JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

1 July 2008 *

In Case T-276/04,

Compagnie maritime belge SA, established in Antwerp (Belgium), represented by D. Waelbroeck, lawyer,

applicant,

v

Commission of the European Communities, represented initially by É. Gippini Fournier, P. Hellström and F. Amato, and then by É. Gippini Fournier, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2005/480/EC of 30 April 2004 relating to a proceeding pursuant to Article 82 EC (Cases COMP/D/32.448 and 32.450 — Compagnie maritime belge) (summarised in OJ 2005 L 171, p. 28), imposing a fine on the applicant for alleged abuse of a collective dominant position by the Cewal conference and, in the alternative, a reduction in that fine,

* Language of the case: French.

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

composed of O. Czúcz, President, J.D. Cooke (Rapporteur) and I. Labucka, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 20 November 2007,

gives the following

Judgment

Background to the dispute

1 By Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450: Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450: Cewal) of the EEC Treaty (OJ 1993 L 34, p. 20), the Commission ordered a number of member undertakings of the Associated Central West Africa Lines shipping conference ('Cewal') to pay fines for abuse of a collective dominant position. On that basis, the applicant, Compagnie maritime belge SA, was fined ECU 9.6 million.

2 The operative part of Decision 93/82 reads as follows:

‘Article 1

…

Article 2

In order to eliminate the principal independent competitor in the trade in question, the undertakings that are members of Cewal have abused their joint dominant position by:

— participating in the implementation of the cooperation agreement with Ogefrem and [requesting] repeatedly by a variety of means that it be strictly complied with,

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

and

— establishing 100% loyalty arrangements (including goods sold fob) which went beyond the terms of Article 5(2) of Regulation (EEC) No 4056/86, accompanied by the use, as described in this decision, of blacklists of disloyal shippers.

Article 3

…

The member undertakings of Cewal are also required to bring to an end the infringements referred to in Article 2.

Article 4

…

Article 5

It is recommended that the members of Cewal amend the terms of their loyalty contracts so that they conform with Article 5(2) of Regulation (EEC) No 4056/86.

Article 6

Fines are hereby imposed on the member undertakings of Cewal by reason of the infringements referred to in Article 2, with the exception of the following shipping companies: Agonave, Portline, Compagnie maritime zaïroise (CMZ) and Scandinavian West Africa Lines (SWAL).

The fines are as follows:

— Compagnie maritime belge: ECU 9.6 million,

— Dafra Line: ECU 200 000,

— Nedlloyd Lijnen BV: ECU 100 000,

— Deutsche Afrika Linien-Woermann Linie: ECU 200 000.

Article 7

The fines imposed in Article 6 shall be paid … within three months of the date of notification of this Decision …

…

Article 8

This Decision is addressed to the Cewal, Cowac and Ukwal shipping conferences and the undertakings that are members thereof, a list of which is attached as Annex I to this Decision.'

3 The applicant is the holding company of the Compagnie maritime belge group (CMB), whose activities include shipowning and managing and operating shipping operations. At the time of the facts at issue in Decision 93/82, it was a member of Cewal, which was made up of shipping companies operating a regular liner service between the ports of Zaire (which has become the Democratic Republic of the Congo) and Angola and those of the North Sea, with the exception of the United Kingdom. Cewal's secretariat was situated in Antwerp (Belgium).

4 The applicant and Dafra-Lines A/S brought actions before the Court of First Instance for annulment of Decision 93/82. Those actions were dismissed in so far as they related to the establishment of the infringements (judgment of 8 October 1996 in Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201; 'the judgment of the Court of First Instance in *CMB*'). However, the Court of First Instance reduced the amount of the fines imposed on the applicants. CMB's fine was reduced from ECU 9.6 million to ECU 8.64 million.

5 The applicant and Dafra-Lines appealed against the judgment of the Court of First Instance in *CMB*. By judgment of 16 March 2000 in Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000]

ECR I-1365 ('the judgment of the Court of Justice in *CMB*'), the Court of Justice rejected all the grounds of appeal relating to the establishment of the infringements in Decision 93/82. However, the Court held, at paragraphs 142 to 147 of the judgment, that the Court of First Instance had erred in law in imposing fines on the various members of Cewal according to their degree of participation in the infringements, when only Cewal had been a direct addressee of the statement of objections (the members of Cewal having received only a copy for comments) and, accordingly, potentially liable to pay a fine. The Court, therefore, giving final judgment in the case, annulled Articles 6 and 7 of Decision 93/82 relating to the fines imposed on the members of Cewal.

6 Following the judgment of the Court of Justice in *CMB*, the Commission repaid to the applicant the amount of the fine which it had paid.

7 On 15 April 2003, the Commission served a new statement of objections ('the 2003 SO') on the applicant, informing it that it intended to adopt a new decision with the aim of imposing a fine on it for the infringements of Article 82 EC referred to in Article 2 of Decision 93/82, in so far as the Commission's findings relating to the infringements and the undertakings having participated in them had not been annulled in the successive actions brought against that decision.

8 By Decision 2005/480/EC of 30 April 2004 relating to a proceeding pursuant to Article 82 EC (Cases COMP/D/32.448 and 32.450 — Compagnie maritime belge) (summarised in OJ 2005 L 171, p. 28; 'the contested decision'), the Commission imposed a fine of EUR 3.4 million on the applicant for the infringements of Article 82 EC established in Decision 93/82, namely at recitals 20 to 27 concerning the agreement with the Zairean Maritime Freight Administration ('Ogefrem'), recitals 28 and 29 concerning the blacklists and loyalty contracts, recital 32 concerning the fighting ships and Articles 2 to 5 of the operative part of that decision.

Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the Court of First Instance on 8 July 2004, the applicant brought the present action.

10 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure. Within the framework of the measures of organisation of procedure, the Court put a number of written questions to the parties. The parties responded within the time allowed.

11 The parties presented oral argument and their answers to the Court's oral questions at the hearing on 20 November 2007.

12 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the amount of the fine;

— order the Commission to pay the costs.

13 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

14 In support of its action, the applicant relies on eight pleas in law. The first four pleas seek, principally, annulment of the contested decision and allege, first, breach of the principle that the Commission must act within a reasonable time and of the limitation rules; second, breach of the rights of defence; third, that in the judgment of the Court of Justice in *CMB* the Court did not 'irrevocably establish' the abuses; and, fourth, 'insufficient reasoning and lack of justification' in the contested decision. The Court will examine in turn the first, third, second and fourth pleas.

15 The remaining four pleas seek, in the alternative, a reduction in the amount of the fine and allege that the fine is discriminatory (fifth plea); that it is disproportionate (sixth plea); that the fine was imposed in breach of the Commission's normal practice (seventh plea); and, last, a misuse of powers (eighth plea).

The pleas seeking annulment of the contested decision

First plea: breach of the principle that the Commission must act within a reasonable time and of the limitation rules

— Arguments of the parties

16 The applicant presents this plea in two parts. First, it claims that the Commission did not adopt the contested decision within a reasonable time. Second, it maintains that the Commission infringed the provisions of Council Regulation (EEC) No 2988/74 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).

17 As regards the first part, the applicant submits that the contested decision was adopted out of time, namely more than four years after the judgment of the Court of Justice in *CMB*. That wholly unexplained delay on the Commission's part is unjustifiable by reference to Article 6(1) of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), the Community case-law and the case-law of the European Court of Human Rights, particularly in the light of the high amount of the fine, the lack of complexity of the contested decision (as the Commission did not examine the infringements at issue in Decision 93/82) and the fact that the delay is not attributable to the applicant. Furthermore, both the principle of legal certainty and the principle of protection of legitimate expectations preclude the Commission from being able to delay the exercise of its powers indefinitely. In those circumstances, the reduction in the amount of the fine applied by

the Commission to take account of the duration of the proceedings is insufficient. In addition, the Commission infringed the applicant's rights of defence in that neither Cewal nor the applicant is now active in the sector concerned and they are therefore unable to defend themselves effectively owing to the difficulty in locating certain documents or questioning former employees.

