COMMISSION DECISION

of 30.04.2004

relating to a proceeding under Article 82 of the EC Treaty

(COMP/D/32.448 and 32/450 - Compagnie Maritime Belge)

(notified under document number C(2004) 1779)

(Only the Dutch text is authentic)

(2005/480/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport[1], and in particular Articles 11 (1) and 19 (2) thereof,

Having regard to the applications lodged on 10 and 20 July 1987, for a finding of an infringement pursuant to Article 10 of Regulation (EEC) No 4056/86,

Having regard to Commission Decision 93/82/EEC of 23 December 1992 relating to a proceeding pursuant to Articles 85 (IV/32.448 and IV/32.450; Cewal, Cowac and Ukwal) and 86 (IV/32.448 and IV/32.450; Cewal) of the EEC Treaty[2],

Having regard to the Commission decision to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission and to present any other comments in accordance with Article 23 (1) of Regulation (EEC) No 4056/86,

1 OJ L 378, 31.12.1986, p. 4. (Hereafter referred to as "Regulation 4056/86).

2 OJ L 34, 10.2.1993, p.20.

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport,

Having regard to the final report of the hearing officer in this case[3],

Whereas:

I. INTRODUCTION

(1) Through the present decision the Commission intends to impose a fine on Compagnie Maritime Belge N.V./S.A., hereinafter 'CMB', for abuses of a dominant position it has committed between July 1987 and November 1989 as a member of the liner shipping conference Associated Central West Africa Lines (hereinafter 'Cewal').

II. PARTY TO THE PROCEEDINGS

(2) CMB is the holding company of the CMB group. The group's activities include ship owning and - managing and shipping operations.

(3) Until 1991, CMB was also active in liner shipping. In that capacity it was a member of Cewal, a shipping conference that existed between the beginning of the 1970s and the mid-1990s. Cewal was made up of shipping companies operating a regular liner service between the ports of Zaïre and Angola and those of the North Sea, with the exception of the United Kingdom. Cewal's secretariat was in Antwerp.

III. THE PROCEDURE

(4) On 23 December 1992, the Commission adopted Decision 93/82/EEC (hereinafter 'the original decision') establishing, *inter alia*, that Cewal and two other liner conferences, Continent West Africa Conference ('Cowac') and United Kingdom West Africa Lines Joint Service ('Ukwal') and the undertakings who were members of those conferences had infringed Article 85, par. 1 of the EC Treaty (presently Article 81 par. 1 and referred to below as such[4]). By engaging in three different forms of abuse of dominant position the undertakings that were members of Cewal had also infringed Article 86 of the

3 OJ

4 Article 1 of the original decision.

EC Treaty (presently Article 82 EC[5] and referred to below as such). The undertakings were ordered to bring the infringements to an end[6].

(5) As to the infringements of Article 82 EC the Commission found, in particular, that the members of Cewal had a joint dominant position on the shipping routes between Zaïrean ports and northern European ports. They had abused that dominant position by insisting on compliance by the Zaïrean authorities on an exclusivity agreement, by using the method of 'fighting ships' to remove their principal competitor from the market, and by using loyalty contracts and blacklists.

(6) In the original decision, the Commission imposed fines for infringement of Article 82 EC on four of the member undertakings of Cewal, as follows:
- CMB: ECU 9,6 million,
- Dafra-Lines: ECU 200 000,
- Nedlloyd Lijnen BV: ECU 100 000,
- Deutsche Afrika Linien-Woermann Linie: ECU 200 000.

(7) All four companies submitted applications for annulment of the original decision to the Court of First Instance ("CFI").

(8) An application for annulment to the CFI was also submitted by Compagnie Maritime Belge Transport, a company belonging to the CMB group of companies to which CMB's liner business had meanwhile[7] been contributed in kind (hereinafter 'CMBT').

(9) In its judgement of 8 October 1996 (hereafter 'the CFI judgment') the CFI dismissed the applications for annulment of the original decision[8].

(10) However, the CFI reduced the amount of the fines imposed on Cewal's individual members as follows:
- CMB: ECU 8 640 000,
- Dafra-Lines: ECU 180 000,
- Nedlloyd Lijnen BV: ECU 90 000,
- Deutsche Afrika-Linien GmbH & Co.: ECU 180 000.

(11) CMB, CMBT and Dafra-Lines appealed the CFI judgement to the European Court of Justice ("ECJ"). In its judgment of 16 March 2000[9] (hereafter 'the ECJ

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5 Article 2 of the original decision.

6 Article 3 of the original decision.

7 The agreement was signed on 7 May 1991 with retroactive effect as from 1 January 1991.

8 Joined cases T-24/93, T-25/93, T-26/93 and T-28/93 *CMB, CMBT and Dafra-Lines v Commission* [1996] ECR II-1201.

judgment') the Court confirmed the CFI judgment in all material respects. It rejected all appeal grounds submitted in relation to the substance of the original decision;

- but annulled the paragraphs of the original decision imposing the fines
- and dismissed the remainder of the appeal, including all grounds related to the substantive findings of the original decision[10].

