated the fines not on the basis of the parties' worldwide turnover in all products and services or on the basis of their total shipping turnover, but solely on the basis of worldwide liner shipping turnover.

373 The Commission regards this approach as correct because it enables it to compare the relative sizes of the undertakings in terms of their real resources and importance (*CEWAL*, cited at paragraph 242 above, paragraph 233).

374 According to the Commission, the method proposed by NYK is of no practical relevance because, even using that approach, NYK would still be in the 'medium to large carriers' group if it was 43.6% of the size of Maersk and the fine would have been the same.

375 The Commission states that, in any event, in the contested decision it did not base the fines solely on the turnover of the parties.

(b) Findings of the Court

376 It should be noted that at paragraph 182 of the contested decision the Commission states that in order to take account of the effective capacity of the undertakings concerned to cause significant damage and the need to ensure that the amount of the fine has a sufficiently deterrent effect, it was appropriate, in view of the considerable differences in size between the FETTCSA parties, to impose larger fines on the bigger parties than on the smaller ones.

377 Accordingly, the Commission divided the FETTCSA parties into four groups according to their size. At paragraph 183, the contested decision explains that the size of each FETTCSA party was determined on the basis of their worldwide liner shipping turnover in 1994, as that figure enables a genuine assessment to be made of the resources and size of the undertakings concerned.

378 Table 5 at paragraph 183 of the contested decision sets out the four groups thus determined and the size of each of the FETTCSA parties in 1994 relative to that of Maersk, the largest of the FETTCSA parties. It is apparent from that table that the four groups and the relative size of the FETTCSA parties which make up those groups are calculated as follows: the 'large carrier' (Maersk [100]), the 'medium to large carriers' (NYK [58], MOL [55], P&O [52], K Line [49], Nedlloyd [46] and Hanjin [41]), the 'small to medium carriers' (Hapag-Lloyd [34], Evergreen [30], NOL [28], DSR-Senator [23] and Yangming [23]) and the 'small carriers' (Cho Yang [17], MISC [14], OOCL [11] and CGM [6]).

379 Table 6 in paragraph 186 of the contested decision sets out the basic amount of the fines for the carriers according to which of the four groups they are in, taking

into account the factors mentioned in paragraphs 179 to 185 of the contested decision, namely the nature of the infringement and the size of the FETTCSA parties. Those amounts are EUR 1 300 000 for the 'large carrier', EUR 1 million for the 'medium to large carriers', EUR 650 000 for the 'small to medium carriers' and EUR 325 000 for the 'small carriers'.

380 It is necessary to consider whether, as the applicants allege, that method of determining the basic amount for calculating the fines infringes the principles of individual assessment and non-discrimination and whether it complies with the principle of transparency and is supported by a sufficient statement of reasons.

The principle of individual assessment

381 The applicants criticise, first of all, the method adopted by the Commission, the result of which is that the fine is set for each group without taking into account the individual size of each undertaking within the group. They also complain that in this instance that method meant that the Commission took no account of factors other than turnover in fixing the fines, and thus excluded other relevant factors.

382 By their first complaint, the applicants challenge the adoption of a fixed rate for the basic amount of the fines for each group of undertakings, as shown in Table 6 in paragraph 186 of the contested decision. It is that fixed rate which led the Commission to ignore the differences which might exist between individual undertakings belonging to the same group.

383 In that respect it should be noted that, according to the case-law, the Commission has a margin of discretion when fixing the amount of each fine and cannot be considered bound to apply a precise mathematical formula for that purpose (*Martinelli* v *Commission*, cited at paragraph 252 above, paragraph 59). At most the amount of the fine imposed must be in proportion to the factors capable of affecting the assessment of the gravity of the infringement (see, to that effect, *Tate & Lyle and Others* v *Commission*, cited at paragraph 262 above, paragraph 106).

384 It is plain that dividing the undertakings concerned into groups according to their size contributes to the aim of penalising the large undertakings more severely since, under that method, undertakings in the groups of larger undertakings receive higher fines than those imposed on undertakings in the groups of the smaller undertakings, and no large undertaking is allocated a basic amount lower than that of a smaller undertaking.

385 It is true that the effect of that method is to make the basic amounts for all undertakings in the same group the same, and therefore has the effect of ignoring the differences in size between undertakings in the same group. However, the Commission is not required, when determining fines on the basis of the gravity and duration of the infringement in question, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 278). Thus, the Court has already held that a calculation whereby the Commission first determines the overall amount of the fines to be imposed and then spreads that total among the undertakings concerned by dividing them into groups according to the extent of their activities in the sector concerned is lawful (*IAZ and Others* v *Commission*, cited at paragraph 351 above, paragraphs 48 to 53).

386 Consequently, the Court finds that the Commission did not err in fact or in law in dividing the applicants into groups when determining the gravity of the infringement.

387 By their second complaint, the applicants criticise the Commission for not having made separate calculations of the fine for each party taking account of criteria other than turnover.

388 It is apparent from Article 15(2) of Regulation No 17, Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86 that the gravity and duration of the infringement are the only criteria that the Commission must take into account when setting the level of fines imposed for infringement of the Community competition rules.

389 Since the duration of the infringement in this case is the same for all the undertakings, it is necessary to consider whether the Commission was entitled, when determining the gravity of the infringement, to fix the basic amount of the fines without taking account at that stage of factors peculiar to each undertaking other than their turnover.

390 According to the case-law, the gravity of infringements is to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and *Ferriere Nord* v *Commission*, cited at paragraph 183 above, paragraph 33). It has been consistently held that the factors on the basis of which the gravity of an infringement may be assessed may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was

committed and the size and economic power of the undertaking (*Musique Diffusion Française and Others* v *Commission*, cited at paragraph 364 above, paragraph 120, and *IAZ and Others* v *Commission*, cited at paragraph 351 above, paragraph 52).

391 Given that the wording of Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86 is the same as that of Article 15(2) of Regulation No 17, that case-law on Article 15(2) of Regulation No 17 also applies to the calculation of the fines under Regulations No 1017/68 and No 4056/86.

392 In this case it is apparent from the contested decision that after setting the basic amount for the largest applicant, Maersk, at paragraph 181, on the basis of the nature of the infringement and the size of that undertaking, the Commission adjusted that figure at paragraphs 182 to 186 on the basis of the relative size of each applicant compared with Maersk according to their worldwide turnover in the market for maritime liner transport. The classification of the applicants and their division into groups according to size appears in Table 5 at paragraph 183 of the contested decision.

393 In Table 6 at paragraph 186 of the contested decision, the basic amount of the fines are set out for each group identified in Table 5. Therefore, the basic amounts set out in Table 6 result indirectly from the reference to the applicants' turnover.

394 The objective of the Commission, as set out at paragraph 182, is, in view of the 'considerable' differences in size between the applicants, to impose larger fines on the large undertakings in order to take account of the effective capacity of the undertakings concerned to cause significant damage and to ensure that the amount of the fine has a deterrent effect.

