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COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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Competition and the Professions

On page 77 of this issue there is a statement by the Commission inviting comments on a study recently completed at the Commission's request on the relationship between the liberal professions and the European Community's rules on competition. For the Commission's purposes, liberal professions can be generally defined as occupations requiring special training in the liberal arts or sciences: for example, lawyers, architects, auditors, doctors, and pharmacists. One thing all these professions traditionally have in common is a high level of regulation: the most regulated professions are also the oldest ones, such as pharmacists and notaries. Historically, liberal professions were either regulated by national governments or self-regulated through professional bodies organised at national or even local level, which is still the case now. This regulation can affect, among other things, the numbers of entrants into the profession; the prices professionals may charge and the permitted charging arrangements; the organisational structure of professional services undertakings; the exclusive rights they enjoy; and their ability to advertise.

The rationale for regulating these professions is varied. One argument is based on what economists call asymmetric information. Since the essence of professional services is the high level of knowledge of the professional, the level of information available to the provider and to the consumer of services is different. In other words, the professional knows and the consumer does not or very little, and may not be able to gauge the quality of the service paid for. Hence, the need to protect the consumer in some way and to ensure that the services are indeed of adequate quality. That does not necessarily mean top quality. It is enough that the service corresponds to what the consumer wants. Not all consumers want, or need, top quality nor want to pay top prices for all kinds of services all of the time; not all professionals can or want to provide top quality and expensive services all of the time.

In the last decade, there have been suggestions that the level of regulation for the professionals is out of step with economic developments and technical progress. In some Member States State regulators as well as self-regulators have undertaken a process of easing some of the restrictions. This is the case of Spain, which has undertaken a legislative reform of the law governing professional bodies. There has also been a comprehensive review of the self-regulatory rules in Denmark and the UK. But this is far from being the case of a majority of countries or of all professions; hence the Commission's interest in soliciting the views of interested parties. ■

(The foregoing paragraphs are based on an address given by the Commissioner for Competition Policy, Mr Mario Monti, in an address to the German Bar Council in Berlin on 21st March, 2003.)

COMPETITION (LIBERAL PROFESSIONS): COMMISSION STATEMENT

Subject: Price fixing
Restrictive practices

Industry: Liberal professions
(Lawyers, accountants, architects, engineers, pharmacists, etc)

Source: Commission Statement IP/03/420, dated 21 March 2003

(Note. The Commission is inviting comments on the regulation of the liberal professions and its effects. According to an independent study carried out for the European Commission, the public would gain if lawyers, architects and other liberal professions were less regulated. Regulation of professional services varies greatly from one European Union country to another, particularly with regard to prices, advertising and inter-professional collaboration.)

For several years, the Commission's competition services have been faced with the question of applying the competition rules, particularly Article 81 of the EC Treaty on restrictive practices, to professional services as a result of complaints, notifications or parliamentary questions. The Commission's action in the field to date comprises three decisions whose main principles have been confirmed by the European Courts. These decisions concerned customs agents' tariffs in Italy, patent agents tariffs in Spain, and the code of conduct of the patent agents at the European Patent Office.

The decision to commission a study on liberal professions arises from the need to know more about the regulations at national level in view of various ongoing cases, of the recent judgments by the Court of Justice in the *Arduino* and *Wouters* cases (on referral from an Italian and a Dutch court respectively) and of an emerging trend among a few public regulators and self-regulators in the Member States of the European Union to ease some of the rules.

The study carried out by the Institute for Advanced Studies in Vienna is meant to open a debate at the European level as to whether the level of regulation for the professionals is out of step with economic developments and technical progress and whether any rules are unjustified under competition law. It compares the regulations governing lawyers, notaries, accountants, architects, engineers and pharmacists in all EU States and concludes that the situation varies considerably from one country to another. Austria, Italy, Luxembourg, Germany and possibly Greece are the countries with the most restrictive regulations for all professions whereas the UK, Sweden, Denmark, the Netherlands, Ireland and Finland show rather liberal regulatory regimes (with the exception of pharmacists in the Nordic countries). The other countries (Belgium, France, Portugal and Spain) appear to be somewhere in the middle.

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On a scale of "regulation indices" from 0 to 12, the study finds that Greece is the country where the legal profession (lawyers and notaries) is the most regulated (9.5) while Finland has practically no rules (0.3). Most other countries cluster around 6. Italy, on the other hand, has the highest regulation index for architects (6.2), a profession which in itself is not the most regulated one since the average across the EU is less than 3. For more information on regulation indices see following table:

	Accountants	Legal	Architects	Engineers	Pharmacists
Austria	6.2	7.3	5.1	5	7.3
Belgium	6.3	4.6	3.9	1.2	5.4
Denmark	2.8	3.0	0	0	5.9
Finland	3.5	0.3	1.4	1.3	7.0
France	5.8	6.6	3.1	0	7.3
Germany	6.1	6.5	4.5	7.4	5.7
Greece	5.1	9.5	n.a.	n.a.	8.9
Ireland	3.0	4.5	0	0	2.7
Italy	5.1	6.4	6.2	6.4	8.4
Luxembourg	5	6.6	5.3	5.3	7.9
Netherlands	4.5	3.9	0	1.5	3.0
Portugal	n.a.	5.7	2.8	n.a.	8
Spain	3.4	6.5	4.0	3.2	7.5
Sweden	3.3	2.4	0	0	12
UK	3.0	4.0	0	0	4.1

The study represents a contribution to the debate and does not reflect the Commission's views. It is based on responses from national professional associations, and looks at regulations on market entry and conduct, such as the regulation of fees (fixed prices, minimum and/or maximum prices), advertising and marketing, inter-professional collaboration, restrictions on geographical locations or on establishment of branch offices, and so on. It concludes, among other things, that there is a trend to lower regulation and that in those countries with low or no regulations there is no evidence that consumers are less protected.