(12) The Court annulled the fines because the Commission had failed to indicate clearly in the statement of objections

- that it was contemplating imposing fines on each individual member of Cewal and
- that the amounts of the fines would be fixed in accordance with an assessment of the participation of each company in the conduct constituting the alleged infringement[11].

(13) Following the judgment, the Commission repaid the fines paid by CMB and Dafra-Lines[12].

(14) On 16 April 2003 the Commission sent CMB and Dafra-Lines a new statement of objections informing them that it intended to adopt a new decision imposing fines on them for the infringements of Article 82 EC established by the Commission in the original decision, the appeal against which had been rejected by the CFI and ECJ. In the statement of objections, the Commission also made CMB and Dafra-Lines explicitly aware that it intended to impose fines on them individually, and that the amount of the fines imposed would be fixed in accordance with an assessment of the participation of each company in the conduct constituting the infringement.

(15) On 1 May 2003 Dafra-Lines' lawyers informed the Commission that the company had been liquidated on 4 March 2003. The procedure against Dafra-Lines was therefore discontinued.

(16) On 16 July 2003, CMB submitted a reply to the statement of objections, also requesting to be heard. A hearing took place on 24 September 2003.

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9 Joined cases C-395/96 P and C-396/96 P *CMB, CMBT and Dafra-Lines v Commission* [2000] ECR I-1365.

10 Paragraphs 141-149 of the ECJ judgement.

11 Since no fine was imposed on CMBT, the judgement did not have any consequences vis-à-vis this company.

12 In relation to the repayment of the fine a dispute arose between the Commission and the parties regarding the payment of interest over the amount of the fine. The dispute was settled on 11 December 2001. On 15 October 2002, the last payment on the basis of that settlement was made by the Commission to the parties.

IV. THE BEHAVIOUR OR PRACTICES WHICH ARE THE SUBJECT OF THE ORIGINAL DECISION

(17) The present decision refers to the substantive findings of the original decision. It is not meant to supplement or amend the facts presented or the infringements established in the original decision. What follows is a descriptive summary of the elements of the original decision that form the basis of the infringements established and how these were assessed by the CFI and ECJ.

4.1 Infringements of Article 81 of the EC Treaty

(18) In the original decision the Commission found that there were agreements between the Cewal, Cowac and Ukwal conferences under which members of one conference had to refrain from acting as an independent shipping company in the area of another conference. The Commission established that these agreements infringed Article 81 of the Treaty[13].

(19) The CFI rejected the applicants' claims that there were no such agreements. It also rejected the applicants' claims that Article 81 of the EC Treaty had not been infringed because the agreements fell outside the scope of this prohibition or qualified for exemption under Article 3 c) of Regulation 4056/86[14].

(20) This finding by the CFI was not contested in the appeal procedure.

4.2 Infringements of Article 82 of the EC Treaty

4.2.1 Assessment of joint dominance

(21) In the original decision, the Commission also established that the agreement between the members of Cewal constituted an agreement between economically independent entities which enabled economic links to be formed that could give these entities jointly a dominant position in relation to other operators on the same market[15].

(22) This finding was confirmed by the CFI, stating that the Commission had sufficiently proved that there were links between the companies such that they adopted uniform conduct on the market. According to the CFI, in such circumstances the Commission was fully entitled to consider that Article 82 EC could apply, subject to the other requirements of that provision being met[16].

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13 See paragraphs 33-40 of the original decision.

14 See paragraphs 47-52 of the CFI judgment.

15 See paragraphs 49-51 of the original decision.

16 See paragraph 67 of the CFI judgment.

(23) The ECJ held that a liner conference, as defined in Regulation 4056/86, by its very nature and in the light of its objectives, can be characterised as a collective entity which presents itself as such on the market *vis-à-vis* both users and competitors[17]. The ECJ also noted that the applicants had not disputed either the definition of the relevant market or the evidence showing the dominant position of the Cewal conference on that market. It also noted that the applicants had not disputed the accuracy of the matters referred to by the CFI when deciding that it was necessary to assess the position of the Cewal members on the relevant market collectively, either. The ECJ determined that the CFI had not erred in law by stating that, in this case, the Commission had shown to the requisite legal standard that the Cewal agreement, as it had been implemented, enabled the conduct of the members of the conference to be assessed collectively.

4.2.2. Existence of a dominant position

(24) The Commission furthermore established that the parties collectively had a dominant position on the market consisting of the whole of the routes on which Cewal's members operated between Zaïre and northern European ports; trade between the northern European ports and Zaïre was in principle reserved exclusively for Cewal on the basis of an agreement between Cewal and the 'Zaïrean Maritime Freight Administration' (the Ogefrem agreement). Moreover, the tonnages announced by Cewal accounted for 89,7% of all liner shipping cargoes carried on the relevant market in 1989 and 81,3 % in 1991. Apart from this very large market share, according to the original decision, Cewal's power also stemmed from a number of other factual circumstances[18].