395 In that system, the turnover of the undertakings in question is thus used not to calculate directly the level of fine as a proportion of that turnover, but when determining the gravity of the infringement to adjust the basic amount calculated on the basis of the nature of the infringement in order to take account of the difference in size between the undertakings concerned.

396 In its Guidelines, the Commission considers that the gravity of the infringement must take account not merely of the actual nature of the infringement, but also of its 'specific impact' (Section 1 A, first paragraph). The Guidelines thus require that account be taken of the effective economic capacity of the offenders to cause significant damage to other operators and that the amount of the fine be set at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph). The Commission also considers that, in most cases, large undertakings have infrastructures capable of providing them with legal and economic information on the basis of which they can better appreciate the unlawful nature of the conduct and the consequences stemming from it under competition law (Section 1 A, fifth paragraph). For those reasons, the Guidelines state that where an infringement involves several undertakings (e.g. cartels), it might be necessary to apply weightings to the basic amounts in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is 'considerable disparity' between the sizes of the undertakings committing infringements of the same type (Section 1 A, sixth paragraph).

397 It follows that, under the method laid down in the Guidelines and applied in the present case, the fines are still calculated according to the gravity of the infringement, which is one of the two criteria referred to in Article 15(2) of Regulation No 17 and in the equivalent provisions of Regulations No 1017/68 and No 4056/86. Furthermore, according to the case-law cited above, the size and economic power of the undertakings concerned constitute factors relevant to determining the gravity of the infringement within the meaning of Article 15(2) of Regulation No 17.

398 Consequently, the method of calculating the fines adopted in the present case, which consists of determining the gravity of the infringement and adjusting the basic amount calculated according to the nature of the infringement on the basis of the size of the undertakings in question, is in accordance with the legal framework of the sanctions as defined by Article 15(2) of Regulation No 17 and the equivalent provisions of Regulations No 1017/68 and No 4056/86 (see, to that effect, *LR AF 1998* v *Commission*, cited at paragraph 385 above, paragraphs 231 and 232).

399 In that regard, contrary to NYK's individual submission, the Commission is entitled when determining the size of the undertakings concerned to refer to the total turnover rather than to their turnover on the relevant market(s). Indeed it has already been held that the total turnover of the undertaking concerned constitutes an indication, albeit approximate and imperfect, of its size and economic power (*Musique Diffusion Française and Others* v *Commission*, cited at paragraph 364 above, paragraph 121). Thus, in the maritime transport sector, the Court of First Instance has already held that in taking the total turnover of the undertaking concerned for maritime liner transport as the basis for calculating the fines, the Commission did not infringe Article 19 of Regulation No 4056/86 (*CEWAL*, cited at paragraph 242 above, paragraph 233).

400 It follows that in order to determine the gravity of the infringement the Commission was entitled, after setting the basic amount of the fine on the basis of the nature of the infringement, to adjust that amount on the basis of the sole criterion of the total turnover of the FETTCSA parties for maritime liner transport services.

401 In any event, contrary to the applicants' submissions, that method does not lead to the Commission setting the level of the fine by means of a calculation based only on total turnover, without taking account of factors peculiar to each applicant. It is apparent from the contested decision as well as from the Guidelines, the principles of which were applied in that decision, that whilst the

gravity of the infringement is initially assessed on the basis of the particular characteristics of the infringement, such as its nature and impact on the market, that assessment is subsequently adjusted according to the individual circumstances of the undertaking, so that the Commission takes into consideration, besides the size and capacities of the undertakings, not only potentially aggravating circumstances but also mitigating circumstances as the case may be. That approach complies with the letter and the spirit of Article 15(2) of Regulation No 17 as it allows the Commission to take account, in its assessment of the gravity of the infringement, of the different role played by each undertaking and its attitude towards the Commission during the proceedings (*Tate & Lyle and Others* v *Commission*, cited at paragraph 262 above, paragraph 109).

402 At paragraph 185 of the contested decision the Commission concluded, however, without being contradicted by the applicants, that there was no basis for distinguishing between the gravity of the behaviour of the FEFC lines on the one hand and that of the non-conference lines on the other. Moreover, the Commission found at paragraph 187 of the contested decision, without being challenged by the applicants, that in the absence of ringleaders and followers, there was no reason which would justify distinguishing between the FETTCSA parties as regards their participation in the infringement.

403 In those circumstances, the Commission was entitled when setting the fines to disregard the factors peculiar to each applicant other than their total turnover from maritime liner transport.

404 The applicants' arguments alleging infringement by the Commission of the principle of individual assessment must therefore be rejected.

The principle of non-discrimination

405 The applicants claim that the Commission infringed the principle of non-discrimination by dividing them into groups, since undertakings of very different sizes are included in the groups identified in the contested decision and the undertakings at the top and bottom of adjacent groups, which are similar in size, are treated differently whilst lines at the top and bottom of any single group which are different in size are treated similarly.

406 According to settled case-law, the principle of equal treatment is infringed where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28, and Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25).

407 In the present case, the division into groups might infringe the principle of non-discrimination either within the groups, by treating undertakings which are in a different situation in the same way, or between the groups, by treating undertakings in a comparable situation differently.

408 It is necessary therefore to consider whether such differences in treatment exist and if so, whether they are objectively justified by the stated objective of penalising large undertakings more severely.

409 First, as regards treating applicants of different sizes in the same way within each group, it should be noted that when the fines were set all applicants falling within the same group, regardless of their size, were allocated the same basic amount, in order of size and according to group, in the sum of EUR 1 300 000, EUR 1 000 000, EUR 650 000 and EUR 325 000.

410 That difference of treatment is plainly inherent in a system based on division into groups, however. It has already been established in the examination of the applicants' first argument in relation to the first part of the present plea that that division represented an accurate assessment of the gravity of the infringement.

411 Therefore, even if the effect of the division into groups is that certain applicants are allocated the same basic amount even though they differ in size, that difference in treatment is objectively justified by the importance attached to the nature of the infringement in comparison with the size of the undertakings in the assessment of the gravity of the infringement (see, to that effect, *IAZ and Others* v *Commission*, cited at paragraph 351 above, paragraphs 50 to 53).

412 Consequently, the Commission was entitled in this case to set the same basic amount for undertakings in the same group and did not thereby infringe the principle of non-discrimination.

413 Second, as regards treating applicants falling within different groups differently, it is apparent from Table 5 in paragraph 183 of the contested decision that the Commission divided the applicants into four groups representing undertakings of, respectively, 0% to 17% of the size of Maersk (the 'small carriers'), 23% to 40% of the size of Maersk (the 'small to medium carriers'), 41% to 58% of the

size of Maersk (the 'medium to large carriers') and the size of Maersk (the 'large carrier'). Moreover, in Table 6 at paragraph 186 of the contested decision, the Commission applied a basic amount to those categories of, respectively, EUR 1 300 000, EUR 1 000 000, EUR 650 000 and EUR 325 000.