18 As regards the second part, the applicant asserts that the contested decision was adopted in breach of Regulation No 2988/74. The limitation period laid down in that regulation of five years after the infringements have ceased can be suspended or interrupted only in the circumstances exhaustively listed therein. Moreover, the interruption of the limitation period, which constitutes an exception to the five-year limitation period, must be interpreted narrowly (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 484, and Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 40).

19 In fact, as the statement of objections of 28 May 1990, following which Decision 93/82 was adopted ('the 1990 SO'), was addressed to Cewal, and not to the applicant, which received a copy only for comment in its capacity as a member of Cewal (and not as a potential addressee of the decision imposing fines), the 1990 SO did not interrupt the limitation period with respect to the applicant, which was not an undertaking 'identified' as '[having] participated in the infringement' within the meaning of Article 2(1) of Regulation No 2988/74. The same applies, mutatis mutandis, to the acts subsequent to the 1990 SO, such as the request for information sent to the applicant and not to Cewal. Likewise, although Decision 93/82 was addressed to the applicant and annulled in so far as the fine was concerned, it cannot be relied on as against the applicant with respect to the limitation period, since the fine is the only relevant issue for the purpose of determining the limitation period.

20 In any event, Regulation No 2988/74 must, in the applicant's contention, be read in the light of the higher principles of Community law, which prevail over secondary law, such as the principle of legal certainty, the principle of the rights of defence or the principle that the Commission must act within a reasonable time (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 29), with which the long period of inactivity on the Commission's part before it reopened the procedure is incompatible. In that regard, the Commission cannot rely on the judgment in *CMA CGM and Others* v *Commission*. At the hearing, the applicant further claimed that the solution adopted in that judgment was not applicable in the present case, on the ground that the contested decision had been adopted after a judgment of the Court of Justice and that in the meantime the Commission had not conducted any investigation, since it merely referred in the contested decision to the abuses definitively established in Decision 93/82.

21 The Commission contends that the first plea is unfounded. It claims, in substance, that the contested decision was adopted in compliance with the limitation rules in Regulation No 2988/74. In the defence and in its answer to the written questions put by the Court, the Commission refers to *CMA CGM and Others* v *Commission* (paragraphs 321 to 324) and submits that, in the absence of a limitation period within the meaning of Regulation No 2988/74, any application of the principle that the Commission must act within a reasonable time must be rejected. However, even on the assumption that that principle did apply, and on the further assumption that a reasonable time was not observed, the Commission claims that such a situation would not constitute a ground for annulment of the contested decision, since the applicant has not adduced any evidence that there has been a breach of its rights of defence. The reduction in the amount of the fine which the applicant was granted does not undermine that point of view.

— Findings of the Court

22 As a preliminary point, it should be noted that the contested decision, which is aimed exclusively, first, at imposing on the applicant, on the basis of infringements strictly

identical to those established in Decision 93/82, a new fine, the amount of which was lower than that of the initial fine annulled by the judgment of the Court of Justice in *CMB*, and, second, at correcting the procedural flaws identified in that judgment (recitals 1, 17, 41, 61 and 108 in the preamble to the contested decision), is to be analysed exclusively as a decision imposing a fine within the meaning of Article 19(2) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles [81 EC] and [82 EC] to maritime transport (OJ 1986 L 378, p. 4), and not as a decision finding an infringement within the meaning of Article 11(2) of that regulation. In effect, the abuses were definitively established by the Commission in the parts of Decision 93/82 that were not annulled (see paragraph 8 above and paragraphs 55 to 60 below).

23 It follows from the provisions of Regulation No 2988/74 that, in so far as the Commission imposed a fine, the contested decision must, on pain of illegality, have been adopted in compliance with the rules on limitation laid down in that regulation. It is therefore appropriate to begin the examination of the first plea by considering the second part and determining whether the limitation period had expired under Regulation No 2988/74 on the date of adoption of the contested decision, namely on 30 April 2004.

24 Article 1(1)(b) of Regulation No 2988/74 lays down a limitation period of five years for the imposition of fines or sanctions for infringements such as those at issue in the present case. For continuing infringements, as in the present case, time begins to run on the day on which the infringement ceases (Article 1(2)).

25 Under Article 2 of Regulation No 2988/74, the limitation period for proceedings is interrupted by any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement. Such actions may include, in particular, the sending of written requests for information (Article 2(1)(a)) or notification of a statement of objections (Article 2(1)(d)), and such interruption is to apply for all the undertakings or associations of undertakings which have participated in the infringement (Article 2(2)).

26 Under Article 2(3) of Regulation No 2988/74, each interruption is to start time running afresh for a period of five years with effect from the date of each interruption but the limitation period cannot exceed a period equal to twice the limitation period, that is to say, 10 years as regards the infringements at issue.

27 Furthermore, the limitation period is to be extended by the period during which it is suspended under Article 3 of Regulation No 2988/74, that is to say, for such period as the decision of the Commission is the subject of proceedings pending before the Court of Justice (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 *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, 'the judgment of the Court of Justice in *PVC II*', paragraphs 144 to 147, and 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* [1999] ECR II-931, 'the judgment of the Court of First Instance in *PVC II*', paragraphs 1098 and 1101).

28 The Court will therefore examine, first, whether the five-year limitation period was observed and, second, whether the limitation period was interrupted and, if so, whether the Commission also observed the 10-year limitation period.

29 It should be borne in mind that, according to Decision 93/82 and, where appropriate, the findings of the Court of First Instance in its judgment in *CMB* (paragraphs 241 and 242), the agreement with Ogefrem was in force until the end of September 1989 and the loyalty arrangements were in force until the end of November 1989. Last, the fighting ships practice ceased at the end of November 1989. It follows that the limitation period began to run, at the earliest, at the end of September 1989.

30 As regards, first of all, the five-year limitation period, that period was first interrupted, under Article 2(1)(d) of Regulation No 2988/74, by the notification of the 1990 SO to Cewal.

31 The applicant disputes that fact on the ground that it was not an addressee of the 1990 SO addressed to Cewal. Such an argument cannot succeed. In effect, in accordance with the wording of Article 2(2) of Regulation No 2988/74, the interruption of the limitation period is to apply for all the undertakings which participated in the infringement in question. In that regard, it is indisputable that the applicant participated in the infringements, even if it was not 'identified' as having done so in the 1990 SO (see, to that effect, Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 47).

32 It must also be borne in mind that the written requests for information, actions independent of the statement of objections, interrupt the limitation period, on condition that they are necessary for the preliminary investigation or the proceedings (*CMA CGM and Others* v *Commission*, paragraph 487). It is irrelevant that the requests were sent after notification of the 1990 SO. It must be considered prima facie that the requests for information in question were necessary for the preliminary investigation or the proceedings. Moreover, the applicant has not disputed in this case that the requests for information in question were necessary. Those requests therefore also interrupted the limitation period.

33 As for Decision 93/82, which was not annulled in so far as it established that the applicant had participated, within the meaning of Article 2(1) of Regulation No 2988/74, in the infringements of Article 82 EC, it remains wholly effective, in particular as regards the interruption of the limitation period with respect to the applicant.

34 The five-year limitation period was then suspended, pursuant to Article 3 of Regulation No 2988/74, throughout the duration of the proceedings in the action brought against Decision 93/82, both before the Court of First Instance and before the Court of Justice (from 19 March 1993 to 16 March 2000, without there being any need to make a determination as regards the period between delivery of the judgment of the Court of First Instance in *CMB* and the lodging of the appeal with the Court of Justice).