(25) The CFI found that the Commission was entitled to conclude that there was a dominant position. It rejected the applicants' claims that the Commission had solely based its findings regarding a dominant position on the existence of high market shares, that Cewal's members had lost market share to only 64%, and that the Commission had fictitiously increased Cewal's market share by ignoring transport from and to French ports[19].

(26) These findings by the CFI were not contested in the appeal procedure before the ECJ.

4.2.3 Abuses

Ogefrem agreement

(27) The Commission established that by actively participating in the implementation of the Ogefrem agreement and repeatedly asking that it be

17 See paragraphs 27-48 of the ECJ judgement.

18 See paragraphs 57-61 of the original decision.

19 See paragraphs 69-82 of the CFI judgment.

strictly complied with in order to remove the only independent shipping operation authorised by Ogefrem from the market, the members of Cewal had infringed Article 82 EC[20].

(28) The CFI considered that an undertaking in a dominant position which enjoys an exclusive right with an entitlement to waive that right is under a duty to make reasonable use of the right of veto conferred on it in respect of third parties' access to the market. The Court held that in this case the members of Cewal did not do so. According to the CFI, the Commission was therefore entitled to take the view that the members of Cewal had infringed Article 82 EC[21].

(29) The ECJ rejected the applicants' claim that the CFI had substituted for the complaint concerning Ogefrem a new complaint based on the applicant's alleged failure to make reasonable use of their right of veto. According to the ECJ, the CFI had not considered, either, that the exclusivity granted by the Ogefrem agreement constituted an abuse in itself. Instead, the CFI and the Commission had considered that the abuse consisted in the fact that Cewal had repeatedly insisted that the Zaïrean authorities strictly observe its exclusive right.

(30) The ECJ determined that it had been established in the present case that Cewal sought to rely on the contractual exclusivity provided for in the Ogefrem agreement in order to remove its only competitor from the market. Accordingly, the ECJ rejected the applicants' argument that there was a contradiction in the reasoning of the CFI judgment[22].

Fighting ships

(31) The Commission also established that Cewal used a method of designating vessels whose dates of sailing were closest to the sailings of its principal competitor and fixing special 'fighting rates' for the ships so designated (called the practice of 'fighting ships'), in order to drive it out of the market. The Commission held that the members of Cewal thus abused their dominant position[23].

(32) The CFI established that the Commission was lawfully entitled to conclude that the practice of fighting ships, as defined in the original decision, constituted an abuse of a dominant position as defined in Article 82 EC[24].

(33) The ECJ held that where a liner conference in a dominant position selectively cuts its prices in order deliberately to match those of a competitor, it derives a

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20 See paragraphs 63-67 of the original decision.

21 See paragraph 109 of the CFI judgement.

22 See paragraphs 72-88 of the ECJ judgement.

23 See paragraphs 73-83 of the original decision.

24 See paragraph 153 of the CFI judgement.

dual benefit. First, it eliminates the principal, and possibly the only, means of competition open to the competing undertaking. Second, it can continue to require its users to pay higher prices for the services that are not threatened by that competition.

(34) The ECJ deemed it not necessary to rule generally on the circumstances in which a liner conference may legitimately adopt lower prices in order to compete with a competitor. It held that is was sufficient for the present case to recall that the conduct at issue was that of a conference having a share of over 90% of the market in question and only one competitor. It held moreover that the applicants had never seriously disputed and even admitted that the purpose of the conduct was to eliminate the competitor from the market. With a view thereto the ECJ determined that the CFI had not erred in law in holding that the Commission's objections to the effect that the practice known as fighting ships as applied by Cewal constituted an abuse of a dominant position were justified.

Loyalty contracts and blacklists

(35) In the original decision the Commission also concluded that the use made of loyalty contracts, on the basis of which rebates were offered to shippers on condition that they would entrust 100% of their goods to the conference, constituted an abuse of a dominant position. Given the fact that in view of Cewal's market share shippers were able only occasionally to use the sole non-conference shipping company this practice was tantamount to unilaterally imposing loyalty contracts. The Commission also established that the same applied to Cewal's use of blacklists of shippers using the only independent shipping company, which aggravated even further the terms imposed under the loyalty contracts[25].

(36) In its judgment the CFI established that the loyalty contracts were not in conformity with Regulation 4056/86. The Court also ruled that the Commission had correctly found that the fact that Cewal, which at the time had more than 90% of the market, offered shippers only 100% loyalty contracts was in fact tantamount to imposing such contracts. The Court also found that minutes of the Zaïre Pool Committee made clear that Cewal actually made use of blacklists. The Court concluded that the Commission was entitled in law to conclude that the practice as a whole had the effect of restricting user's freedom and thereby affecting the competitive position of Cewal's only competitor on the market[26].