414 It follows that the difference in treatment between the applicants falling within different groups results, first, from the division into different groups in Table 5 at paragraph 183 of the contested decision and, second, from the calculation of the basic amounts applied to each group in Table 6 at paragraph 186 of the contested decision.

415 As regards, first, the thresholds for the definition of the different groups, it is clear that, as the applicants point out, the difference in size between the applicants falling within two different groups is sometimes less than between applicants belonging to the same group. Thus, Yangming and DSR-Senator were placed in the same group as Hapag-Lloyd and not in that of Cho Yang, even though their relative size is closer to that of Cho Yang than that of Hapag-Lloyd. Equally, Hanjin was placed in the same group as NYK and not in the Hapag-Lloyd group, even though its relative size is closer to that of Hapag-Lloyd than that of NYK.

416 The sixth paragraph of Section 1 A of the Guidelines states that a 'considerable' disparity between the offending undertakings is such as to render differentiation necessary in the appraisal of the gravity of the infringement (see, to that effect, Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 90). Moreover, according to the case-law, whilst the Commission has a margin of discretion when fixing the amount of each fine and cannot be considered bound to apply a precise mathematical formula for that purpose (*Martinelli* v *Commission*, cited above at paragraph 252, paragraph 59), the amount of the fines imposed must at least be proportionate in relation to the factors capable of

entering into the assessment of the seriousness of the infringement (*Tate & Lyle and Others* v *Commission*, cited at paragraph 262 above, paragraph 106). Consequently, where the Commission divides the undertakings concerned into groups for the purpose of setting the amount of the fines, the thresholds for each of the groups thus identified must be coherent and objectively justified (see, to that effect, *LR AF 1998* v *Commission*, cited at paragraph 385 above, paragraph 298).

417 It should be noted in that regard that the Commission, by stating in the introduction to its Guidelines that the discretion which the legislature grants to the Commission to set fines must be guided by a 'coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules', has undertaken expressly to comply with those principles in determining the amount of the fines for infringement of the competition rules.

418 Accordingly, it is necessary to consider whether the determination of the thresholds separating the four groups identified by the Commission in Table 5 at paragraph 183 of the contested decision is coherent and objectively justified.

419 It should be noted in that regard that, at paragraph 182, the contested decision states merely that, in order to impose the largest fines on the biggest FETTCSA parties, the Commission divided the parties into four groups according to their size and that Table 5, at paragraph 183, sets out the four groups thus constituted and the relative size of each of the FETTCSA parties in 1994 compared to Maersk, the largest of them. By contrast, the contested decision does not explain the method and the criteria used by the Commission to define the four groups in question.

420 In reply to a written question from the Court on the manner in which the applicants were divided into four groups and the basic criterion by which those four groups were defined in Table 5 at paragraph 183 of the contested decision, the Commission explained, first, that the applicants were divided into different groups exclusively on the basis of worldwide turnover from maritime liner transport in 1994 and, second, that the divisions between the groups were drawn where the relative differences in size were most pronounced.

421 On the basis of those explanations, if the relative difference in size is understood to be the difference between the relative sizes of two undertakings expressed as a percentage of the size of the smallest undertaking, the Court observes that the thresholds between the four groups identified in Table 5 in the contested decision were placed where the relative difference in size was, respectively, 72% of the size of NYK (between Maersk and NYK), 20.5% of the size of Hapag-Lloyd (between Hanjin and Hapag-Lloyd) and 35% of the size of Cho Yang (between Yangming and Cho Yang). Such relative differences in size reflect considerable disparities within the meaning of the Guidelines and they are therefore such as to make differentiation necessary in assessing the gravity of the infringement.

422 It should be noted, however, that, contrary to the Commission's contention, those relative differences in size are not the most pronounced amongst those appearing in Table 5 at paragraph 183 of the contested decision, which shows that the relative differences in size between OOCL and CGM, MISC and OOCL, Cho Yang and MISC and NOL and DSR-Senator are, respectively, 83%, 27%, 21.4% and 21.7%, and thus greater than the relative difference in size of 20.5% separating the 'medium to large carriers' from the 'small to medium carriers'. The same would be true if the relative difference in size was understood to be the difference in relative sizes between two undertakings expressed as a percentage of that of the largest undertaking.

423 At the hearing, in reply to a question from the Court, the Commission explained that the boundaries between the groups were drawn where the relative differences in size were most pronounced in absolute terms.

424 Whilst it is true that the thresholds between the four groups are situated where the differences in size are the most pronounced in absolute terms, it should be noted that that explanation contradicts that given in reply to a written question from the Court. Moreover, a division based on differences in size in absolute terms would not take account of the actual specific weight of the applicants, which is reflected solely in the differences in size expressed in relative terms, and thus lacks coherence.

425 Furthermore, in setting the basic amount of the fine for each group the Commission used still another method (the successive reduction of 25% of the basic amount applied to the 'large carrier'), as will be explained below. Yet, in the first place that method appears to be more coherent in the absence of factors which might explain a different division, and in the second place the Commission did not explain why it considered that it had to use another method to divide the undertakings into groups.

426 It follows from the foregoing that the Commission failed in the contested decision to justify the choice of thresholds between the four groups identified in Table 5 at paragraph 183 of the contested decision. It is also apparent from the explanations given by the Commission in reply to the Court's written questions and at the hearing, which were in any case contradictory, that the thresholds were not based on any objective criterion and lack consistency. Consequently, the Commission's division of the applicants into four groups in Table 5 at paragraph 183 of the contested decision infringes the principle of non-discrimination.

427 Next, the Commission explains at paragraph 186 of the contested decision that the basic amounts applied to each group in Table 6 in the contested decision were calculated after taking account of the factors set out in paragraphs 179 to 185. As has already been held in relation to this plea, it is apparent from those paragraphs

that the Commission calculated the amount of the fines having regard to the duration and gravity of the infringement, the latter being determined on the basis of the nature of the infringement, and adjusted that amount according to the relative size of the applicants, expressed in terms of their worldwide turnover for maritime liner transport compared to that of the 'large carrier'.

428 As already found when addressing the first part of the first plea, paragraph 181 of the contested decision indicates that the Commission fixed the basic amount for the 'large carrier' on the basis of the lowest end of the scale of fines appropriate for serious infringements. However, the decision does not set out the method of calculation used to obtain the precise basic amounts for the 'medium to large carriers', the 'small to medium carriers' and the 'small carriers'.