Another conclusion is that countries with low degrees of regulation have relatively lower revenues per professional, but a proportionally higher number of practising professionals generating a relatively higher overall turnover. This would suggest that low regulation is not a hindrance but rather a spur to overall wealth creation. The study is available on the Internet. The Commission would like to receive comments on the study by the end of May. ■

ABUSE OF DOMINANT POSITION (BANKING): THE CLEARSTREAM CASE

Subject: Abuse of dominant position
Complaint
Statement of objections
Discrimination

Industry: Banking

Parties: Clearstream Banking AG

Source: Commission Statement IP/03/462, dated 31 March 2003

(Note. The Commission is continuing its attack on suspected contraventions of the rules on competition in the banking sector; and, this time, it has based its action on the provisions of the EC Treaty prohibiting the abuse of a dominant position, with particular reference to allegations of discrimination by Clearstream at the expense of a party making a complaint to the Commission.)

As part of its ongoing enquiry into cross-border clearing and settlement within the internal market, the Commission has informed Clearstream Banking AG, as well as its parent company Clearstream International SA, of its preliminary competition concerns. The Commission's objections relate to Clearstream Banking AG's refusal to supply certain cross-border clearing and settlement services as well as its discriminatory manner in relation to one of its clients. Clearstream now has two months to reply to the Commission's objections. It may also request an oral hearing. The Commission's statement of objections initiates proceedings under Article 82 of the EC Treaty on the abuse of a dominant position. It does not prejudge the outcome of these proceedings.

Clearing and settlement are the processes by which securities market transactions are finalised. The proper functioning of these processes across the European Union is essential for the development of a European Union capital market. The processing of cross-border securities trades within the European Union (as opposed to trades conducted within a single Member State) has traditionally been costly and inefficient. The introduction of the fiduciary European Union in 1999 was one of the catalysts for significant growth in cross-border trading. It is a priority objective of the Community to ensure that cross-border trade in securities can take place without obstacles.

In its Communication of 28 May 2002 to the Council and the European Parliament on clearing and settlement, the Commission announced that its services had launched an in-depth own-initiative antitrust enquiry into clearing and settlement. Among the issues investigated were access and pricing. The Commission sent requests for information in March 2001 to a number of clearing and settlement agencies, trading platforms and banks. The replies to those

requests prompted the Commission to focus its investigation on Clearstream's behaviour.

The Clearstream group provides clearing, settlement and custody services for securities. Clearstream International SA is the group's holding company, based in Luxembourg. It holds Clearstream Banking AG (usually referred to as Clearstream Banking Frankfurt) and Clearstream Banking Luxembourg SA. Clearstream Banking AG is the German Central Securities Depository. Clearstream Banking Luxembourg is, together with Euroclear Bank SA, one of the two International Central Securities Depositories in the European Union.

The Commission takes the view that Clearstream Banking AG is the dominant supplier of clearing and settlement services for securities issued according to German law. This dominance stems from the fact that securities issued in accordance with German law in order to have those securities traded are issued in Clearstream Banking AG, the German Central Securities Depository. The clearing and settlement services provided by the issuer Central Securities Depository for the securities that it has in its safekeeping must be distinguished from the processing of securities trades by financial intermediaries, such as banks. Intermediaries rely on being able to settle their trades with the Depository where the securities have been issued.

The Commission's objections relate to Clearstream Banking AG's refusal to supply clearing and settlement services and to discriminatory behaviour. In pursuing these possible infringements of the competition rules, the Commission aims at ensuring cross-border competition in European Union capital markets. The events under investigation concern clearing and settlement for registered shares, which have taken a growing importance in Germany since 1997. There is evidence that Clearstream refused Euroclear Bank SA access to the settlement platform for registered shares in Germany for more than two years. In the Commission's view, there is no justification for such a long period between the request for access and the actual granting of this access. The Commission considers that Clearstream's behaviour had the effect of limiting cross-border trade in such securities, while Clearstream was at the same time establishing a competing cross-border operation. Further evidence suggests that Clearstream Banking AG's dilatory behaviour contrasts with the short delay within which other customers received access to the same application. In the Commission's view, such short delays constitute the normal industry practice. This discrimination also extended to pricing. Until January 2002 Clearstream Banking AG charged a higher per transaction price to Euroclear than to national Central Securities Depositories outside Germany. In the Commission's view, there is no justification for the difference in treatment. Among other factors, the transaction volumes and the level of automation are higher for Euroclear than for national Central Security Depositories.