(37) The ECJ rejected the applicants' ground of appeal that a practice which falls under Regulation 4056/86 under normal competition cannot constitute an abuse of dominant position. It also rejected the applicants' plea that before imposing fines for a practice that falls under Regulation 4056/86 the Commission should withdraw the benefit of the block exemption.

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25 See paragraphs 84-86 of the original decision.

26 See paragraphs173-186 of the CFI Judgement.

4.2.4. Effect on inter state trade

(38) In the original decision the Commission also established that the practices in question affected trade between Member States given the fact that a shipping conference such as Cewal, made up of companies established in different Member States is liable to affect trade between Member States. This applies in particular to the practices concerned since their object was to obstruct a competitor made up of a Belgian and an Italian shipping company operating from several Community ports[27].

(39) In its judgement the CFI held that practices whereby a group of undertakings seeks to eliminate from the market their main established competitor in the common market are inherently capable of affecting the structure of competition in that market and thereby affecting trade between Member States within the meaning of Article 82 EC[28].

(40) This finding was not contested in the appeal procedure before the ECJ.

V. LEGAL ASSESSMENT

5.1 State of the procedure; issues regarding the substance

(41) The present decision, adopted after a new statement of objections has been issued, is aimed at correcting the procedural flaws identified by the ECJ and imposing a fine on CMB.

(42) For the purposes of the present decision the Commission considers that the findings in the original decision as to the existence, character and extent of the infringements of Article 82 EC committed by the members of Cewal are established in the sense that they are no longer open to challenge in law, for the following reasons.

(43) The findings in the original decision and procedural elements that constitute matters of fact and law that have been actually or necessarily settled by the ECJ judgement are *res judicata*[29].

(44) The same applies with respect to the elements of the case that have actually or necessarily been settled by the CFI judgment and in respect of which no appeal was lodged[30].

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27 See paragraphs 92-96 of the original decision.

28 See paragraphs 201-203 of the CFI judgment.

29 See 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 et al v Commission* [2002] ECR I-8375.

(45) The principle of *res judicata* also applies with respect to the matters actually or necessarily settled by the judgments of the CFI or the ECJ that are taken over in the considerations and operational part of the present decision; a measure adopted by an institution constitutes *res judicata* in so far as it consists of a mere repetition of the un-annulled part of a former measure which has been partly annulled[31].

(46) To the extent that the original decision also contains elements that cannot be considered as actually or necessarily settled by the judgments of the CFI and the ECJ they may not be considered as *res judicata.* However, such elements of the decision have acquired a definitive nature after the remainder of CMB's grounds of appeal were dismissed. Once the time-limit for bringing an action has expired decisions and judgments acquire a definitive nature in accordance with the requirements of legal certainty[32]. In this respect it is relevant that in paragraph 148 of the ECJ judgment, the Court decided that there was no need to refer the case back to the CFI but that instead the ECJ itself could render judgment. In so doing, it annulled only the articles of the original decision concerning the fines and dismissed the remainder of the appeal. As a consequence thereof, all parts of the original decision

- that do not concern the elements of the fines against which the appellants have submitted appeal grounds
- and that cannot be considered as having been actually or necessarily settled by the CFI or the ECJ judgement

have acquired a definitive nature.

(47) For the sake of completeness it is observed that as to all elements regarding the substance of the present case, the present decision will not put CMB in a position that is less favourable *vis-à-vis* the position it was put in by the original decision. Also for that reason the findings as to the existence, character and extent of the infringements of Article 82 EC committed by the members of Cewal are established in the sense that they are no longer open to challenge in law[33].

(48) It follows from the foregoing that the findings in the original decision as to the existence, character and extent of the infringements of Article 82 EC committed

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30 See case T-308/94 *Cascades v Commission* [2002] ECR II-813. In this case an element of the case (the liability for two subsidiaries) was referred back to the CFI by the ECJ. In the second proceedings before the CFI the applicants repeated an action challenging their ringleadership of the cartel. The CFI rejected the action because its findings in the first proceedings were definitive, since they were settled in those proceedings and the applicants did not challenge the findings in appeal.

31 See case 14-64 *Emilia Gualco v High Authority of the ECSC* [1965] ECR 51, .

32 See Case C-188/92 *TWD Textilwerke Deggendorf v Germany* [1994] ECR I-833 and Case C-239/99 *Nachi Europe v Hauptzollamt Krefeld* [2001] ECR I-1197.

33 See Case T-251/00 *Lagardère v Commission* [2002] ECR II-4825, paragraphs 111-114, from which it can be derived that only an appeal against a new (part of a) decision which puts the addressee in a less favourable position than the first decision is admissible.

by the members of Cewal are no longer open to challenge in law. In its reply to the statement of objections and during the hearing CMB has raised a number of arguments regarding the substance of the case. However, for the forementioned reason the Commission considers these arguments to be of no relevance.