429 In reply to a written question from the Court, the Commission explained that the basic amounts for the groups other than the 'large carrier' had been fixed on the basis of the basic amount applied for the latter by making successive reductions of 25% of that amount. The Commission thus pointed out that the basic amounts appearing in Table 6 at paragraph 186 of the contested decision represent approximately 75%, 50% and 25% respectively of the basic amount used for the 'large carrier'.

430 It has already been held above that fixing the fine imposed on the 'large carrier' on the basis of the abovementioned criteria did not go beyond the legal framework for penalties laid down by Article 15(2) of Regulation No 17, and by the equivalent provisions of Regulations No 1017/68 and No 4056/86. Since the fines for the other groups of applicants were determined on the basis of that for Maersk according to the same criteria, the fixing of those fines likewise does not go beyond the legal framework for penalties as defined by those provisions.

431 With regard to the amount of those fines, shown in Table 6 at paragraph 186 of the contested decision, since the Commission was not required to calculate the fines on the basis of a precise arithmetic formula it should be accepted that in fixing the basic amounts of the fines by making successive reductions of 25% of the basic amount imposed on the 'large carrier', the Commission did not exceed its margin of discretion. Since the Commission defines four groups on the basis of the applicants' relative size, the successive reduction in steps of 25% of the basic amount used for the group containing the largest applicant may be regarded as a coherent method which may be objectively justified.

432 Consequently, the applicants' arguments are accepted solely to the extent that the definition of the groups in Table 5 at paragraph 183 of the contested decision infringes the principle of non-discrimination.

The principle of transparency and compliance with the obligation to state reasons

433 The applicants criticise the Commission for failing to explain both why it was necessary to divide the FETTCSA parties into four groups and the criteria used by the Commission to define the various groups. They further claim that the Commission does not explain why, having taken a basic amount of EUR 1 300 000 for Maersk, it set the basic amounts of the fines for the other groups at EUR 1 million, EUR 650 000 and EUR 325 000 respectively.

434 In so far as it was held above that, in the circumstances of the present case, the fixing of fines on the basis of a division of the applicants into groups infringed the principle of non-discrimination, there is no need for the Court to make any finding on the present complaints.

435 However, for the sake of completeness, the Court finds with regard, first, to the division of the applicants into groups, that paragraphs 181 and 182 of the contested decision explain sufficiently in law that the purpose of that division is to adjust the fine calculated on the basis of the nature of the infringement according to the size of the undertakings in question.

436 It follows that the contested decision contains a sufficient statement of reasons on that point.

437 Second, with regard to the criteria used by the Commission to set the thresholds between the four groups, as already noted above the contested decision contains no explanation in that regard and it was only in reply to written and oral questions from the Court that the Commission undertook to explain the method used to make that distinction.

438 In addition to the fact that it has already been held that those explanations do not justify the setting of the thresholds used to define the four groups identified by the Commission, it should be noted that in the introduction to the Guidelines the Commission itself states that the principles laid down therein are intended to ensure the transparency and objectivity of the Commission's decisions, in the eyes of both the undertakings and the Court of Justice, whilst ensuring that the Commission's margin of discretion in this context is used to further a coherent and non-discriminatory policy of penalising infringements of the competition rules.

439 It is true that the Court has held that the Commission may be allowed to submit subsequently data to translate into figures the criteria set out in the contested decision, where those are capable of being quantified (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 206 above, paragraph 4735, and *PVC II*, cited at paragraph 318 above, paragraph 1181). However, those criteria are precisely absent in the present case.

440 Consequently, there is an inadequate statement of reasons for the definition of the groups in Table 5 at paragraph 183 of the contested decision.

441 Third, as regards the setting of the basic amounts in Table 6, as has been held above the contested decision refers at paragraph 186 to the factors set out in paragraphs 179 to 185, namely the duration and gravity of the infringement, adjusted to take account of the nature of the infringement and the size of the undertakings concerned.

442 It is true that the contested decision does not set out the method or the calculation whereby the Commission determined the basic amounts for the groups other than the 'large carrier' group, or their relationship with the groups identified at Table 5. However, those amounts should be regarded as translating into figures the division into four groups carried out in the contested decision. The Commission's explanations on that point in reply to a written question from the Court do not, therefore, constitute a statement of reasons in addition or subsequent to the contested decision (*Cimenteries CBR and Others* v *Commission*, cited at paragraph 206 above, paragraph 4735, and *PVC II*, cited at paragraph 318 above, paragraph 1181).

443 However, it has already been held when considering the first part of the present plea that the choice of a specific starting point of EUR 1 300 000 for the 'large carrier' was vitiated by an inadequate statement of reasons since the setting of an amount at a level higher than the very lowest end of the scale of fines appropriate for serious infringements laid down by the Guidelines was not explained sufficiently in law. Consequently, in so far as the specific starting points adopted for the three other groups were fixed according to the basic amount for the 'large carrier', they, too, must be regarded as a result as vitiated by a failure to state adequate reasons.

444 Consequently, the contested decision also contains an inadequate statement of reasons on that point.

445 Lastly, the applicants also allege that, in so far as the Commission's division into groups in the contested decision is intended to take account of the harm caused by, and benefits deriving from, the agreement in question, the Commission has failed to identify those factors.

446 However, it is apparent from the discussion of the plea alleging misapplication of Article 81(1) EC and Article 2 of Regulation No 1017/68 that the contested decision finds an infringement of Article 81(1) EC and Article 2 of Regulation No 1017/68 solely on the basis that the agreement not to give discounts on charges and surcharges has as its object the restriction of competition. By contrast, the contested decision does not, as paragraph 135 expressly states, find that the effect of that agreement was to restrict competition.

447 Since, in order for Article 81(1) EC and Article 2 of Regulation No 1017/68 to apply, it suffices that the agreement in question has as its object the restriction of competition, there was no obligation on the Commission to identify the specific harm which might arise from that agreement.

448 In any event, in paragraphs 134 and 138 of the contested decision the Commission explains sufficiently in law why the agreement in question, both by its nature and by the position of the FETTCSA parties on the trade between northern Europe and the Far East, has as its object the restriction of competition to an appreciable extent.

449 Consequently, the complaint alleging failure to state reasons with regard to consideration of the harm caused by and the benefits deriving from the agreement in question cannot be upheld.

450 It follows from all of the foregoing that the applicants' argument alleging failure to state reasons must be accepted with regard to the definition of the four groups in Table 5 at paragraph 183 of the contested decision and the calculation of the basic amounts of the fines in Table 6 at paragraph 186 of the contested decision.

Part three: calculation of the fine on P&O Nedlloyd

(a) Arguments of the parties

451 P&O Nedlloyd complains separately that the Commission failed, when fixing the fines, to take account of the merger on 19 December 1996 between P&O and Nedlloyd.

452 It observes that the new entity P&O Nedlloyd has been fined more than Maersk, the only line in the Commission's 'large carrier' group.