The Commission's statement of objections opens the infringement procedure and gives the right to Clearstream to defend itself by replying to the objections within a period of two months. Clearstream can also request an oral hearing. The Commission's objections do not prejudge the outcome of the procedure. ■

British Airways / SN Brussels Airlines

The Commission has approved for a period of six years a co-operation agreement between British Airways and SN Brussels Airlines. The agreement will be beneficial for consumers by, in particular, giving SN's passengers access to BA's long-haul network. On the only route, Brussels-Manchester, where the alliance would have eliminated competition, the airlines have submitted undertakings that safeguard consumer choice. On 25 July 2002, British Airways (BA) and SN Brussels Airlines (SN) notified to the Commission a number of co-operation agreements requesting an exemption under Article 81(3) of the Treaty. Airline alliances generally present benefits for the consumer but regulators must ensure that they do not result in the elimination of competition on certain routes. The BA-SN agreement will enable the parties to co-operate across their respective networks in terms of pricing, scheduling and capacity. The Commission's analysis has shown that the parties' networks are largely complementary and that their network co-operation will bring benefits for consumers. In particular, the agreement will allow SN's passengers to have access to a long-haul network, while BA's passengers will benefit from an easier access to SN's African destinations.

The Commission looked closely at the impact of the alliance on travel between Brussels and London, on the one hand, and Brussels-Manchester, on the other hand, where both BA and SN have operations. As far as Brussels-London is concerned, although the alliance will have an appreciable impact on this route, it will not eliminate competition as BA and SN will continue facing bmi and Eurostar, two powerful competitors. Bmi operates seven daily frequencies from London Heathrow. Eurostar operates eight daily frequencies between Brussels and London Waterloo and is a competitive alternative for both business and leisure passengers. The Commission also considered that the five daily frequencies on weekdays operated by VLM - between Brussels-National and London-City were also likely to exercise a competitive constraint on the parties.

The examination of the alliance revealed that Brussels-Manchester was the route where it would have the most restrictive effect as the parties' cumulative market share would be close to 100%. Furthermore, there are capacity constraints at Brussels National airport at peak-time periods, which could prejudice a new entrant's ability to enter this market. To remedy the concerns raised by the Commission during the initial review, the carriers undertook to release enough landing and take-off slots at Brussels National for a new entrant to operate three daily services to Manchester, in case these slots were not available through the normal slot allocation procedure. Together the parties operate seven daily services on the route and the Commission considers that the three daily services provided by a competitor should exercise sufficient constraint on their behaviour.

Source: Commission Statement IP/03/350, dated 10 March 2003

MERGERS (KITCHEN GOODS): THE SEB / MOULINEX CASE

Subject: Mergers
Trade marks
Referrals (to Member States' competition authorities)
Commitments (sc undertakings) (by parties to merger)
Procedure
"Individual concern"

Industry: Small electrical kitchen goods
(Implications for all industries)

Parties: Babyliss
Philips
Commission

Source: Judgments of the Court of First Instance in Cases T-114/02 and T-119/02 (*BaByliss v Commission, Philips v Commission*)

(Note. This is an interesting case, involving a detailed consideration of the procedure for the approval of mergers and acquisitions under the Mergers Regulation. On the substantive law, there are some important observations on the licensing of trade marks, while on procedural matters there is guidance on the meaning of "individual concern", on the rules governing the offering of commitments or undertakings by the parties and on the circumstances in which cases may be referred by the Commission to the competition authorities of the Member States. In the judgment itself a distinction is rightly made between the Commission's Approval Decision and its Referral Decision. The former is the Decision in which the Commission formally approved the merger; the latter is the Decision in which the Commission formally referred some aspects of the merger to the French authorities. Throughout the judgment, the Court refers to the "commitments" of the parties. This should be taken to mean the undertakings given or offered by the parties as a means of helping to make the merger more acceptable from the point of view of the Commission's competition concerns.

Since the Court's judgment is extremely long and circumstantial, the report which follows comprises the following elements:

- *the Court's short statement about its judgment,*
- *the Commission's comments on the judgment and*
- *some extracts from the judgment.)*

Court Statement (CJE/03/293, dated April 2003)

The court of first instance for the most part confirms the Commission's decision approving the merger between Seb and Moulinex. Nevertheless the Court annuls the decision insofar as it concerns the markets in those countries not subject to the conditions imposed by the Commission in approving that merger.

In 2002 the Commission approved a merger by which SEB (a French manufacturer of small electrical household goods with worldwide trade marks) took control of certain activities of Moulinex (a French company, and direct competitor of SEB) in the area of small electrical kitchen goods. This merger took place in the framework of a receivership procedure in France and was notified to the Commission in conformity with the Community's Merger Regulation.

To dispel serious doubts aroused by the merger in relation to competition, the Commission's decision was subjected to certain commitments, notably:
a) that SEB must grant third parties an exclusive licence to the mark Moulinex for a period of 5 years in 9 member States of the European Economic area (Germany, Austria, Belgium, Denmark, Greece, Norway, the Netherlands, Portugal and Sweden) in order to permit those paries to use that mark with their own mark (co-branding) and
b) that SEB must abstain from using the mark Moulinex for three years following the expiry of these licences.