5.2 State of the procedure; issues regarding the fines

(49) In order to comply with the ECJ judgment the Commission must have regard not only to the operative part of that judgment but also to the grounds which constitute its essential basis[34]. CMB should therefore be placed in a position, as regards the imposition of fines, to put forward a proper defence[35]. With a view thereto, the Commission has issued a statement of objections to CMB on 16 April 2003, offered CMB access to file -of which offer CMB did not make use- and granted CMB's request to be heard.

5.3 Statute of limitations

(50) During the hearing CMB argued that the limitation period for imposing a fine in the present case has expired long ago. However, on the basis of Council Regulation (EEC) No 2988/74 on the limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition[36] ('Regulation 2988/74'), the Commission is not time-barred from imposing fines in relation to the infringements established in the original decision.

(51) In this respect a distinction must be made between the Commission's competence to establish an infringement of the competition rules, which is subject to the rules concerning 'unreasonable delay' and to impose fines, which is subject to Regulation 2988/74[37].

(52) Under Article 1 (1)(b) of Regulation 2988/74 the power of the Commission to impose fines or penalties for infringements shall be subject to a limitation period of five years. This period can be interrupted by 'any action taken by the Commission (…) for the purpose of the preliminary investigation or proceedings in respect of an infringement.'

34 See Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, paragraph 27.

35 See Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071, paragraph 465.

36 OJ L 319, 29.11.1974, p. 1.

37 In the so-called *FETTCSA* case (Case T-213/00 *CMA CGM et al v Commission*, not yet published) the CFI ruled that Regulation 2988/74 established a complete system of rules covering in detail the periods within 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. (at paragraph 324).

(53) Under Article 3 of Regulation 2988/74 the limitation period shall be suspended as long as the original decision of the Commission is the subject of proceedings before the Court of Justice of the European Communities.

(54) Pursuant to Article 2 (3) of Regulation 2988/74 the limitation period shall expire at the latest on the day on which a period of ten years has elapsed without the Commission having imposed a fine or penalty. Article 2 (3) provides that this period shall also be extended by the time during which limitation is suspended because of Court proceedings.

(55) In the present case, the limitation period started running on the dates on which the infringements have ceased. In accordance with the CFI judgement these dates are 1 October 1989 with respect to the enforcement of the Ogefrem agreement, and 1 December 1989 with respect to the parties' conduct in relation to the fighting ships and the loyalty rebates. Both the first five-year limitation period and the general ten-year limitation period have therefore started on those dates in relation to the respective infringements.

(56) The original decision itself should be seen as the last 'action by the Commission for the purpose of proceedings'. The original decision was notified to the parties on 5 January 1993; accordingly a new five-year period limitation started to run on that date.

(57) The first appeal was lodged on 19 March 1993. The final judgement was rendered by the ECJ on 16 March 2000. This means that both the five-year limitation period, which had run between 5 January 1993 and 19 March 1993 and the ten-year limitation period, which had run between 1 October 1989 and 1 December 1989 respectively and 19 March 1993 were suspended during the period between 19 March 1993 and 17 March 2000 and started to run again on 17 March 2000.

(58) That means that in the case of CMB, the five year limitation period would expire on 3 January 2005. This period has been interrupted again by the issue of the statement of objections on 16 April 2003. The five year period that is presently running will therefore expire on 16 April 2008. The total ten years periods will expire on 28 September 2006 and 28 November 2006 respectively. Neither the five-year nor the ten-year limitation periods have therefore expired so that it is within the Commission's competence to impose fines.

VI. FINES

6.1 Article 19 (2) of Regulation (EEC) No 4056/86: fines

(59) Under the terms of Article 19 (2) of Regulation 4056/86, the Commission may, by decision, impose on undertakings or associations of undertakings fines of EUR 1000 to one million or alternatively a maximum sum of 10% of the undertakings' turnover where, either intentionally or negligently, they infringe Articles 81 or 82 EC.

(60) In the original decision, the Commission did not impose fines for the infringements of Article 81 (1) of the EC Treaty because of a possible misapprehension on the part of the parties of the legal situation which the original decision was intended to clarify. For the same reason, the Commission does not impose fines for the infringements of Article 81 (1) of the EC Treaty in the present decision. However, it does impose fines for CMB's infringements of Article 82 EC that have been established in the original decision.

(61) The Commission considers it necessary to impose a fine pursuant to Article 19 (2) of Regulation 4056/86 on CMB for the infringements of Article 82 EC established in Article 2 of the original Decision, (cf. paragraphs 20 to 27 of the original decision - agreement with Ogefrem; paragraphs 28 and 29 of the original decision - blacklists and loyalty contracts; and paragraph 32 - fighting ships.