35 After delivery of the judgment of the Court of Justice in *CMB*, the longest period for the purpose of calculating the limitation period is the period up to notification to the applicant of the 2003 SO (15 April 2003). That period, approximately 37 months, is less than five years. As no period of more than five years elapsed from the end of the abuses after an interruption of the limitation period, it must be held that the five-year limitation period was observed.

36 As regards, next, the 10-year limitation period, that period is still running in the present case, since the 1990 SO interrupted the limitation period. During the period of approximately 14½ years which elapsed between the end of the abuses, which, depending on the particular abuse, occurred between the end of September 1989 and December 1989, and the notification of the contested decision to the applicant (on 30 April 2004), the 10-year limitation period was suspended during the proceedings in the action brought against Decision 93/82, that is to say, for approximately seven years.

37 It follows that as the period, excluding suspension, between the end of the abuses established and the adoption of the contested decision does not exceed 10 years, the 10-year limitation period within the meaning of Article 2(3) of Regulation No 2988/74 was also observed.

38 The contested decision was therefore adopted in compliance with Regulation No 2988/74.

39 It is therefore appropriate now to examine the applicability to the present case of the principle that the Commission must act within a reasonable time. Such a principle, which is incorporated, as an element of the right to good administration, in Article 41(1) of the Charter of Fundamental Rights of the European Union, must be observed in every Community administrative procedure (Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 36).

40 The parties disagree as to whether the principle that the Commission must act within a reasonable time applies in this case (see paragraphs 20 and 21 above).

41 In *CMA CGM and Others* v *Commission* (paragraph 324), the Court of First Instance held that Regulation No 2988/74 established a complete system of rules covering in detail the periods within which the Commission was 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 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. On appeal, the Court of Justice implicitly upheld that assessment by the Court of First Instance (order of the Court of Justice of 28 October 2004 in Case C-236/03 P *Commission* v *CMA CGM and Others* (not published in the ECR), paragraph 35).

42 It must be held that the solution arrived at in *CMA CGM and Others* v *Commission*, confirmed by the order of the Court of Justice, is perfectly capable of being transposed to the present case. In *CMA CGM and Others* v *Commission*, the applicants simply claimed that there had been a breach of the principle that the Commission must act within a reasonable time not for the purpose of securing annulment of the contested decision, but in support of the plea whereby they sought annulment of the fines imposed on them, or a reduction in the amount of those fines. In fact, as the contested decision is a decision imposing a fine within the meaning of Article 19(2) of Regulation No 4056/86 (see paragraph 22 above), the present plea, which seeks annulment of that decision, in reality seeks annulment of the fine imposed by that

decision. Furthermore, the Commission adopted the contested decision in compliance with the limitation rules laid down in Regulation No 2988/74. In those circumstances, there is no reason to depart from the solution reached by the Court of First Instance in *CMA CGM and Others* v *Commission*.

43 With regard to the arguments, which, moreover, the applicant scarcely touches upon (see paragraph 20 above), seeking to preclude the application to the present case of the solution adopted in *CMA CGM and Others* v *Commission*, it must be held that they do not stand up to analysis. As regards the reference to the principle of legal certainty, Regulation No 2988/74 expressly takes into account, in the second recital in the preamble thereto, the need to ensure legal certainty, specifically by the introduction of the principle of a limitation period (*CMA CGM and Others* v *Commission*, paragraph 322). As regards the principle of respect for the rights of defence, it must be borne in mind that, so long as the limitation period laid down in Regulation No 2988/74 has not expired, any undertaking or association of undertakings which is the subject of a competition investigation under Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87) remains uncertain as to the outcome of the procedure and as to whether sanctions or fines will be imposed. Thus, the prolongation of that uncertainty is inherent in proceedings implementing Regulation No 17 and does not in itself constitute a breach of the rights of defence (see, to that effect, Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 91, applicable by analogy to investigations conducted on the basis of Regulation No 4056/86 and not set aside on that point by the Court of Justice).

44 As regards the argument which the applicant put forward at the hearing and which is set out at the end of paragraph 20 above, it must be held that that argument finds no support in Regulation No 2988/74 and must therefore be rejected.

45 As regards the application of the competition rules, moreover, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements where it has been proved that infringement of that principle affected the ability of the undertakings concerned to defend themselves. Except in that specific circumstance, failure to comply with the principle that a decision must be adopted within a reasonable time cannot affect the validity of the administrative procedure (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 74 and the case-law cited).

46 Furthermore, a decision taken fairly by the Commission, in accordance with a practice which has hitherto been consistent and approved by the Community judicature, to reduce the amount of the fine because of the length of the procedure, represents the exercise of its discretion when setting fines and is not of such a kind as to undermine the non-application of the reasonable time principle in this case (see, to that effect, *CMA CGM and Others* v *Commission*, paragraph 325).

47 It follows from the foregoing that, in spite of the Commission's delay in adopting the contested decision, as the limitation periods within the meaning of Regulation No 2988/74 were observed, the principle that the Commission must act within a reasonable time does not apply.

48 Without there being any need, in the context of the present plea, to examine the applicant's claim alleging breach of its rights of defence set out at paragraph 17 above, which will be examined in the context of the second plea (see paragraph 78 below), the first plea must therefore be rejected as unfounded.

Third plea: there is no irrevocable finding of the abuses in the judgment of the Court of Justice in *CMB*

— Arguments of the parties

49 The applicant complains, in substance, that the Commission did not re-examine, in the contested decision, the question whether the infringements established in Decision 93/82 did in fact take place, on the ground that they are 'no longer open to challenge' (recital 48 in the preamble to the contested decision). The applicant therefore considers it inconceivable that it is unable to challenge the very bases of the contested decision.

50 First, the Commission is wrong to rely on the judgments which it cites in the contested decision as regards *res judicata* attaching to the judgment of the Court of Justice in *CMB* and the judgment of the Court of First Instance in *CMB*. In order to constitute *res judicata*, a judgment of the Court of Justice must, in the applicant's submission, concern the same parties, the same pleas and, above all, the same act (Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraphs 50 to 52). In the present case, however, the contested act is distinct from Decision 93/82. Furthermore, 'multiple pleas' were not raised in the proceedings in the action brought against Decision 93/82. Last, the separate adoption of the contested decision, on the basis of Decision 93/82, adopted 12 years previously, cannot be accepted.

51 Second, as competition law 'fundamentally [forms part of] criminal law' and as the 'fundamental rights applicable to criminal law … apply to proceedings culminating in competition law fines' (Case C-199/92 *Hüls* v *Commission* [1999] ECR I-4287,

paragraph 150, in keeping with the case-law of the European Court of Human Rights), it follows from the 'applicable general principles' and also, in particular, from Article 49 of the Charter of Fundamental Rights of the European Union and Article 15 of the United Nations Covenant on Civil and Political Rights that it is the most favourable law that must apply. In accordance with the maxim *tempus regit actum*, the lawfulness of the contested act must therefore be determined by reference to the elements of fact and of law as existing on the date on which the act was adopted. The applicable law has fundamentally evolved in a sense favourable to the applicant since Decision 93/82 was adopted. In the applicant's submission, the principle of legal certainty on which the Commission relies could not prevent it from taking that evolution into account. On the contrary, it was under a duty, under the principle *nulla poena sine lege*, which is 'fundamentally linked to the principle of legal certainty', and also Article 7 of the European Convention on Human Rights and Article 49 of the Charter of Fundamental Rights of the European Union, to take that evolution into account.

52 Third, numerous events which occurred subsequent to Decision 93/82 establish that the original accusations were wrong and cannot be disregarded by the Commission.