The final version of these undertakings was proposed by SEB and Moulinex only after the expiry of the time period laid down by the Merger Regulation (three weeks after the notification of the concentration). However, the Commission approved the merger without imposing any commitments [sc conditions, or "without requiring any undertakings"] in regard to the Spanish, Italian, Finnish, British and Irish markets.

The Commission also complied with the request made by the French competition authorities to allow them to examine the effects of the proposed merger on competition in France.

BaByliss, a French company, which wished to acquire some of the activities of Moulinex and position itself as a potential competitor on the market for small household electical appliances brought a case before the Court of First Instance against the decision of the Commission. In addition, Philips, a Dutch company and a direct competitor of SEB, brought a case before the Court of First Instance requesting the annulment of the merger decision. Philips also contested the referral to the French authorities.

The Court's evaluation

Expiry of the time limit

The Court considers that the time limit is imposed only on the notifying parties, not on the Commission. It observes that the limit was designed to allow the Commission to have the appropriate time to evaluate the commitments, to consult third parties and also to avoid commitments being presented at "the last minute". The Commission therefore had the right to accept commitments after the expiry of the three week time limit.

The commitments

The Court considers that Philips could not validly argue that the licence holders would suffer from parallel imports of Moulinex goods. During the approval procedure, Philips had themselves emphasized the absence of any significant parallel imports on the markets in question and the existence of distinct national markets, with regard to the national distributions, supply and logistics structures.

The Court also considers that the duration of the licences provided for by the commitments was adequate. It observes that, if the licences for the mark Moulinex are conceded for a period of five years, SEB would be deprived, by virtue of the commitments, of the right to use the Moulinex mark in the nine Member States concerned for eight years. The migration of the Moulinex mark to the marks of the licencees was therefore assured, notably in view of the characteristics of the markets (in particular the life cycle of the products in question of 3 years)

However, the Court annuls the decision insofar as it concerns the markets in the countries not covered by the commitments. According to the Commission, if in these countries, the total turnover of the combined SEB-Moulinex on the markets where they would have a dominant position, only represented a small amount of their total turnover, retailers would be able to punish any attempt at anti-competitive behaviour by SEB-Moulinex on other markets (product range effect). The Court rejects this justification. In this respect, it notes, particularly, that the Commission omitted to take account of the entirety of the markets dominated by SEB-Moulinex, in particular those in which there was no significant overlap. These circumstances could effectively dismiss fears of the creation or reinforcement of a dominant position on the markets concerned, but the Commission should have taken into consideration the total turnover for these markets to verify the possibility of a product range effect.

The decision to refer to the French authorities

The Court considers that the two conditions laid down by the Merger Regulation for referring a merger to a Member State were fulfilled. As regards the problem of the creation or reinforcement of a dominant position on the internal market of a Member State, the Court notes that the new entity would have an unrivalled range of products and portfolio of marks in France. As regards the existence of a distinct market, the Court observes that France effectively constitutes such a market, having regard, notably, to differences in price, different marks, and the national distribution, supply and logistics structures.

The Court states, however, that the systematic referral to member States when the products in question raise concerns for distinct national markets, could damage the principle of a "one stop shop" (sole control by the European authorities). Nevertheless, the Court considers that this risk is inherent in the referral procedure laid down in the Merger regulation. The Court considers that it is not its place to supplement Community legislation in view of the lacunae in the referral mechanism.

The French competition authorities approved the merger insofar as it concerned France without imposing any commitments, basing its decision on a theory (the "failing company theory") that the Commission had explicitly excluded in its decision of approval. The Court nevertheless confirms that the legality of the referral should be assessed only at the moment when the Commission adopts its decision. Consequently the Court rejects the claims by Philips against the decision in its entirety.

Commission Statement (IP/03/491, dated 3 April 2003)

The Commission welcomes the CFI ruling in the SEB/Moulinex case. The Court of First Instance has, the Commission points out, confirmed several aspects of the European merger control with respect to:

- remedies negotiation,
- referral to Member States and
- the taking into account of portfolio effects by the Commission

The latter refers to the fact that a merger can have anti-competitive effects by combining several brands.

In January 2002, the Commission approved the acquisition by SEB of Moulinex, which had filed for bankruptcy, on condition that SEB grants a 5-year exclusive license for the Moulinex brand in the nine Member States where competition problems had been identified (Portugal, Greece, Belgium, the Netherlands, Germany, Austria, Denmark, Sweden and Norway). SEB submitted an application to grant such a licence to Benrubi for Greece and to Saeco for the eight other countries. The Commission approved these two companies as licencees on 31 October 2002. In addition, in January 2002, the Commission referred the French part of the concentration to the French authorities which had asked for it as France was the centre of gravity of the case.

SEB and Moulinex sell a large number of small electrical appliances including deep fryers, mini-ovens, toasters, waffle makers, rice and steam cookers, appliances for 'pierrade', 'fondue' and 'raclette', and coffeemakers, blenders, mixers and irons. These products are marketed under the Krups, Tefal, Calor, Rowenta and Swan brands, as well as under the Moulinex and SEB brands.