(62) The infringements thus established are of a serious nature. As stated in the original decision, they enabled Cewal to maintain a virtual monopoly on its routes to and from Zaïre. The infringements also had the effect of impeding the attainment of a single market in so far as they partitioned the shipping routes in question and favoured the shipping lines of certain Community countries to the detriment of their competitors in other Member States[38]. Their serious character was confirmed by the CFI[39].

(63) It is in the interest of an effective and consistent competition policy that adequate fines are imposed with respect to infringements of the competition rules.

(64) When imposing the fine on CMB for the infringements established in the original decision, the Commission will to a large extent base itself on its considerations regarding the imposition of the fines in the original decision, and the CFI's considerations with regard thereto. As noted by Advocate General Fennelly, the CFI has carefully reviewed the imposition, the level and the allocation of the fines[40].

(65) In its reply to the statement of objections and during the hearing CMB has raised a number of arguments regarding the fine imposed on itself and the attribution of the fines in general. In the following these arguments, that concern in particular the attribution of most of the fine to CMB, violation of the non-discrimination principle, the nature of the infringements, the nature and value of

38 See paragraph 102 of the original decision.

39 See paragraph 231 of the CFI judgment.

40 Opinion of Advocate general Fenelly delivered on 29 October 1998, joined cases C-395/96 P and C-396/96 P *CMB, CMBT and Dafra-Lines v Commission* [2000] ECR I-1365, at paragraph 184.

the services concerned, the novelty of the infringements and their duration, will be dealt with in the framework of the references to the CFI's considerations with respect to the fines.

(66) When determining the amount of the fine the Commission will have regard to the gravity and the duration of the infringement:

6.2 Basic amount of the fine

6.2.1 Gravity

6.2.1.1. The nature of the infringements

(67) The infringements of Article 82 EC committed by CMB and the other members of Cewal are of a serious nature, in as much as they enabled Cewal to maintain a virtual monopoly on its routes to and from Zaire.

(68) The behaviour of Cewal's members, including CMB, was implemented in order to drive out the only competitor on the market. There is thus no ground for denying the deliberate and serious nature of the infringements[41].

(69) It should also be recalled, as stated in paragraphs 67, 77, 78 and 79 of the original decision, that:
- the practices linked to the Ogefrem agreement had been described by the OECD as an abuse of a dominant position of a conference,
- and the practice of fighting ships is prohibited by international rules dealing with shipping conferences, in particular the Unctad code of conduct for shipping conferences, applicable to the trade in question.

In these circumstances, these infringements must be considered to have been committed intentionally.

(70) Therefore, for the purpose of imposing a fine in the present case the Commission concludes that the established infringements are of a serious nature.

6.2.1.2. The impact of the infringements on the market

(71) The infringements referred to in the original decision affected the whole of the liner shipping trade concerned; they concerned Cewal itself, its members and the only competitor on the trade. They therefore directly affected the conditions under which all goods were traded (with the exception of basic products carried by tramp vessels) between the North Sea and Zaire.

41 cf. paragraph 231 of the CFI judgment.

(72) At the time of the adoption of the original decision the incidence of freight rates on the prices of goods carried by liner vessels was generally estimated at between 4 and 12 %; the incidence could be even higher in the case of low or average value added products which form a large proportion of the trade between Europe and Africa.

(73) It follows from the original decision (paragraph 57) that in 1987, the cargoes lifted by the members of Cewal accounted for approximately 90%, by volume, of all liner shipping cargoes carried on the relevant market. In 1989 they accounted for 89,7%[42]. At the time of the original decision, it was not possible to assess what the exact market shares of Cewal and its members would have been in the absence of these agreements and practices. It was clear, however, that their market shares at the time of the adoption of the original decision resulted partly from the practices covered by that decision and not solely from their own competitive capacity.

(74) These agreements and practices therefore enabled the conference to maintain a very high market share, which contrasted with other Euro-African trades for which the market share of the conferences in question was sometimes less than 60 %. This same differential existed as far as prices were concerned. The power of Cewal's members allowed freight rates to be kept at an artificial level, which seemed to be significantly above its members' costs, as was suggested by Cewal's statements concerning its fighting rates[43].

(75) The CFI considered that the practices were bound to have had the effect of slowing down the only competitor’s penetration of the market. In so far as Cewal and that competitor were the only providers of liner shipping services between northern Europe and Zaïre, the whole of the market was affected[44].

(76) Although the parties did argue in the proceedings before the CFI that Cewal’s market share had declined sharply and that of the independent competitor had increased, they did not contest the effect of the freight rates on trade in goods shipped by liner vessels. With a view thereto, the CFI decided that there was no reason to reduce the fine imposed in the original decision.

(77) Consequently, the Commission will take note of its original considerations with regard to impact on the market, as set out above, when determining the basic amount of the fine to be imposed in the present procedure.

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42 See paragraph 57 of the original decision.

43 See paragraph 82 of the original decision.

44 See paragraph 247 of the CFI judgment.

6.2.1.3. The size of the relevant geographic market

(78) The present case concerns the market in liner services between northern European ports and Zaïre.