53 Fourth, the lack of precision in the original objections prevented the applicant from challenging them.

54 The Commission contends that none of the arguments put forward in support of the present plea is well founded. Those arguments, contrary to the principles of *res judicata* and legal certainty, amount to calling in question the solution arrived at in the judgment of the Court of Justice in *CMB* and the judgment of the Court of First Instance in *CMB* and also the validity of the parts of Decision 93/82 that were not

annulled, in particular the parts in which the abuses in question were established. The Commission then disputes the assertion that Community competition law is of a criminal law nature and the claim that that law has evolved in a manner favourable to the applicant.

— Findings of the Court

55 It must be borne in mind at the outset that the Court of Justice has recognised the fundamental importance in both the Community legal order and the domestic legal orders of the principle of *res judicata*. In order to ensure both the stability of the law and of legal relations and the proper administration of justice, it is essential that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits prescribed in that connection can no longer be called in question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38, and Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20).

56 The findings on those points of fact and of law are definitive since those points were actually or necessarily settled by a judgment and are not affected by that judgment having been set aside in part (judgment of the Court of First Instance in *PVC II*, paragraph 77; see also, to that effect, Case T-308/94 *Cascades* v *Commission* [2002] ECR II-813, paragraph 70).

57 Consequently, the points of fact or of law that were actually or necessarily settled by the judgment of the Court of Justice in *CMB* and the judgment of the Court of First Instance in *CMB*, in that they are not affected by the judgment of the Court of First

Instance in *CMB* having been set aside in part, acquired the authority of *res judicata*. It follows that all the parties to the judgment of the Court of Justice in *CMB*, including both the applicant and the Commission, are precluded from reopening what has already been determined.

58 The applicant's reference to *Altmann and Others* v *Commission* cannot undermine that conclusion. As the Commission observes, moreover, that judgment was delivered in the context of an objection of inadmissibility, whereas the admissibility of the present action is not in issue. The judgment in *Altmann and Others* v *Commission*, one of a line of decisions establishing that the *res judicata* attaching to a judgment of the Court of Justice constitutes an obstacle to the admissibility of a subsequent action only where the two actions involve the same parties, concern the same subject-matter and are based on the same cause of action (see, to that effect, Joined Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, paragraph 9; Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12; and Case T-28/89 *Maindiaux and Others* v *ECS* [1990] ECR II-59, paragraph 23), is therefore irrelevant.

59 It should also be borne in mind that, under the principle of legal certainty, measures of the Community institutions are presumed to be lawful and produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923, paragraph 18 et seq.). Furthermore, the principle of legal certainty also precludes the definitive nature of measures adopted by the Community institutions being called in question once the time-limit laid down in Article 230 EC for bringing an action against those measures has expired, even in the context of an objection of illegality raised against those measures (Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 19, and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 29; see also, to that effect, Case C-188/92 *TWD* [1994] ECR I-833, paragraph 16).

60 Thus, the parts of Decision 93/82 which were not annulled, and which are henceforward immune to challenge, definitively form part of the Community legal structure and produce all their legal effects. The same applies, in particular, to the passages in Decision 93/82 on the applicant's participation in the abuses established in that decision, since the annulment of the fine (that is to say, the annulment of only Articles 6 and 7 of the operative part of Decision 93/82) by the judgment of the Court of Justice in *CMB*, for purely procedural reasons, does not in any way affect the legality of those passages in Decision 93/82. Nor is that legality disputed by the applicant.

61 It follows that the applicant's argument that certain other pleas were not raised during the proceedings in the action brought against Decision 93/82 must be rejected as unfounded. If such an argument were upheld, that would amount to calling in question, contrary to the principle of legal certainty, parts of Decision 93/82 which have become definitive.

62 It also follows that the Commission was entitled to base the contested decision on the parts of Decision 93/82 that were not annulled for the purpose of imposing a fine on the applicant by way of a penalty for the abuses established in that decision.

63 In that regard, neither Regulation No 4056/86 nor Regulation No 17 expressly precluded the formally separate adoption, on two distinct legal bases, of two distinct measures, namely the decision establishing the infringement (in the case of Regulation No 4056/86, on the basis of Article 11(1)) and the decision imposing the fine (on the basis of Article 19(2) of that regulation).

64 It makes no difference, moreover, that 12 years elapsed between the adoption of Decision 93/82 and the adoption of the contested decision, since the contested decision was adopted in compliance with the time-limits provided for in Regulation No 2988/74.

65 The applicant's argument that substantive Community competition law is criminal in nature and that the Commission was therefore required to take into account in the contested decision the evolution in such law which is alleged to be favourable to the applicant must also be rejected.

66 In effect, the premiss of that argument is incorrect. It follows from the wording of Article 19(4) of Regulation No 4056/86 that even the fines imposed under that provision are not of a criminal law nature. Furthermore, it has been held that the effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of criminal law were accepted (see, to that effect, Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 97). It is appropriate to observe, moreover, that *Hüls* v *Commission*, on which the applicant relies, is not relevant, since in that judgment the Court of Justice merely held that the principle of the presumption of innocence applied to procedures relating to infringements of the competition rules applicable to undertakings that might result in the imposition of fines or periodic penalty payments (paragraph 150). Last, it must be held that the applicant has put forward no other valid argument in support of its submission, which must be rejected.

67 It follows that the applicant's argument must be rejected, without there being any need to examine whether or not the competition rules by reference to which the infringements at issue were established and penalties imposed in Decision 93/82 became more flexible to the applicant's advantage during the period between the judgment of the Court of Justice in *CMB*, which approved the analysis carried out in Decision 93/82 as regards the establishment of the infringements, and the contested decision. As a subsidiary point, it is appropriate to observe that, even on the assumption that competition law had evolved in a manner favourable to the applicant, which the applicant has wholly failed to demonstrate, the parts of Decision 93/82 establishing the infringements and the applicant's participation in them could not be impugned without infringing the principle of legal certainty and the principle of *res judicata*.

68 As regards the applicant's argument relating to the alleged new facts which have arisen since Decision 93/82, it must be held that, even on the assumption that such facts did occur, they could not have been taken into account because of the principle of *res judicata*, which is also applicable to the Commission, and the principle of legal certainty, and also because the complex assessments made by the Commission, particularly in competition matters, must be considered in the light only of the evidence available to it at the time when it made them (Case T-251/97 T. P*ort* v *Commission* [2000] ECR II-1175, paragraph 38).

69 Last, the argument relating to what is alleged to be the imprecise nature of the original objections, which is based solely on an assertion, must also be rejected, in so far as the applicant has not shown that its situation might have been different if the original objections had not been imprecise, as it claims.

70 It follows from the foregoing that the third plea must be rejected as unfounded.

Second plea: breach of the rights of defence

— Arguments of the parties

71 The applicant maintains that there has been a breach of its rights of defence on the ground that the Commission, in spite of changes in the law on certain 'fundamental points', refused to discuss whether the abuses had indeed taken place and limited the discussion to the fine. As the applicant had received only a 'copy for comments' of the 1990 SO, it was unable at the material time to defend itself as a person to whom the decision was directly addressed, and who was potentially liable to pay a fine, would have done. As the Court of Justice annulled the fine which had been imposed on the

applicant in Decision 93/82 on the ground that the 1990 SO had not been addressed to the applicant, the Commission was under a duty to reopen the procedure in its entirety by sending a 'full' statement of objections to the applicant, thus enabling the applicant to discuss the infringements established in Decision 93/82. The 2003 SO therefore does not fulfil its function of giving undertakings all the information necessary to enable them to defend themselves properly before the Commission adopts a final decision (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, paragraph 42).