453 According to P&O Nedlloyd, the disproportionate nature of the fine imposed on it is a result of the Commission's division of the undertakings concerned into four

categories in the contested decision. Because it placed both P&O and Nedlloyd in the second group without having regard to their individual circumstances, when setting the fine for the new merged entity the Commission added together the fines of EUR 620 000 imposed on each of them. Consequently, contrary to the principle of equal treatment, P&O Nedlloyd finds itself obliged to pay a fine 48% higher than the second largest fine, that imposed on Maersk.

454 P&O Nedlloyd suggests that, had the Commission followed the principle of non-discrimination in applying its own method based on the division of the FETTCSA parties into four groups, it would have placed P&O Nedlloyd in the same group as Maersk, because the combined size of P&O and Nedlloyd in 1994, the year of reference used in Table 5 in the contested decision (paragraph 183), was similar to that of Maersk.

455 In support of its argument, P&O Nedlloyd states that the Commission's purpose in sending it requests for information in 1998 and 1999 was to find out the turnover of the new merged entity, rather than the turnover of P&O and Nedlloyd separately. The turnover of the new merged entity was thus the figure that the Commission ought to have taken into account in establishing the maximum fine it was entitled to impose under Article 19(2) of Regulation No 4056/86. Furthermore, it would be for P&O Nedlloyd to pay the fine if the applicants are unsuccessful. Consequently, it is its own size relative to the other FETTCSA parties in 1998, the business year preceding the adoption of the contested decision, that is relevant in fixing the fines, rather than the relative sizes of P&O and Nedlloyd in 1994.

456 Finally, P&O Nedlloyd observes that if the purpose of the requests for information sent to it in 1998 and 1999 was not to enable the Commission to establish the maximum fine it could impose on it, then the Commission did not give sufficient reasons for those requests.

457 The Commission contends that the Court should reject the applicant's argument on this point.

(b) Findings of the Court

458 It is apparent from the contested decision that in 1992, at the time of the facts in question, P&O and Nedlloyd were independent shipping lines, both party to the agreement in question not to discount from the charges and surcharges. Furthermore, it is not in dispute that P&O and Nedlloyd merged on 19 December 1996 to form P&O Nedlloyd. Lastly, it is apparent from Article 4 of the contested decision that when that decision was adopted on 16 May 2000 P&O Nedlloyd received a fine of EUR 1 240 000, the highest fine imposed by the Commission in this case.

459 At paragraph 184 of the contested decision, the Commission found, in considering the gravity of the infringement, that the merger between P&O and Nedlloyd was not relevant as the infringements occurred before that event. Consequently, in Table 5 at paragraph 183 of the contested decision P&O and Nedlloyd were both placed by the Commission in the 'medium to large carriers' category and, according to Table 6 in paragraph 186 of the contested decision, the Commission applied a basic amount of EUR 1 million for each of them. After deductions for mitigating circumstances, cooperation and the duration of the procedure, P&O and Nedlloyd received fines as set out in Table 7 at paragraph 206 of the contested decision of EUR 620 000, so that the new entity P&O Nedlloyd was given a fine of EUR 1 240 000.

460 The applicant's argument based on the fact that the fine should have been calculated on the basis of the size of the new merged group cannot be accepted.

The assessment of the gravity of the infringement must take account of the economic reality as it was at the date on which the infringement was committed. Consequently, in order to assess the size and economic power of each undertaking as well as the scale of the infringement committed by each undertaking, the Commission must refer to the turnover of each undertaking during the period in which the infringement was committed (*Enso Española* v *Commission*, cited at paragraph 109 above, paragraph 339, Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraphs 663 and 664, and *PVC II*, cited at paragraph 318 above, paragraphs 1147 and 1148).

461 The Commission was therefore entitled in the present case not to refer to the turnover figures for the business year preceding the adoption of the contested decision in assessing the gravity of the infringement committed by P&O Nedlloyd. It should be noted in that connection that Article 19(2) of Regulation No 4056/86 and the similar provisions in Regulations No 17 and No 1017/68, which refer to turnover, are intended to determine not the gravity of the infringement but the maximum amount of the fine which may be imposed on an undertaking for infringement of Article 81(1) EC (*PVC II*, cited at paragraph 318 above, paragraph 1146). Provided that it complies with the limit laid down in Article 19(2) of Regulation No 4056/86 and by the analogous provisions of Regulations No 17 and No 1017/68, the Commission may set the fine on the basis of the turnover of its choice, in terms of geographical area and relevant products (Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 91).

462 Furthermore, in order to comply with the principle of non-discrimination, the Commission should ordinarily use one and the same method for calculating the fines imposed on the undertakings penalised for having participated in the same infringement (see, *inter alia*, Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraphs 63 to 68, Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 97 to 99, and Case T-308/94 *Cascades* v *Commission* [2002] ECR-II-813, paragraph 65).

463 Therefore, given that the merger took place after the facts in issue, the Commission cannot be criticised for not having taken account of the size of P&O Nedlloyd relative to that of Maersk in fixing the fine when it adopted the contested decision.

464 It is true that in the case of a merger which occurs after the facts in issue the effect of dividing the applicants into groups may, as in the present case, be to highlight the lack of a connection between the fine ultimately imposed and the size of the undertaking because of the addition of the fixed basic amounts used for each of the undertakings concerned. That, however, is the natural consequence of the system of fixing the basic amounts of the fines according to group. It has already been held in the context of the second part of the present plea that that system does not infringe Article 15(2) of Regulation No 17 or the equivalent provisions of Regulations No 1017/68 and No 4056/68, or the principles of individual assessment and non-discrimination.

465 Therefore, the applicant's argument on this point is rejected.

Conclusion

466 The contested decision is vitiated by substantive defects as regards the method used to calculate the fines. The first arises from the fact that the contested decision determines the fines for each of the applicants according to the basic amount for Maersk without adequately explaining why the latter is greater than the minimum laid down by the Guidelines for serious infringements. It follows that each of the basic amounts for the applicants is, in turn, vitiated by failure to

state reasons. The second arises from the fact that the contested decision determines the fines after dividing the applicants into groups in a way which does not comply with the principle of non-discrimination or, at the very least, with a wholly inadequate statement of reasons for so doing.

467 Before ruling on the legal consequences of those substantive defects, however, the Court considers it necessary, given the circumstances surrounding the adoption of the contested decision in the present case, to examine the plea in law concerning the limitation period for fines.

5. The plea in law concerning the limitation period

Arguments of the parties

468 The applicants submit that the fines imposed by the Commission in the contested decision are time-barred under Article 1(1) of Regulation No 2988/74.

469 They submit that the final step which validly stopped time running for the purposes of the limitation period relating to fines, in accordance with Article 2(1) of Regulation No 2988/74, was the Commission's request to the FETTCSA parties of 24 March 1995 for their turnover figures for 1993 and 1994. Consequently, the five-year limitation period relating to fines laid down by Article 1(1) of Regulation No 2988/74 came to an end on 24 March 2000. Since it was adopted on 16 May 2000, the contested decision could not therefore lawfully impose fines on the applicants.