6.2.1.4 Impact of CMB's conduct

(79) When determining the amount of the fine based on gravity, the Commission will take into account the real impact of the offending conduct of each undertaking concerned on the market. Therefore, the real impact of the offending conduct by CMB as compared to the involvement of other members of Cewal will be considered.

(80) The main effect of the entry into force of the illegal practices was to establish the supremacy of the CMB group (which has included, in addition to CMB itself, Dafra-Lines and Woermann Linie since 1 January 1988 and 1 April 1990 respectively) on that market.

(81) Moreover, during the time the infringements took place, the President and Secretary-General of the Cewal Conference were members of CMB's executive staff.

(82) Also, the Cewal secretariat was situated in premises also occupied by CMB.

(83) Moreover, with respect to the involvement of the other parties it is relevant that Nedlloyd played only a limited part in Cewal in comparison with CMB and had a much smaller share of the trade than CMB. Also, the two shipping companies Angonave (Angola) and Portline (Portugal) only operated between Angola and Portugal. Swal, finally, had not played any active role in maritime transport between Europe and Zaïre since 1984.

(84) The degree of involvement of the individual parties was also taken into account when establishing the fines in the original decision. The parties have unsuccessfully challenged this approach before the CFI, stating that it would infringe the principle of equal treatment. Thus, according to the parties it would be discriminatory that CMB bore 95% of the fine whereas its share of the ‘pool’ of earnings from the conference amounted to only 30 or 35%.

(85) However, the CFI did not accept that argument. It observed that those criticisms were based essentially on the applicants' contention that the fines should have been fixed in accordance with each of their shares in Cewal's earnings pool. However, the CFI held that where it appears that undertakings did not take part to the same extent in an infringement, referring to the fixed share of each of

them in the pool would have the effect of placing at an advantage those which had had a large part in the infringement and of penalising those which had participated to a lesser degree. Consequently, the CFI decided that the mere fact that the Commission opted for the undertakings' degree of participation rather than their share of the earnings pool did not cause it to infringe the principle of equal treatment[45].

(86) The CFI also determined that the Commission rightly took into account that CMB controlled a preponderant share of the trade, with the result that the impact on the market of its actions was significant, and that it occupied a decisive position within Cewal. The Court held that in those circumstances, by imposing on CMB a fine substantially greater than that imposed on the other undertakings, the Commission did not infringe the principle of equal treatment[46].

(87) The CFI also found that the Commission was lawfully entitled to conclude that Swal had not played an active role in the infringements and to decide, without infringing the principle of equal treatment, that no fine should be imposed on it.

(88) Also, it found that the Commission was properly entitled to decide not to impose fines on CMZ without infringing the principle of equal treatment, since none of the applicants could claim to be in a situation identical to that of CMZ: CMZ had to give up its ships and was no longer carrying out any maritime transport business itself[47].

(89) Therefore, when determining the amount of the fine based on gravity the Commission will base itself on its original considerations with respect to CMB's individual involvement as described above.

6.2.1.5. Circumstances relevant to the dissuasive effect of the fine

(90) The CFI held that since the fine was also intended to dissuade the undertakings from committing the infringements anew, the Commission was lawfully entitled to take account of the fact that vessels belonging to the CMB group carried, at the time when the original decision was adopted, almost all the cargoes of the conference[48].

45 See paragraph 234 of the CFI judgment.

46 See paragraph 235 of the CFI judgement.

47 See CFI judgment paragraphs 235 and 237.

48 See paragraph 235 of the CFI judgment.

(91) Since at the time of the adoption of the present decision no such specific circumstance applies –CMB is no longer a member of Cewal, which has ceased its activities in 1995 and has even entirely withdrawn from liner shipping in 1998- the Commission will not take it into account when establishing the basic amount on gravity.

(92) With a view to the foregoing considerations regarding
- The nature of the infringements;
- The impact of the infringements on the market;
- The size of the relevant geographic market
- The impact of CMB's conduct and
- The CMB group not carrying 98% of the cargo of Cewal at the time of the infringements

The amount based on gravity to be used for the calculation of the fine to be imposed on CMB is hereby fixed at EUR 1 million for each infringement.

6.2.2. The duration of the infringements

(93) In accordance with the CFI judgement the Commission will consider that the period to be taken into account with regard to the infringement relating to the agreement with Ogefrem runs from 1 July 1987, the date on which Regulation 4056/86 entered into force, to September 1989.

(94) As for the fighting ships, also in accordance with the CFI judgement, account will be taken, in calculating the fines, of the conduct of the undertakings during the period from May 1988 to November 1989.

(95) In the case of the irregular and abusive loyalty contracts and blacklists, the period to be taken into account will be from 1 July 1987 to November 1989.

(96) It follows from the foregoing that the infringements were of medium duration (between eighteen and twenty eight months and on average two years).