72 The Commission claims that the applicant, unlike another undertaking which contested Decision 93/82, which was also addressed to it, chose to rely on those arguments in the proceedings relating to the action brought against Decision 93/82 only with respect to the fine, thus demonstrating that it had considered that it had properly defended itself at the material time with respect to the establishment of the infringements. Next, the Commission contends that the principle of legal certainty precludes the applicant from raising those arguments in the present proceedings and relies in that regard on the judgment of the Court of Justice in *PVC II* (paragraph 73), where it was held that the procedure intended to replace an act which has been annulled may be resumed at the point at which the illegality occurred. That principle should apply for even stronger reasons in the present case, since Decision 93/82 was annulled by the judgment of the Court of Justice in *CMB* only with respect to the part concerning the fines. Last, in the present case, the initial procedural defect was purged, since the applicant was an addressee of the 2003 SO in which it was informed that a fine might be imposed on it in its individual capacity.

— Findings of the Court

73 By the present plea, the applicant claims that the fact that it was given the opportunity to dispute that the infringements had in fact taken place during the proceedings in the action brought against Decision 93/82, but, it asserts, was not given the

opportunity to do so during the administrative procedure preceding the adoption of that decision, constitutes a breach of its rights of defence during that administrative procedure.

74 At the hearing, the applicant was asked how it would have been in a better position to defend itself if the 1990 SO had been addressed directly to it, rather than being defended, as a member of the shipping conference, by Cewal. The applicant failed to provide a convincing reply, but merely referred to the compromise which, it claims, inspires any line of defence taken by a trade association whose members, being competitors, have different, or indeed diverging, interests. Such a general argument is not convincing in the present case, in so far as it was precisely in the interest of all the members of Cewal, without exception, to dispute the existence of the infringements established by the Commission in the 1990 SO.

75 It is for the applicant to adduce tangible proof that its situation might have been different, that is to say, that Directive 93/82 might have been adopted in different terms as regards the establishment of the abuses imputed to the applicant if it had been in a position to submit its comments not as the addressee of a copy of the 1990 SO but as a direct addressee of that statement of objections. In that regard, it must be borne in mind that the applicant was formally invited not only to submit its written comments on the 1990 SO, which in fact it did, but also to take part in the administrative hearing, which took place in the applicant's presence on 22 October 1990.

76 In any event, even on the assumption that the applicant was not able to defend itself in the best possible way as regards the establishment of the infringements during the initial administrative procedure, which it has failed to demonstrate, that alleged breach of its rights of defence cannot be successfully relied on in the present case, since Decision 93/82 has become final as regards the establishment of the infringements. It should be borne in mind (see paragraphs 59 to 61 above) that the principle

of legal certainty precludes any challenge of any parts of Decision 93/82 that were not annulled.

77 Furthermore, the 2003 SO identifies the applicant as a person to whom the fine is addressed. The applicant responded at length and disputed the infringements as far as their establishment was concerned but did not put forward the slightest argument either closely or distantly related to the present plea. The objections raised by the Commission in the contested decision are strictly identical to those set out in the 2003 SO (which are themselves identical to the objections in Decision 93/82). The applicant was also given a hearing before the Hearing Officer. It was offered access to the file. It was therefore able formally to exercise its rights of defence. Contrary to the applicant's contention, the 2003 SO therefore wholly fulfilled its function.

78 As regards, last, the alleged breach of the applicant's rights of defence, put forward in the context of the first plea, resulting from its inability to locate old documents or former employees because of the time that had elapsed since Decision 93/82 (see paragraph 17 above), it must be considered that the applicant has also failed to adduce proof of such a breach or to indicate precisely which documents or witness statements would have been of use to it. It should be borne in mind, moreover, that the applicant did not take the opportunity offered to it to have access to the file (recital 49 in the preamble to the contested decision), whereas, as the Commission observed at the hearing, all the documents were in the file. In any event, it would appear that what are alleged to be the missing documents to which the applicant refers deal with the reality of the abuses. As those abuses were established definitively in Decision 93/82, the question whether or not they did indeed take place cannot be reopened without undermining the principles of *res judicata* and legal certainty.

79 It follows from the foregoing that the second plea must be rejected as unfounded.

Fourth plea: insufficient reasoning and lack of justification for the contested decision

— Arguments of the parties

80 The applicant maintains, in substance, that the contested decision does not contain a sufficient statement of reasons, on the ground that the Commission failed to establish either that Cewal held a dominant position, or that any of the three alleged abuses identified did indeed take place, or that they had the effect of foreclosing the market for the purpose of Article 82 EC. Furthermore, the contested decision does not put the Court in a position to review the merits and the amount of the fine in the exercise of its unlimited jurisdiction.

81 The Commission replies, in substance, that the present plea, which is linked with the second plea and overlaps with the third plea, must be rejected. In effect, this plea, in flagrant breach of the time-limits for bringing actions and the principles of legal certainty and *res judicata*, seeks a re-examination not only of the merits of the parts of Decision 93/82 that were not annulled but also of the parts of the judgment of the Court of Justice in *CMB* and the judgment of the Court of First Instance in *CMB*, both of which are final, which rejected the pleas seeking annulment of the findings of Decision 93/82 as regards the abuses committed by the applicant.

— Findings of the Court

82 It has consistently been held that the obligation to provide a statement of reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested

measure. Accordingly, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to defend their rights and the Court to exercise its power of review (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19, and Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraph 62). In the case of a decision adopted pursuant to Article 82 EC, that principle requires that the contested decision mentions facts forming the basis of the legal grounds of the measure and the considerations which led to the adoption of the decision (see, to that effect, Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 57, not appealed on that point).

83 In reality, the present plea is based on the presumption that the Commission ought to have re-examined the case as regards the establishment of the infringements. The contested decision is a decision imposing a fine within the meaning of Article 19(2) of Regulation No 4056/86 (see paragraph 22 above). The requisite statement of reasons with respect to the fine is provided at recitals 67 to 111 in the preamble to the contested decision. Furthermore, the approach taken in the contested decision, which consists in relying, for the purpose of imposing the fine, on the parts of Decision 93/82 which were not annulled and were definitive, in that they establish the abuses, was found to be justified in the context of the assessment of the third plea. It is clear, moreover, that that approach was explained to the requisite legal standard by the Commission. It is apparent upon reading the contested decision (recitals 17 and 41) and, in addition, the 2003 SO (in particular, paragraph 27) that, as regards the substantive existence of the abuses committed by the applicant, the Commission simply referred to the parts of Decision 93/82 which establish those infringements, which are summarised in the contested decision (recitals 21 to 40). The Commission also stated in the contested decision (recitals 42 to 46) that the parts of Decision 93/82 which were not annulled became final by virtue of the principles of legal certainty and *res judicata*.

84 It is therefore an undeniable fact that the applicant was able to ascertain all the reasons for the contested decision. Furthermore, the Court was fully able to exercise its jurisdiction to review the legality of the contested decision.