470 The applicants acknowledge that after its request for information of 24 March 1995 the Commission sent the FETTCSA parties two further requests for information on 30 June 1998 and 11 October 1999, both of which satisfied the provisions of Regulations No 17, No 1017/68 and No 4056/86. However, they maintain that those two requests for information, relating to the turnover figures of the FETTCSA parties for 1997 and 1998, did not stop time running for the purposes of the limitation period because they were not indispensable 'for the purpose of the preliminary investigation or proceedings in respect of an infringement' within the meaning of Article 2(1) of Regulation No 2988/74.

471 The applicants maintain that the information requested was not in this case necessary 'for the purpose of the preliminary investigation' since the Commission had already concluded its preliminary investigation and adopted the statement of objections. They also submit that the Commission had no valid need to request the turnover figures for 1997 and 1998 'for the purpose of proceedings in respect of an infringement'. The applicants point out that on 16 September 1994 the Commission received the FETTCSA parties' reply to its statement of objections and that in May and June 1995, pursuant to a request for information of 24 March 1995, it received their turnover figures for 1993 and 1994. The Commission was then in possession of all of the information it needed to adopt a decision on the agreement in question. The applicants take the view that if the Commission had ultimately to send two further requests for information to the FETTCSA parties in order to obtain their respective turnover figures for the most recent business year, that was solely because of its own delay in adopting a decision.

472 The applicants suggest that, in its assessment of the present plea, the Court might take into account the dicta of the Court of Justice in *Austria* v *Commission*, cited at paragraph 43 above. It is clear from that judgment, which concerns the procedure for examining State aid, that the Commission may not prolong a limitation period artificially by sending the parties concerned requests for information that are not relevant or are unnecessary.

473 If the Commission were entitled to stop time running for the purposes of the limitation period by repeatedly sending requests for the turnover figures of the undertakings concerned it would be able to prolong the limitation period up to the maximum of 10 years laid down by Article 2(3) of Regulation No 2988/74, which would make the five-year limitation period laid down in Article 1(1) of that regulation devoid of purpose.

474 The Commission argues that its requests for information of 30 June 1998 and 11 October 1999 were intended to enable it to fix the fines in accordance with its obligations under Article 15(2) of Regulation No 17, Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86, which provide that no fine may exceed 10% of an undertaking's turnover in the preceding business year. It is therefore misconceived to suggest that the requests for information in question were not indispensable for the adoption of the contested decision.

475 That being so, and since each of those requests for information stated its legal basis and the fines for which the parties would be liable should they supply incorrect information, the Commission maintains that they complied with Article 11 of Regulation No 17, Article 19 of Regulation No 1017/68 and Article 16 of Regulation No 4056/86 and that, consequently, they stopped time running for the purposes of the limitation period, in accordance with Article 2(1) of Regulation No 2988/74. Its actions were not therefore time-barred when it adopted the contested decision on 16 May 2000.

476 In support of that conclusion, the Commission asserts, first of all, that the applicants' argument would result in depriving the Commission of the possibility of sending repeated requests and penalising it for having sent a request for information to the undertakings concerned very early on in the proceedings.

477 Secondly, nothing in the wording of Article 2(1) of Regulation No 2988/74 precludes it from issuing more than one request for information relating to the undertakings' turnover figures.

478 Thirdly, Article 2(1) of Regulation No 2988/74 should be interpreted in the light of Article 2(3) of that regulation, which imposes on the Commission an absolute limit of 10 years that cannot be exceeded in any circumstances. That provision, according to the Commission, confers on undertakings the necessary procedural guarantees.

479 Fourthly, the Commission disputes the relevance to the present case of the judgment in *Austria* v *Commission*, cited at paragraph 43 above. That judgment, concerning State aid, merely finds that Article 88(3) EC precludes the Commission from making repeated requests for information in order to prolong the period allowed it for forming a prima facie opinion as to the compatibility of the aid with the common market and whether or not to open a formal investigation into the aid under Article 88(2) EC. It was in that context that the Court held that it was not necessary for the Commission to obtain exhaustive information on the aid. The Commission takes the view that the circumstances of the present case are different in that the relevant procedural regulations require it to obtain sufficiently recent turnover information for the purpose of fixing the amount of the fines.

Findings of the Court

480 Article 1(1)(b) of Regulation No 2988/74 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of

the Community competition rules. The period begins to run on the day on which the infringement is committed, or, in the case of continuing or repeated infringements, on the day on which it ends.

481 The limitation period may, however, be interrupted or suspended in accordance with Articles 2 and 3 of Regulation No 2988/74 respectively. Under Article 2(1) of that regulation, '[a]ny action taken by the Commission... for the purpose of the preliminary investigation or proceedings' and in particular 'written requests for information by the Commission... and a Commission decision requiring the requested information' interrupts the limitation period. Under Article 2(3) of Regulation No 2988/74, each interruption shall start time running afresh. However, the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty.

482 In the present case, paragraph 180 of the contested decision states that the limitation period began to run with effect from 28 September 1992, the date found by the Commission to mark the end of the infringement. It is not in dispute that the limitation period was validly interrupted, first, on 19 April 1994 by the statement of objections, then again on 24 March 1995 by a request for information from the FETTCSA parties concerning their turnover figures for 1993 and 1994. Since the contested decision was adopted on 16 May 2000, more than five years after 24 March 1995, it is necessary to ascertain whether other subsequent acts validly interrupted the five-year limitation period. In the absence of such acts, the Commission's power to impose fines on the applicants for the infringement found in the contested decision would be time-barred and the fines imposed on the applicants under Article 4 of the contested decision would have been unlawful.

483 It is common ground between the parties that in this case the only steps taken by the Commission during the administrative procedure leading to the adoption of

the contested decision after its request for information of 24 March 1995 were, first, the request for information of 30 June 1998, seeking information relating to the FETTCSA parties' turnover for 1997 and, second, the request for information dated 11 October 1999 seeking information relating to the FETTCSA parties' turnover for 1998. It is therefore necessary to consider whether, as the Commission asserts at paragraph 194 of the contested decision, those two requests for information validly interrupted the limitation period for the purposes of Article 2(1) of Regulation No 2988/74.

484 Since the interruption of the limitation period laid down by Article 2 of Regulation No 2988/74 constitutes an exception to the five-year limitation period laid down by Article 1(1)(b) of that regulation, it must be interpreted narrowly.

485 Furthermore, it is apparent from the first subparagraph of Article 2(1)(a) of Regulation No 2988/74 that in order to interrupt the limitation period in accordance with that regulation written requests for information by the Commission, which are expressly mentioned in that provision as examples of actions interrupting the limitation period, must be 'for the purpose of the preliminary investigation or proceedings in respect of an infringement'.