(97) With a view thereto increases of 20% of the amount based on gravity regarding the Ogefrem agreement, 15% regarding the fighting ships and 20% regarding the loyalty arrangements are justified, which leads to amounts of € 200.000, € 150.000 and € 200.000 respectively.

6.2.3. Aggravating or mitigating circumstances

6.2.3.1. Aggravating circumstances

Conduct of the undertakings

(98) Unlike in the original decision, the Commission will not have regard to its finding that the members of Cewal did not change their conduct after the

submission of the complaints or the requests for information sent by the Commission.

(99) In its judgement, the CFI held that given the general character of the complaints the members of Cewal could not be accused of failing to terminate the practices complained of when the complaints were lodged.

(100) In conformity with the CFI judgement, the failure to terminate the infringing practices will not be regarded as an aggravating circumstance.

6.2.3.2. Attenuating circumstances

The novelty of applying Regulation (EEC) No 4056/86 to infringements

(101) The original decision concerned one of the first cases of application of Regulation 4056/86 for the purposes of imposing a fine for infringement of Article 82 EC. It is customary in such cases for the Commission to show moderation in determining the amount of the fine in order to take account of the possibility that the parties concerned by the original decision may not have been fully informed of their obligations under the Community rules on competition or may have underestimated the gravity of the infringements they committed.

(102) In the original decision, the Commission decided however not to apply this policy in the present case since the members of Cewal were fully aware of the provisions applicable to them as regards competition. Moreover, the code of conduct for shipping conferences, with which all conferences operating in the trade covered by the code were supposed to be familiar, and which is cited in the third paragraph in the preamble to Regulation 4056/86, expressly condemned some of the abusive practices carried out by Cewal.

(103) The members of Cewal were fully informed of the fact that the block exemption granted pursuant to Regulation 4056/86 to liner conferences (after extensive consultations with the parties concerned) does not allow the latter to remove all outside competition and to extend the effects of their agreements to all the liner trades in which they operate.

(104) In these circumstances, the Commission considered it undesirable in the original decision to give the members of Cewal the benefit of any particular advantage by virtue of the fact that this is one of the first times Regulation 4056/86 has been applied to a case of infringement.

(105) The CFI rejected the applicants' objections regarding these findings, holding that the aim of the abusive practices at issue, namely to drive the only competitor out of the market, was not in any way novel in competition law[49].

49 See paragraph 248 of the CFI judgement.

(106) In view of all of the above, the Commission will not grant any reduction to the basic amount under this heading.

6.2.3.3 Lapse of time

(107) In view of the lapse of time since the conduct was terminated, as well as the time passed following the ECJ judgment until the issuing of the statement of objections in April 2003, the Commission has considered what effect if any this should have on the amount of the fine.

(108) The Commission does not consider that lapse of time is a reason not to impose a fine, provided that the lapse of time does not exceed the limitation period for competition proceedings laid down by Regulation 2988/74. As set out above, the Commission considers the present decision imposing fines to be adopted within the statutory limitation period of Regulation 2988/74.

(109) The Commission is also bound by the general principle of Community law that decisions following administrative proceedings relating to competition policy must be adopted within a reasonable time[50].

(110) The Commission does not consider that the lapse of time in the present case has in any way affected the outcome of the case. However, the Commission considers that the duration of the proceedings in the present case justifies a reduction of the basic amounts of the fine by EUR 50.000 for each infringement.

6.2.4 Application of 10% turnover limit

(111) According to its last annual report, the total turnover of the CMB group over 2002 amounted to EUR 839 million[51]. The maximum amount that can be imposed by the Commission therefore is 10% of this amount, *i.e.* EUR 83,9 million[52]. The amount to be imposed stays well within that limit.

6.2.5. Amount of fine imposed

(112) With a view to all of the foregoing, the Commission imposes a fine of EUR 3.400.000 on CMB.

HAS ADOPTED THIS DECISION:

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50 See Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, in which the ECJ reduced by ECU 50 000 the applicant's fine of ECU 3 million as satisfaction for the excessive duration of proceedings before the CFI (cf. paragraphs 47 and 141 of the judgment).

51. This was EUR 1.175 millions in 1991.

52 See Art. 19 (2) a) of Regulation 4056/86.

Article 1

For the infringements referred to in Article 2 of Decision 93/82/EEC, a fine of EUR 3.400.000 is imposed on Compagnie Maritime Belge NV/SA.

Article 2

The fine shall be paid, within three months of the date of notification of this Decision, into bank account No 001-3953713-69
of the European Commission with **FORTIS BANK** S.A.
Rue Montagne du Parc, 3
B-1000 BRUXELLES
(Code SWIFT: GEBABEBB
– code IBAN BE71 0013 9537 1369). After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points, namely 5,5%.

Article 3

This Decision is addressed to:
Compagnie Maritime Belge N.V./S.A.
De Gerlachekaai 20
2000 Antwerp, Belgium.

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, *For the Commission*

Member of the Commission