The Philips and Babyliss appeals

Philips and Babyliss both brought actions before the Court of First Instance (CFI) seeking the annulment of Commission Decisions in the Seb/Moulinex case. Philips challenged the referral decision of the French part of the transaction to France and the conditional clearance for all European Union countries except France. Babyliss challenged only the clearance decision.

In rejecting Philips' appeal against the Commission decision to refer the French part of the operation to the French competition authorities, the CFI considered that the Commission has a certain discretionary power to grant a request for referral submitted by a Member State under Article 9 of the Merger Regulation.

In upholding the main part of the conditional clearance decision of the Commission, the CFI confirmed notably the competitive analysis of the Commission in particular the examination of portfolio effects. It is the first time that the CFI has taken a position on this theory, which has been used several times in the past by the Commission, in particular in the Guiness/GrandMet case. The CFI considers that, in assessing the competitive position of a company, the Commission may have to take into account the portfolio of brands held by this company or the fact that it holds strong positions on numerous affected product markets.

The Court also indicated that the Commission did not sufficiently establish that the concentration was not creating competition concerns for the five other Member States (Italy, Spain, Finland, the United Kingdom and Ireland), in particular with regard to the examination of range effects. The Commission will carefully examine this aspect of the Court decision and will draw the necessary consequences.

The Court also considered that the procedural approach adopted by the Commission when negotiating remedies was compatible with Community law. The judgment of the Court clarifies in particular the conditions under which remedies can be modified during the first phase and upholds re-branding as a remedy to competition concerns identified on markets where brands are of a paramount importance.

Extracts from the Judgment

Territorial effects of trade mark licensing

215. It is clear from Article 2(1) of Regulation 4064/89 that when, in the course of examining the compatibility of a concentration with the common market, the Commission is appraising whether the concentration creates or strengthens a dominant position within the meaning of Article 2(2), it must "take into account the need to maintain and develop effective competition within the common market in view of, among other things, the structure of the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community".

216. It is therefore correct that, as De'Longhi submits, the Commission cannot, when applying Regulation 4064/89, approve commitments which are contrary to the competition rules laid down in the Treaty inasmuch as they impair the preservation or development of effective competition in the common market. In that context, the Commission must appraise the compatibility of those commitments in particular according to the criteria of Article 81(1) and (3) of the EC Treaty (which, in reference to Article 83, constitutes one of the legal bases for Regulation 4064/89: see Case T-251/00, *Lagardère v Commission*, paragraph 85).

217. However, in the present case, it must be observed, first, that the last subparagraph of Section 1(c) of the commitments provides that "the licensee or

licensees shall undertake to market products bearing the Moulinex trade mark only in the territory or territories licensed to them and for which the products are intended". Contrary to what De'Longhi claims, it does not follow from the terms of that clause that the commitments expressly impose on the licensees of the Moulinex trade mark a ban on exports to the other Member States. The clause can be interpreted as merely obliging the licensees to market products bearing the Moulinex trade mark in the territory licensed to them. A clause obliging a licensee to concentrate the sale of the products covered by the licence on his territory does not, in principle, have as its object or effect the restriction of competition within the meaning of Article 81(1).

218. Second, it should be noted that, even if, as the applicant maintains, the clause at issue had to be interpreted as prohibiting the licensees from exporting products bearing the Moulinex trade mark to other Member States, De'Longhi has not shown how, in the present case, that clause would be contrary to Article 81(1). De'Longhi does not explain how, having regard to the national dimension of the relevant product markets and the absence of significant parallel imports between the Member States, the clause at issue might appreciably restrict competition on the relevant market in the Community or significantly affect trade between the Member States within the meaning of Article 81(1). It is settled case-law that even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article 81(1) if it affects the market only insignificantly (Case C-306/96, *Javico*, paragraph 17; Joined Cases 100/80 to 103/80, *Musique Diffusion Française and Others v Commission*, paragraph 85; and Case 5/69, *Völk v Vervaecke*, paragraph 7).

219. Moreover, De'Longhi does not establish that a licensee of the Moulinex trade mark who is not protected against, at least, active competition from the other licensees in respect of the territory licensed to him would be prepared to accept the risk of marketing products bearing that trade mark together with his own trade mark by way of "co-branding". The purpose of the commitments is to enable the licensees, over a transitional period during which they will be entitled to use their own trade mark together with the Moulinex trade mark, to ensure the migration from the Moulinex trade mark to their own trade marks, so that they can compete effectively against the Moulinex trade mark after the transitional period, when SEB will again be entitled to use the Moulinex trade mark in the nine Member States concerned. It must be held that, in such a context, the absence of any protection of the licensees against, at least active, competition from the other licensees could undermine the strengthening of the trade marks competing with the Moulinex trade mark and thus adversely affect competition on the relevant market in the territory of the Community. Consequently, in so far as they prohibit active sales, the provisions of the clause at issue cannot be regarded as necessarily restricting competition within the meaning of Article 81(1) (see, to that effect, Case 258/78, *Nungesser v Commission*, paragraph 57, and Case 262/81, *Coditel v Ciné-Vog Films*, paragraph 15).

220. It follows from the above considerations that De'Longhi's arguments alleging that the commitments lead to market sharing must be rejected.