486 Pursuant to Article 11 of Regulation No 17 and, as regards the transport sector concerned in the present case, Article 19 of Regulation No 1017/68 and Article 16 of Regulation No 4056/86, requests for information must, according to the first paragraph of those provisions, be 'necessary'. According to the case-law, a request for information is 'necessary' within the meaning of Article 11(1) of Regulation No 17 if it may legitimately be regarded as having a connection with the putative infringement (Case T-39/90 *SEP* v *Commission* [1991] ECR II-1497,

paragraph 29). Since the wording of Article 19 of Regulation No 1017/68 and Article 16 of Regulation No 4056/86 is the same, the same principles apply to requests for information based on those provisions.

487 Thus, it follows from the foregoing considerations that in order validly to interrupt the five-year limitation period laid down by Article 1(1)(b) of Regulation No 2988/74 a request for information must be necessary for the preliminary investigation or proceedings.

488 Although a request for information may interrupt the limitation period for fines where its purpose is to enable the Commission to comply with its obligations in fixing the fine, therefore, the Commission cannot, for instance, make requests for information the sole purpose of which is to prolong the limitation period artificially so as to preserve the power to impose a fine (see, to that effect, *Austria* v *Commission*, cited at paragraph 43 above, paragraphs 45 to 67). Requests for information solely for that purpose cannot be necessary for infringement proceedings. Furthermore, if the Commission were able to interrupt the limitation period by sending requests for information not necessary for the proceedings it would be able systematically to prolong the limitation period up to the 10-year maximum laid down by Article 2(3) of Regulation No 2988/74, thereby subverting the five-year limitation period laid down by Article 1(1) of that regulation and converting it into a 10-year one.

489 In the present case, it is apparent from the express wording of the requests for information dated 30 June 1998 and 11 October 1999 that their intended purpose was to enable the Commission to determine the amount of the fine, if any, to be imposed on the applicants. In the written procedure before the Court, the Commission explained in the defence that those requests were intended to enable it to fix the maximum amount of the fines in accordance with the

provisions of Article 15(2) of Regulation No 17, Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86, which provide that in no circumstances may the fines exceed 10% of the turnover of the undertaking concerned during the preceding business year. In the rejoinder, the Commission stated that it was therefore 'crucial' that it obtained sufficiently recent turnover figures to enable it to set appropriate fines.

490 It must be accepted that a request for information seeking turnover figures for undertakings which are the subject of a proceeding applying the Community competition rules is a necessary step in the infringement proceedings, since it enables the Commission to check that the fines it intends to impose on those undertakings do not exceed the maximum amount permitted by the regulations cited above for infringements of the Community competition rules.

491 Consequently, if the purpose of the requests for information of 30 June 1998 and 11 October 1999 was to obtain turnover figures necessary for the Commission to be able to check that the intended fines did not exceed the permitted upper limit, they were capable of interrupting the limitation period within the meaning of Regulation No 2988/74.

492 Therefore it is necessary to ascertain whether, when they were sent, those requests were necessary for the Commission to be able to adopt a final decision imposing fines or whether, as the applicants allege, the circumstances surrounding the adoption of those requests for information show, on the contrary, on the basis of precise and consistent indicia, that they did not validly interrupt the limitation

period because they were not necessary for the infringement proceedings since the Commission already had all the information necessary for the adoption of the contested decision following receipt of the applicants' replies to the request for information dated 24 March 1995.

493 In this regard it is first necessary to consider the context in which the requests for information of 30 June 1998 and 11 October 1999 were sent by the Commission during the administrative procedure concerning the agreement in question.

494 It should be noted at the outset that it has already been held, at paragraphs 317 to 321 above, that having regard to the context of the case, what is at stake for the undertakings concerned and its degree of complexity, the duration of the procedure in the present case appears, at least at first sight, to have been unreasonable.

495 In the first place, the agreement in question is an agreement between the FETTCSA parties which came into force on 1 July 1992. It is apparent from the file before the Court that the Commission was informed of the agreement in question following the request for information of 26 June 1992 in the context of the preliminary investigation into the FETTCSA agreement, which had been running since the beginning of 1991. It was, in fact, in reply to that request for information that the Commission obtained a copy of the minutes of the FETTCSA meeting of 9 June 1992 which contains the terms of the agreement in question.

496 Furthermore, the Commission notified the applicants of its preliminary legal assessment of the FETTCSA agreement as early as 28 September 1992. In paragraph 180 of the contested decision the Commission finds that the infringement alleged against the applicants came to an end on that date.

497 Next, by the requests for information of 31 March 1993 and 7 October 1993 the Commission sought certain additional information about the agreement in question. Then, on 19 April 1994, it sent a statement of objections to the applicants, to which they replied on 16 September 1994, after meeting the Commission's officials for the purpose of considering the grounds, if any, on which it might bring the administrative procedure to an end. Lastly, on 24 March 1995, the Commission sent a request for information to the applicants seeking to obtain the turnover figures of the FETTCSA parties for 1993 and 1994.

498 It is not in dispute that the requests for information dated 30 June 1998 and 11 October 1999 were sent to the applicants without any further step having been taken by the Commission in the preliminary investigation between the request for information of 24 March 1995 and the date when those requests were sent.

499 Lastly, it should be borne in mind that the contested decision was adopted on 16 May 2000.

500 In the light of those circumstances, the Court finds, first of all, that the Commission's investigation in this case was completed by March 1995. By that time the Commission had completed all the procedural steps prior to the adoption of a decision applying Article 81 EC and Article 2 of Regulation No 1017/68. In particular, the Commission had sent its statement of objections and received the applicants' observations. In that regard, the very fact that on 24 March 1995, shortly after receiving the response to the statement of objections of 16 September 1994, the Commission sent a request for information seeking to

obtain the turnover figures of the FETTCSA parties for 1993 and 1994 shows that the final stage of the administrative procedure had been reached and that the Commission was then preparing to adopt a final decision imposing fines, since the only purpose of that request was to obtain the turnover figures so as to enable it to fix the fines without exceeding the maximum amount permitted under Article 15(2) of Regulation No 17, Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86.

501 It follows that it may be considered to be established, and indeed this is not challenged, that the Commission had fully concluded the investigation into the present case when the request for information of 24 March 1995 was sent and that, at that time, having received the information sought, it had all the information necessary to adopt a final decision imposing fines. It is not disputed, however, that the Commission did not adopt a final decision after receiving the applicants' replies to the request for information of 24 March 1995.

502 Next, following the lapse of a period of 39 months, the Commission sent a fresh request for information on 30 June 1998 seeking once again to obtain the applicants' turnover figures, this time for 1997. Since the Commission took no further step in the investigation into the case during that period, having completed the examination of the file in 1995, there can have been no purpose to that request other than to update the turnover figures requested in 1995 so as to adopt a final decision imposing fines on the applicants. It is not in dispute, however, that in spite of the fact that the investigation was complete and that the adoption of a final decision imposing fines seemed imminent, the Commission did not adopt such a decision after receiving the applicants' replies to the request for information dated 30 June 1998.