85 It follows from the foregoing that the contested decision contains a sufficient statement of reasons.

86 In those circumstances, the fourth plea must be rejected as unfounded.

The form of order sought in the alternative, seeking a reduction in the amount of the fine

Fifth plea: the fine is discriminatory

— Arguments of the parties

87 The applicant maintains that the imposition of 'virtually all' of its fine is discriminatory. The Compagnie maritime du Congo ('CMDC'), formerly the Compagnie maritime zaïroise ('CMZ'), which, under the goods-sharing system provided for in Article 3(e) of Regulation No 4056/86, gained most from the abuses owing to its preponderant share in the earnings pool, ought to have been fined as well. In addition, the fact that the president and secretary-general of Cewal were members of the applicant's management board, the fact that Cewal's secretariat-general was located in the same building as the applicant, the practices which are alleged to have ensured the applicant's supremacy, which are referred to in the contested decision, are not conclusive grounds. Cewal was a separate entity from its members and all its

decisions were adopted unanimously or by a majority of two thirds of its members. Nor is the ground relating to the applicant's acquisition of control of Dafra-Lines and Deutsche Afrika Linien-Woermann Linie conclusive, as the dates on which control of those undertakings was acquired do not coincide with the period during which the alleged abuses were committed. As regards the sale or transfer of CMZ's rights to the applicant or to Cewal, this concerned only short-term agreements between the applicant and CMZ, during which CMZ continued to exercise in full its role as a shipping operator. CMZ used its own vessels again in 1993. That practice, moreover, took place after the alleged abuses had ceased. In the period during which the abuses are alleged to have been committed, CMZ provided a regular shipping service. Last, CMDC is the only member of Cewal still active on the route between Europe and the Democratic Republic of the Congo (now Zaire). Furthermore, the Commission's approach, namely that the applicant had the greatest responsibilities within Cewal and that its conduct had a particularly significant impact on the market, is contrary to the Commission's practice and to the collective dominant position theory. Last, at the time of adoption of the contested decision, CMDC was no longer experiencing the financial difficulties which had led the Commission not to impose a fine on it in Decision 93/82, whereas the applicant itself is experiencing such difficulties.

88 In those circumstances, the applicant contends that the 'only justification', provided at recital 88 in the preamble to the contested decision, for not imposing a fine on CMDC, namely that no other member of Cewal 'could claim to be in a situation identical to that of CMZ … [which] had to give up its ships and was no longer carrying out any maritime transport business itself', is not convincing. In fact, it is the applicant that is now in the situation of no longer having any ships and of no longer carrying out any maritime transport business. On the basis of the Commission's reasoning, therefore, it is CMDC, and not the applicant, that ought to pay the fine.

89 The applicant also submits that the Commission acknowledged that it took 2003 as the reference year for the purpose of setting the fine, rather than 1992. In those circumstances, the Commission ought to have examined the discriminatory nature

of the fine in 2004 and to have taken into account the fact that CMDC is now active in the relevant sector and is no longer experiencing the difficulties that led the Commission not to impose a fine on it in Decision 93/82.

90 Nor can the Commission properly rely on the judgment of the Court of First Instance in *CMB*, which was delivered on the basis of the situation existing in 1992, to discount the complaint alleging unequal treatment. On the contrary, when applied to the applicant's situation in 2004, paragraph 237 of that judgment should have the effect of exempting the applicant from payment of any fine, since it is no longer carrying out the activity in question.

91 The Commission disputes those arguments.

— Findings of the Court

92 It must be borne in mind that, according to consistent case-law, there is a breach of the principle of equal treatment only where comparable situations are treated differently or where different situations are treated in the same way, unless such difference in treatment is objectively justified (Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraphs 155 and 156; Case T-48/02 *Brouwerij Haacht* v *Commission* [2005] ECR II-5259, paragraph 108; and Case T-303/02 *Westfalen Gassen Nederland* v *Commission* [2006] ECR II-4567, paragraph 152).

93 In this case, the applicant claims to have suffered discrimination by comparison with the other member undertakings of Cewal, in particular by comparison with CMDC,

which, although placed at the time of adoption of the contested decision in a situation alleged to be comparable to the applicant's when Decision 93/82 was adopted, did not receive a fine.

94 Where an undertaking has acted in breach of Article 82 EC, it cannot escape being penalised altogether on the ground that other traders have not been fined when, as in the present case, those traders' circumstances are not even the subject of proceedings before the Courts (see, concerning undertakings which infringed Article 81 EC, *Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 197; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, paragraph 430; and *Peróxidos Orgánicos* v *Commission*, paragraph 77).

95 In any event, the Court considers that, in the exercise of its unlimited jurisdiction under Article 21 of Regulation No 4056/86, within the meaning of Article 229 EC, it is not required to reduce the amount of the fine imposed on the applicant to take into account the alleged discrimination suffered by the applicant by comparison with CMDC.

96 On the one hand, the applicant and CMZ cannot be considered to have been in comparable situations when Decision 93/82 was adopted. In that regard, it is sufficient to recall that the degree of the applicant's participation in the infringements was greater. Furthermore, CMZ's financial and commercial situation was quite different from the applicant's when Decision 93/82 was adopted, so that the Commission did not infringe the principle of equality by imposing a higher fine on the applicant than on the other members of Cewal and not imposing a fine on CMZ.

97 On the other hand, the similarity in situations on which the applicant relies in this plea is linked with a change in its own situation, which came about after the establishment of the infringements in Decision 93/82. Such a change in circumstances could not have been taken into account in the contested decision, which was intended to impose financial penalties for the infringements definitively established in Decision 93/82. It is solely for the purpose of complying with the maximum threshold of 10% of turnover, within the meaning of Article 19(2) of Regulation No 4056/86, achieved during the financial year preceding the adoption of the contested decision, that the Commission was required to take the applicant's new circumstances into account, which, moreover, it did (recital 111 in the preamble to the contested decision).

98 The fifth plea must therefore be rejected as unfounded.

Sixth plea: the fine is disproportionate

— Arguments of the parties

99 In support of this plea, the applicant essentially puts forward four complaints.

100 First, the infringements established are not serious. In that regard, Cewal lost market share to its competitor during the period when the infringements are alleged to have been committed, Cewal was accused of charging prices that were too low, and not prices that were too high, and the relevant market was 'microscopic'.

101 Second, the applicant claims that the novel nature of the finding of abuse of a collective dominant position in itself required, by reference to the Commission's diametrically opposite normal practice and the case-law, that only a token fine be imposed. The applicant also emphasises the novel nature, even today, of the alleged abuses, namely, in substance, that the abuse associated with the agreement with Ogefrem is the first case of abuse taking the form of pressure being brought to bear on a foreign government, that the abuse connected with the fighting ships practice entails an extension of the concept of predatory prices and that the loyalty rebates raise a new problem of the interpretation of Regulation No 4056/86.

102 Third, the applicant maintains that it cooperated with the Commission as a member of Cewal. Cewal put an end to the abuses several months before the 1990 SO was issued and also actively endeavoured to assist the Commission in the conflict of laws between the European Community, the Organisation for Economic Cooperation and Development (OECD) and the countries of western and central Africa. That cooperative approach should be regarded as an attenuating circumstance under 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').

103 Fourth, and last, the applicant contends that the calculation of the fine by reference to the duration of the infringements is incorrect. As the duration of the abuses 'varied between one and a half years and two years', the applicant is unable to understand why the Commission, without justification, increased the amounts of the fine by 15% or 20%, depending on the abuses, from the first year of the infringements, that is to say, in a way 'distinctly more significant' than permitted by the Commission's practice and the Guidelines.

104 The Commission disputes those arguments.

105 As regards, first of all, the serious nature of the abuses, the Commission contends that the fall in Cewal's market share during the period of the infringements, correlated with the increase in the competitor's market share, cannot undermine its assessment, which was based principally not on Cewal's market share but on a number of other factors, including normal freight rates, applied other than in the fighting ships practice, which were higher than the costs borne by the members and revealed weak competition. The Commission observes that, in any event, the judgment of the Court of First Instance in *CMB* confirms the serious nature of the infringements.

106 As regards, second, what is alleged to be the novel nature of the finding of an abuse of a collective dominant position in Decision 93/82 and what the applicant claims to be the resulting prohibition, according to the case-law, on imposing a fine, the Commission refers first of all to the judgment of the Court of First Instance in *CMB*, where it was held that it was lawful not to take account of the supposedly novel nature of the concept of a collective dominant position, as there was nothing novel in competition law about the objective of the abuses. The Commission also observes that the judgment of the Court of Justice in *CMB* clearly stated that the practices censured in Decision 93/82 did not constitute a new abusive practice.