Individual concern

291. Persons other than the addressees of a decision can claim to be individually concerned only if that decision affects them by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee (see, *inter alia*, Case 25/62, *Plaumann v Commission* and Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, paragraph 36).

292. In the present case, the Commission does not dispute that the Approval Decision is of individual concern to the applicant. The parties agree that the applicant is one of the principal current competitors of the parties to the concentration on the relevant markets. In recital 32 of the Approval Decision, the applicant is thus mentioned as one of the operators which, like SEB, Moulinex, Bosch, Braun and De'Longhi, offer a wide range of products in the small electrical household appliances sector and have a pan-European presence. Further, at several points in the decision, in particular recitals 51, 57, 65 and 75, the Commission assessed the concentration, taking into account the position of the applicant. Finally, the applicant actively participated in the single administrative procedure leading to the adoption of the Approval Decision and submitted observations which might have influenced the Commission's assessment of the concentration and the commitments proposed to remove the competition problems raised by it.

293. However, the Commission submits that those facts, while distinguishing the applicant individually in connection with its claim for annulment of the Approval Decision, are not relevant when the admissibility of the claim for annulment of the Referral Decision is being considered.

294. That argument cannot be upheld.

295. Since, in view of the above undisputed facts, the Approval Decision is of individual concern to the applicant, it must be held that, had the referral not been made, it would have been open to the applicant, by way of an action for annulment under Article 230 of the EC Treaty, to challenge the Commission's assessment of the effects of the concentration on the relevant markets in France.

296. In that regard, it should be pointed out that, although the Commission alleges that the Approval Decision does not deal with the applicant's position on the relevant markets in France, it does not, however, claim that the applicant is not one of the principal current competitors of the parties to the concentration on those markets. In recital 34 of the Referral Decision, the Commission also expressly stated that, on the relevant markets in France, the applicant has the largest range of products after the parties to the concentration. Likewise, in their request for referral, the French authorities stated that the Philips trade mark is the "principal" trade mark competing with SEB and Moulinex in France.

297. Since the Referral Decision deprives the applicant of the opportunity to challenge before the Court of First Instance assessments which it would have

been entitled to challenge had the referral not been made, it must be held that the Referral Decision individually affects the applicant in the same way as it would have been affected by the Approval Decision had the referral not been made (see, by analogy, Case C-68/95 *T. Port*, paragraph 59).

298. Consequently, the applicant must be regarded as individually concerned by the Referral Decision.

[Paragraphs 320ff deal with the question of Article 9 referrals to Member States]

Reasons for Decision

389. According to the case-law, the purpose of the obligation to state reasons for an individual decision is to provide the party concerned with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged and to enable the Community judicature to review the legality of the decision; the scope of that obligation depends on the nature of the act in question and on the context in which it was adopted (see, inter alia, Case T-49/95, *Van Megen Sports Group v Commission*, paragraph 51). ■

The Mirabelier case

The Commission has welcomed a decision adopted by the Court of First Instance on the appeal brought by Pétrolessence, a French company which owns the motorway food chain Le Mirabelier and which applied for the purchase of some of the 70 motorway petrol-stations in France that TotalFinaElf had committed to divest as a condition for clearance of its merger in 2000. The Commission had refused the candidature of Le Mirabelier after having concluded that it would not be in a position to exert competitive pressure on TotalFinaElf on motorways. However, the Commission approved the Carrefour, Agip and Avia proposals. The opening of Carrefour petrol stations on French motorways has exerted a pressure on fuel prices for car drivers using the French motorways. In rejecting this appeal, the CFI had, for the first time, the opportunity to clarify the margin of appreciation of the Commission when assessing a candidate purchaser for assets to be divested as a condition for clearance of a merger. In particular, the CFI clearly confirmed that the Commission had to reject such candidatures when it appeared that purchasers, even if they were profitable companies, would not be able to meet the objective of the remedies, namely, to allow the maintenance of effective competition on the market in question.

A report on this case will appear in a future issue if it appears to raise additional legal issues.

PRICE FIXING (SHIPPING): THE FEFC CASE

Subject: Price fixing
Limitations (periods of)
Complaints
Fines
Annulment (of part of Commission Decision)

Industry: Shipping
(Some implications for other industries)

Parties: Members of the FEFC and others (see list in paragraph 15 below)
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 19 March 2003, in Case T-213/00 (*CMA CGM et al v Commission of the European Communities*)

(Note. This is an unusual instance of the Court upholding the substance of a Commission Decision while annulling in its entirety the Commission's imposition of fines on all the parties concerned. The explanation lies in the fact that the procedure followed by the Commission in determining the levels of the fines contravened the rules on limitations. The Court's discussion of the manner in which the rules on limitations apply to fines is an invaluable guide to those who may find themselves in a similar position. The judgment is exceptionally long, running to well over five hundred paragraphs; and the report which follows concentrates solely on the question of the rules on limitations.)

Judgment

Legal background

[Paragraphs 1 to 13 refer to the special rules on competition applying to the field of transport and in particular to Regulations EEC/1017/68 and EEC/4056/86.]