503 Finally, after the lapse of a further period of 15 months, making a total of some 54 months since the request for information of 24 March 1995 was sent, the Commission sent a third request for information on 11 October 1999 seeking to obtain the applicants' turnover figures, this time for 1998. It is, however, not in dispute that the Commission still did not adopt a final decision imposing fines following receipt of the applicants' replies to that request, any more than it had after receiving the applicant's replies to the requests of 24 March 1995 and 30 June 1998.

504 In those circumstances, the applicants are right to question whether the requests for information of 30 June 1998 and 11 October 1999 were necessary.

505 Second, it is necessary to consider the reasons given by the Commission to justify sending the requests for information dated 30 June 1998 and 11 October 1999 and to decide whether those justifications support the conclusion that those requests were necessary for the infringement proceedings.

506 Both in the written procedure and during the hearing before the Court the Commission has repeatedly claimed that the requests for information of 30 June 1998 and 11 October 1999 were necessary because of its obligation to fix the maximum amount of the fines in accordance with the applicable legal provisions. It claims that the only purpose of the turnover figures for 1997 and 1998 given in response to those requests for information was therefore not to calculate the fines but solely to check that it had not exceeded the maximum amount permitted for those fines. In the present case, however, those figures did not enable the

Commission to make that calculation. Since the contested decision was adopted on 16 May 2000 the reference year for the calculation of the maximum amount of the fine was not 1997 or 1998 but 1999, which was the business year preceding the adoption of the contested decision (order of the Court of Justice in Case C-213/00 P *Italcementi — Fabbriche Riunite Cemento* v *Commission*, not published in the ECR, paragraph 98). It is common ground that the Commission did not request the applicant's turnover figures for the 1999 business year. In the application the applicants asserted, without being contradicted by the Commission on that point, that most of them release their financial results in March of the following year. It follows that when the contested decision was adopted on 16 May 2000 most of the applicants had closed their accounts for the 1999 business year.

507 In the light of the foregoing, it may therefore be accepted that the Commission was in a position to adopt the contested decision imposing fines without having at its disposal the turnover figures required to calculate the permitted upper limit of the fines. Whilst that fact alone does not mean that the requests for information of 30 June 1998 and 11 October 1999 could not interrupt the limitation period, since the Commission was free to run the risk of adopting a decision imposing fines without checking that they did not exceed the permitted upper limit under the applicable legal rules, it shows that in the present case, contrary to the Commission's persistently asserted justification for sending the requests for information of 30 June 1998 and 11 October 1999, the obligation to check that the fines do not exceed the upper limit permitted by the applicable legal provisions cannot provide that justification since the Commission did not have that information when it adopted the contested decision. The Commission does not advance any other ground to justify the need for the requests for information in question.

508 In reply to a written question from the Court, the Commission stated that it had calculated the upper limit of fines permitted in this case on the basis of the applicants' turnover for 1998 and that as a precaution it had also satisfied itself that the fines imposed did not exceed 10% of the applicants' worldwide turnover

in 1993. The same explanations appear at paragraph 207 of the contested decision.

509 Those explanations do not, however, undermine the finding that the requests for information of 30 June 1998 and 11 October 1999 cannot be justified by the obligation to check that the fines do not exceed the permitted upper limit. On the contrary, the fact that the Commission calculated the permitted upper limit of the fines on the basis of turnover figures for 1998, besides showing that the Commission did not make that calculation in accordance with the applicable legal provisions, confirms that it was able to adopt the contested decision imposing fines without having to obtain the turnover figures for the business year preceding the adoption of that decision.

510 Furthermore, since the Commission felt able to calculate the permitted upper limit of fines on the basis of the turnover figures for 1998, which are not those for the last business year before the adoption of the contested decision, it could also have done so on the basis of the turnover figures for 1993 and 1994, which it had in its possession since the request for information of 24 March 1995. The Commission does not explain why those turnover figures were not sufficient to enable it to check that the upper limit for fines had not been exceeded and that that fact made it necessary to send the requests for information of 30 June 1998 and 11 October 1999.

511 In the light of the foregoing, it does not appear that the Commission's sending of the requests for information of 30 June 1998 and 11 October 1999 can be justified by the need to comply with the applicable legal provisions laying down the maximum amount of the fines.

512 Abandoning the argument set out in its written pleadings, the Commission explained at the hearing that it had not requested the turnover figures for 1999 because it intended to impose such a modest fine that it would, in any event, be below the permitted maximum.

513 The Commission's new explanations show that it admits that in the present case it did not check whether the fines imposed exceeded the permitted maximum, either on the basis of the 1999 figures or on the basis of another reference year.

514 Therefore the Commission's explanations at the hearing, although different from those set out in its written pleadings, again confirm that the purpose of the requests for information of 30 June 1998 and 11 October 1999 could not have been to enable the Commission to calculate the maximum permitted fine since, according to the new explanation, the Commission intended to impose such low fines that no such calculation was necessary. In those circumstances, as the applicants claim, the Commission had at its disposal in the present case all the information necessary to adopt a final decision imposing fines upon receipt of the replies to the request for information of 24 March 1995. The Commission's contention in that regard, formulated for the first time at the hearing, that the decision to impose a modest fine was only taken in 1999, is unsupported by any evidence and cannot therefore be accepted.

515 In the light of all of those factors, and without needing to consider why no decision was adopted following the issue of the request for information of 24 March 1995, it may be concluded that the purpose of the requests for

information of 30 June 1998 and 11 October 1999 was not to enable the Commission to calculate the maximum permitted fines.

516 In those circumstances, since the Commission had concluded its examination of the file when the request for information of 24 March 1995 was sent and it did not take any step in the investigation before sending the requests for information of 30 June 1998 and 11 October 1999, those requests for information were not necessary for the conduct of the investigation and they did not therefore validly interrupt the limitation period.

517 Consequently, Article 4 of the contested decision must be annulled in so far as it imposes fines, since they were imposed on 16 May 2000, after the five-year limitation period laid down by Articles 1(1)(b) and 2(1) and (3) of Regulation No 2988/74, which started to run anew with effect from 24 March 1995, had expired.

Costs

518 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. As the action has been partially successful, the Court considers it fair in the circumstances of the case to order the Commission to bear its own costs and to pay half of the costs incurred by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls Article 4 of Commission Decision 2000/627/EC of 16 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 — Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA));

2. Dismisses the remainder of the action;

3. Orders the Commission to bear its own costs and to pay half of the applicants' costs;

4. Orders the applicants to bear half of their own costs.

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 19 March 2003.

H. Jung

Registrar

K. Lenaerts

President

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