107 As regards, third, the applicant's argument relating to what it claims to be its cooperative approach, and primarily the fact that Cewal quickly put an end to the abuses, the Commission contends that the Guidelines refer solely to the Commission's practice with respect to fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, and not to fines imposed pursuant to Article 19(2) of Regulation No 4056/86. However, even on the assumption that it were possible to apply the Guidelines by analogy in the present case, the applicant would be unable to rely on the attenuating circumstance in the present case, since the voluntary termination of the infringement before the Commission had opened its investigation was already sufficiently taken into account in the calculation of the duration of the infringement period and an undertaking can rely on the third indent of Section 3 of the Guidelines only where cessation of its unlawful conduct was prompted by the

Commission's involvement (Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 341). As regards the argument relating to the assistance provided by the applicant to the Commission in connection with the conflict of laws, the Commission disputes this and refers to the judgment of the Court of First Instance in *CMB*.

108 As regards, last, the applicant's argument relating to the duration of the infringements, the Commission contends that, even on the assumption that the Guidelines were applicable, the increase in the amount of the fine could, pursuant to Section 1.B of the Guidelines, be up to 50% in the case of infringements of medium duration (in general, one to five years), which authorises an increase of 10% per annum, also including the first 12 months of the infringement. The Commission states that such an increase is its consistent practice.

— Findings of the Court

109 It should be borne in mind at the outset that, contrary to the Commission's contention, the Guidelines are applicable by analogy to infringements of the transport rules established and penalised pursuant to Regulation No 4056/86 and, accordingly, to the present case (*CMA CGM and Others* v *Commission*, paragraph 242; Case T-66/99 *Minoan Lines* v *Commission* [2003] ECR II-5515, paragraph 270; and Case T-65/99 *Strintzis Lines Shipping* v *Commission* [2003] ECR II-5433, paragraph 158; see also, to that effect, Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraphs 1525, 1528 and 1571).

110 Furthermore, the fact that the Court of Justice, in its judgment in *CMB*, annulled Articles 6 and 7 of the operative part of Decision 93/82 on the sole procedural ground that the undertakings which had been fined according to the degree of their participation in the infringements had not been addressees of the 1990 SO, which identified only Cewal as a potential addressee of the fine, does not impair the validity of the parts of Decision 93/82 dealing with the characteristics of the abuses committed by Cewal, including those that might be taken into account in the calculation of the fine imposed on the applicant. In the exercise of its unlimited jurisdiction under Article 21 of Regulation No 4056/86, within the meaning of Article 229 EC, to assess the amount of the fine imposed on the applicant in the contested decision, the Court can therefore properly refer to those parts of that decision.

The gravity of the abuses

111 It must be borne in mind that in Decision 93/82 (recitals 102 and 103), the Commission considered that the abuses at issue were serious and intentional. Furthermore, in the 2003 SO (paragraphs 31 to 61) and then in the contested decision (recitals 67 to 84), the Commission continued to regard the abuses at issue as serious infringements. It considers, in particular, that the whole market (shipping traffic between the North Sea and the Congo) was affected.

112 It should also be borne in mind that, in the context of the principal form of order sought, namely that Decision 93/82 should be annulled, the applicant disputes the existence of infringements within the meaning of Articles 81 EC and 82 EC, that the members of Cewal were in a collective dominant position and also the abusive nature of the fighting ships and loyalty contracts practices. However, it did not deny that

the practices in question had been implemented in order to overcome the only competitor present on the market, and the applicant cannot therefore deny the deliberate and serious nature of the abuses in question.

113 The claim that the abuses in question were not serious must therefore be rejected.

The alleged novelty of the infringements

114 It must be borne in mind that, in Decision 93/82 (recitals 116 to 119), the Commission considered that the abuses at issue were not novel and that a reduction in the fine was not justified. In its judgment in *CMB* (paragraph 248), the Court of First Instance held that the infringements in question were not novel. That assessment was expressly approved by the Court of Justice as regards the fighting ships practice (judgment of the Court of Justice in *CMB*, paragraph 120).

115 In the 2003 SO (paragraphs 63 to 67), and then in the contested decision (recitals 101 to 106), the Commission maintained its initial approach.

116 The Court therefore considers that there is no reason to depart from its previous assessment. It must be held that the objective of the abusive practices in question, namely to drive the only competitor from the market, is not novel in competition law.

117 The complaint relating to the alleged novelty of the infringements at issue must therefore be rejected.

The alleged cooperation with the Commission

118 As regards, first of all, the assistance alleged to have been provided by Cewal to the Commission in the negotiations with non-member States or the OECD, it must be observed that, in its judgment in *CMB* (paragraph 239), the Court of First Instance held that such assistance had no bearing on the amount of the fine imposed in respect of three infringements of Article 82 EC.

119 In that regard, the Court considers that there is no reason to depart from its previous assessment.

120 As regards, next, the applicant's alleged cooperation in the termination of the infringements, after the Commission first became involved, according to consistent case-law, the Commission cannot be required, as a general rule, either to regard the continuation of the infringement as an aggravating circumstance or to consider that the termination of an infringement constitutes an attenuating circumstance (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 213). In effect, a reduction applied in such circumstances would duplicate the reduction for duration of the infringement which is applied in calculating the fine. Consequently, the Commission cannot be required to grant, in the exercise of its discretion, a reduction in the fine for termination of a manifest infringement, whether that infringement was terminated before or after the Commission became involved.

121 The complaint relating to the applicant's alleged cooperation with the Commission must therefore be rejected.

The duration of the infringements

122 It must be borne in mind at the outset that, according to Decision 93/82 and, where appropriate, the findings of the Court of First Instance in its judgment in *CMB* (paragraphs 241 and 242), the agreement with Ogefrem constituted an infringement from the entry into force of Regulation No 4056/86, that is to say, from 1 July 1987, until the end of September 1989, namely for two years and three months. The infringement linked with the loyalty arrangements took place from 1 July 1987 to the end of November 1989, namely for a period of two years and five months. Last, the abuse linked with the fighting ships practice took place from May 1988 to the end of November 1989, namely for one and a half years.

123 The abuses in question belong to the category of infringements of average duration (from one to five years) within the meaning of the Guidelines. In that regard, it follows from Section 1.B of the Guidelines that, for infringements of that duration, the increase in the fine for the duration of the infringement may be up to 50% of the amount set to reflect the gravity of the infringement.

124 The Guidelines are silent as to whether the first year of the infringement warrants an increase of 10% in the amount of the fine set to reflect the gravity of the infringement. In that regard, the Court has held that, in the light of Section 1.B of the Guidelines, the very short duration of an infringement — that is to say, a duration of under one year — meant only that no additional amount should be imposed on the amount calculated by reference to the gravity of the infringement (*CMA CGM and Others* v *Commission*, paragraph 283).

125 It follows, by contrary inference, that, as the abuses in question lasted for more than one year, the Commission was correct to consider implicitly in the contested decision that every full year of the infringement could lead to an increase of 10% in the amount set to reflect the gravity of the infringement and that, for periods of less than a year, every period greater than six months could justify an increase of 5%.

126 The additional amounts of 20% for the agreement with Ogefrem and the loyalty arrangements, and 15% for the abuse linked with the fighting ships, are therefore justified.

127 The complaint that the increase in the amount of the fine to reflect the duration of the infringements was not justified must therefore be rejected.