Facts

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

15. The FETTCSA initially brought together 14 members of the Far Eastern Freight Conference ('FEFC'), the liner conference operating between northern Europe and South-East and East Asia which was the subject of Commission Decision EC/985/94 of 21 December 1994 relating to a proceeding pursuant to

Article [81] of the EC Treaty and the case giving rise to the judgment of the Court of First Instance of 28 February 2002 in Case T-86/95, *Compagnie Générale Maritime and Others v Commission*, and six shipping lines independent of the FEFC.

16. The FEFC members party to the FETTCSA were Ben Line Container Holdings Ltd, Compagnie Générale Maritime (CGM), East Asiatic Company, Hapag-Lloyd AG, Kawasaki Kisen Kaisha (K Line), A.P. Møller - Maersk Line (Maersk), Malaysia International Shipping Corporation Bhd (MISC), Mitsui OSK Lines Ltd (MOL), Nedlloyd Lijnen BV (Nedlloyd), Neptune Orient Lines Ltd (NOL), Nippon Yusen Kaisha (NYK), Orient Overseas Container Line Ltd (OOCL), P & O Containers Ltd (P&O) and Polish Ocean Line (POL). The independent members of the FETTCSA were Cho Yang Shipping Co. Ltd (Cho Yang), Deutsche Seereederei Rostock (DSR), Evergreen Marine Corp (Taiwan) Ltd (Evergreen), Hanjin Shipping Co. Ltd (Hanjin), Senator Linie GmbH & Co. KG (Senator Lines) and Yangming Marine Transport Corp. (Yangming).

17. According to section 2 of the FETTCSA, that agreement had as its purpose:
- the establishment by the parties of industrial standards for the calculation and setting of charges and surcharges by means of procedural mechanisms common to all the parties, and
- the use of a common mechanism for the calculation and setting of charges and surcharges other than sea freight and inland haulage.

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

[Paragraphs 19 to 29 explain the procedure leading to the Commission's Decision; this is covered largely in the Court's statement of the law below.]

The contested decision

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

[Paragraphs 31 and 32 describe in detail these charges and surcharges.]

33. As regards the competition rules applicable, the decision states that the charges and surcharges in question concern maritime transport services which fall

within the scope of Regulation EEC/4056/86; rail, road and inland waterway transport services (or services ancillary thereto) which fall within the scope of Regulation EEC/1017/68 and services which fall within the scope of neither of those two regulations which therefore fall within the scope of Regulation 17 (paragraphs 123 and 126 to 130 of the contested decision).

34. The Commission therefore explains that in the present case it applied the procedures applicable under Regulations 17, EEC/1017/68 and EEC/4056/86 (paragraph 124 of the contested decision). Thus, it states, even if it were wrong in its identification of the regulation(s) applicable to each of the charges and surcharges, the parties have had the benefit of the procedural safeguards provided by all possibly applicable regulations (paragraph 124 of the contested decision).

35. The Commission claims that the relevant market for the purpose of assessing the agreement not to discount entered into by the FETTCSA parties (the agreement in question) is that of "scheduled maritime transport services for the transport of containerised cargo between northern Europe and the Far East" (paragraph 55 of the contested decision).

36. In its analysis of the substance, the Commission concludes that the agreement in question restricts price competition, contrary to Article 81(1)(a) of the EC Treaty and Article 2(a) of Regulation EEC/1017/68, even if the parties do not expressly agree on the level of their published prices (paragraphs 131 to 144 of the contested decision).

[Paragraphs 37 to 39 deal with "technical agreements", block exemption and individual exemption.]

40. Since the infringement found was committed deliberately, according to the contested decision, it imposes a fine on each of the FETTCSA parties pursuant to Article 15(2) of Regulation 17, Article 22(2) of Regulation EEC/1017/68 and Article 19(2) of Regulation EEC/4056/86 (paragraphs 176 to 207 of the contested decision).

41. The operative part of the decision reads as follows:

Article 1

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

Article 2

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

Article 3

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

Article 4

Fines as set out below are hereby imposed on the undertakings to whom this decision is addressed [in €]:

CMA CGM SA	134 000
Hapag-Lloyd Container Linie GmbH	368 000
Kawasaki Kisen Kaisha Limited	620 000
A.P. Møller-Maersk Sealand	836 000
Malaysia International Shipping Corporation Berhad	134 000
Mitsui O.S.K. Lines Ltd	620 000
Neptune Orient Lines Ltd	368 000
Nippon Yusen Kaisha	620 000
Orient Overseas Container Line Ltd	134 000
P&O Nedlloyd Container Line Ltd	1 240 000
Cho Yang Shipping Co., Ltd	134 000
DSR-Senator Lines GmbH	368 000
Evergreen Marine Corp. (Taiwan) Ltd	368 000
Hanjin Shipping Co., Ltd	620 000
Yangming Marine Transport Corp.	368 000

Findings of the Court

480. Article 1(1)(b) of Regulation No 2988/74 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of breaches of the Community competition rules. The period begins to run on the day on which the infringement is committed, or, in the case of continuing or repeated infringements, on the day on which it ends.