128 It follows from the foregoing that the sixth plea must be rejected as unfounded.

Seventh plea: breach of the Commission's normal practice

— Arguments of the parties

129 The applicant maintains, in substance, that in shipping conference cases, with the exception of the present case, the Commission has always based the fine on the worldwide turnover of the undertakings concerned in the liner transport sector, generated

during the business year preceding the year in which the decision imposing the fine was adopted. The Commission inexplicably departed from that practice, without providing an objective and non-discriminatory basis for the imposition of the fine. The applicant claims, furthermore, that the Commission departed from the indications given in the 2003 SO and that the choice of 1991, rather than 2003, is particularly arbitrary (Case T-142/89 *Boël* v *Commission* [1995] ECR II-867, paragraph 133) and that the Commission fails to state the reasons on which it is based.

130 The Commission observes that, since the adoption of the Guidelines in 1998, the amount of the fine has no longer been calculated by reference to the turnover of the undertaking which committed the infringement. In that regard, the contested decision is not actually based on the applicant's turnover for the purpose of calculating the fine, but on all the other factors indicated in the 2003 SO. Moreover, the choice of reference year is unimportant since, in each case, the threshold of 10% of the applicant's turnover was not exceeded.

— Findings of the Court

131 The Commission is not required, when assessing fines in accordance with the gravity and duration of the infringement in question, to calculate the fines on the basis of the turnover of the undertakings concerned (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 255, and Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraphs 484 and 496).

132 It should be observed, moreover, that the Commission is not bound by its previous decisions, a fortiori where the decisions invoked pre-date the application of the Guidelines (see, to that effect, *Bolloré and Others* v *Commission*, paragraph 650). In any event, the Commission's previous practice does not itself serve as a legal framework for fines imposed in competition matters, since that framework is established solely in Regulation No 4056/86 (*Tokai Carbon and Others* v *Commission*, paragraph 191, delivered within the framework of Regulation No 17 and applicable in this case by analogy).

133 The Commission was therefore entitled to depart from its previous practice and to disregard the applicant's turnover when calculating the amount of the fine, particularly since it has a wide discretion when determining the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (see, to that effect and by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 172, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 60 and the case-law cited).

134 It must be held, moreover, that the choice of reference year is neutral for the purposes of calculating the threshold of 10% of turnover that must not be exceeded, since in the light of the figures provided in the contested decision and not disputed by the applicant, the amount of the fine imposed remains below that threshold by reference to the applicant's turnover, with respect to both its 1991 turnover and its 2003 turnover.

135 It follows that the seventh plea must be rejected as unfounded.

Eighth plea: misuse of powers

— Arguments of the parties

136 The applicant claims, in substance, that the failure to impose a fine on CMDC can be explained only by political reasons, wholly unconnected to Community competition law, which seek, without directly attacking Zaire (now the Democratic Republic of the Congo), through CMZ, which was wholly owned by the Zairean State, to secure the abolition of the Zairean system for the allocation of goods. A number of factors support that argument, such as the circumstances surrounding the initiation of the proceedings that culminated in the adoption of Decision 93/82, following a number of complaints about the Zairean legislation and following the failure of certain negotiations between the Community and Zaire in the context of an old dispute concerning the interpretation of the code of the United Nations Conference on Trade and Development (Unctad). In Decision 92/262/EEC of 1 April 1992 relating to a proceeding pursuant to Articles 85 and 86 of the EEC Treaty (IV/32.450: French-West African shipowners' committees) (OJ 1992 L 134, p. 1), adopted in parallel with Decision 93/82, the Commission did not impose a fine with respect to African cargo lines. Furthermore, senior national or Commission officials stated, before the adoption of Decision 93/82, respectively, that competition law was not the best means of resolving the question of cargo transport in Africa and that there would be a political problem if CMZ were ordered to pay a fine. Last, the applicant contends that the Commission cannot rely on the judgment of the Court of First Instance in *CMB*, as the plea alleging misuse of powers was held at the time to be an 'entirely different plea'. In those circumstances, the contested decision was adopted for a purpose other than that stated (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023).

137 The Commission submits that it is unable to see any indication of a misuse of powers in the failure to impose a fine on CMDC and refers to the judgment of the Court of First Instance in *CMB*, where the Court rejected an identical plea. The Commission emphasises that the arguments which the applicant raises in this plea relate to facts

pre-dating Decision 93/82 and seek, in reality, to challenge once again the merits of that decision. The Commission notes, in that regard, that the applicant has not even sought to ascertain whether the Congolese legislation, which, according to its argument, the contested decision was intended to circumvent, was still in force when the contested decision was adopted.

— Findings of the Court

138 According to consistent case-law, a decision is vitiated by a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated (Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 99, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68).

139 It must also be borne in mind that the Court of First Instance, at paragraph 238 of its judgment in *CMB*, rejected the argument alleging misuse of powers. In the present case, the applicant has totally failed to substantiate its assertion that the argument on which the Court adjudicated in its judgment in *CMB* was quite different from the argument on which it now relies. On the contrary, the arguments put forward in support of the plea raised in the present case seem to correspond very broadly to the argument submitted for the Court's assessment in 1993 concerning Decision 93/82. In any event, as the Court stated previously when examining the fifth plea (see paragraph 96 above), the Commission was entitled not to impose a fine on CMZ in Decision 93/82 on the ground that its commercial and financial circumstances were different from those of the other participants in the infringements at the material time. Moreover, even if it is true that the investigation that culminated in the adoption of Decision 93/82 was initiated by the Commission following the failure of certain negotiations through diplomatic channels, the fact that the Community had first adopted that approach without success does not prevent the Commission from exercising its powers in competition matters.

140 In any event, it follows from the structure and the wording of the contested decision that it was adopted to compensate for the annulment by the judgment of the Court of Justice in *CMB* of the fine initially imposed on the applicant in Decision 93/82 for its infringements of Article 82 EC. It does not appear that the supposed reasons put forward by the applicant for the adoption of the contested decision, set out at paragraph 136 above, all of which relate to facts preceding the adoption of Decision 93/82, are the real grounds for its adoption, and the failure to impose a fine on CMDC therefore does not constitute a misuse of powers.

141 The eighth plea must therefore be rejected as unfounded and, accordingly, the action in its entirety must be dismissed.

Costs

142 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to the second subparagraph of Article 87(3) of those rules, the Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.

143 It has, admittedly, been held that the Commission had not been in breach of the principle that it must act within a reasonable time (see paragraphs 39 to 47 above). It must be borne in mind, however, that the Commission delayed reopening the administrative procedure. Some 37 months, that is more than three years, elapsed between the delivery of the judgment of the Court of Justice in *CMB* (on 16 March 2000) and the issue of the 2003 SO (on 15 April 2003). As the Commission did not reopen the procedure concerning the establishment of the infringements, the drafting of the

2003 SO, a document of only 12 pages, was not a major task. In fact, all that needed to be redrafted was a passage on the purpose of resuming the procedure, a summary of the infringements established in Decision 93/82, as confirmed by the judgment of the Court of Justice in *CMB* and the judgment of the Court of First Instance in *CMB*, a passage on the method of calculating the fine and a section on compliance with the limitation periods in the light of Regulation No 2988/74. It must also be borne in mind that that delay, for which no convincing explanation was given and which led the Commission to reduce of its own initiative the amount of the fine by EUR 150 000, that is, approximately 4% by reference to the amount fixed in the contested decision, is wholly attributable to the Commission.

144 That delay formed the basis of a part of the applicant's application, mainly of its first plea.

145 The Court will make an equitable assessment of the case in ruling that the applicant is to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission and that the Commission is to bear one third of its own costs and to pay one third of the costs incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Compagnie maritime belge SA to bear two thirds of its own costs and to pay two thirds of the costs incurred by the Commission and the Commission to bear one third of its own costs and to pay one third of the costs incurred by Compagnie maritime belge.

Czúcz Cooke Labucka

Delivered in open court in Luxembourg on 1 July 2008.

E. Coulon O. Czúcz

Registrar President