481. The limitation period may, however, be interrupted or suspended in accordance with Articles 2 and 3 of Regulation EEC/2988/74 respectively. Under Article 2(1) of that regulation, "[a]ny action taken by the Commission ... for the purpose of the preliminary investigation or proceedings" and in particular "written requests for information by the Commission ... and a Commission decision requiring the requested information" interrupts the limitation period. Under Article 2(3) of Regulation EEC/2988/74, each interruption shall start time running afresh. However, the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty.

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

imposed on the applicants under Article 4 of the contested decision would have been unlawful.

483. It is common ground between the parties that in this case the only steps taken by the Commission during the administrative procedure leading to the adoption of the contested decision after its request for information of 24 March 1995 were, first, the request for information of 30 June 1998, seeking information relating to the FETTCSA parties' turnover for 1997 and, second, the request for information dated 11 October 1999 seeking information relating to the FETTCSA parties' turnover for 1998. It is therefore necessary to consider whether, as the Commission asserts at paragraph 194 of the contested decision, those two requests for information validly interrupted the limitation period for the purposes of Article 2(1) of Regulation EEC/2988/74.

484. Since the interruption of the limitation period laid down by Article 2 of Regulation EEC/2988/74 constitutes an exception to the five-year limitation period laid down by Article 1(1)(b) of that regulation, it must be interpreted narrowly.

485. Furthermore, it is apparent from the first subparagraph of Article 2(1)(a) of Regulation EEC/2988/74 that in order to interrupt the limitation period in accordance with that regulation written requests for information by the Commission, which are expressly mentioned in that provision as examples of actions interrupting the limitation period, must be "for the purpose of the preliminary investigation or proceedings in respect of an infringement".

486. Pursuant to Article 11 of Regulation 17 and, as regards the transport sector concerned in the present case, Article 19 of Regulation EEC/1017/68 and Article 16 of Regulation EEC/4056/86, requests for information must, according to the first paragraph of those provisions, be "necessary". According to the case-law, a request for information is necessary within the meaning of Article 11(1) of Regulation 17 if it may legitimately be regarded as having a connection with the putative infringement (Case T-39/90, *SEP v Commission*, paragraph 29). Since the wording of Article 19 of Regulation EEC/1017/68 and Article 16 of Regulation EEC/4056/86 is the same, the same principles apply to requests for information based on those provisions.

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

488. Although a request for information may interrupt the limitation period for fines where its purpose is to enable the Commission to comply with its obligations in fixing the fine, therefore, the Commission cannot, for instance, make requests for information the sole purpose of which is to prolong the limitation period artificially so as to preserve the power to impose a fine (see, to that effect, *Austria v Commission*, paragraphs 45 to 67). Requests for information solely for that purpose cannot be necessary for infringement proceedings.

Furthermore, if the Commission were able to interrupt the limitation period by sending requests for information not necessary for the proceedings it would be able systematically to prolong the limitation period up to the 10-year maximum laid down by Article 2(3) of Regulation EEC/2988/74, thereby subverting the five-year limitation period laid down by Article 1(1) of that regulation and converting it into a 10-year one.

489. In the present case, it is apparent from the express wording of the requests for information dated 30 June 1998 and 11 October 1999 that their intended purpose was to enable the Commission to determine the amount of the fine, if any, to be imposed on the applicants. In the written procedure before the Court, the Commission explained in the defence that those requests were intended to enable it to fix the maximum amount of the fines in accordance with the provisions of Article 15(2) of Regulation 17, Article 22(2) of Regulation EEC/1017/68 and Article 19(2) of Regulation EEC/4056/86, which provide that in no circumstances may the fines exceed 10% of the turnover of the undertaking concerned during the preceding business year. In the rejoinder, the Commission stated that it was therefore "crucial" that it obtained sufficiently recent turnover figures to enable it to set appropriate fines.

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

491. Consequently, if the purpose of the requests for information of 30 June 1998 and 11 October 1999 was to obtain turnover figures necessary for the Commission to be able to check that the intended fines did not exceed the permitted upper limit, they were capable of interrupting the limitation period within the meaning of Regulation EEC/2988/74.

492. Therefore it is necessary to ascertain whether, when they were sent, those requests were necessary for the Commission to be able to adopt a final decision imposing fines or whether, as the applicants allege, the circumstances surrounding the adoption of those requests for information show, on the contrary, on the basis of precise and consistent indicia, that they did not validly interrupt the limitation period because they were not necessary for the infringement proceedings since the Commission already had all the information necessary for the adoption of the contested decision following receipt of the applicants' replies to the request for information dated 24 March 1995.

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

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

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

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

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

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

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

500. In the light of those circumstances, the Court finds, first of all, that the Commission's investigation in this case was completed by March 1995. By that time the Commission had completed all the procedural steps prior to the adoption of a decision applying Article 81 of the EC Treaty and Article 2 of Regulation EEC/1017/68. In particular, the Commission had sent its statement of objections and received the applicants' observations. In that regard, the very fact that on 24 March 1995, shortly after receiving the response to the statement of objections of 16 September 1994, the Commission sent a request for information seeking to obtain the turnover figures of the FETTCSA parties for 1993 and 1994 shows that the final stage of the administrative procedure had been reached and that the Commission was then preparing to adopt a final decision imposing fines, since the only purpose of that request was to obtain the turnover figures so as to enable

it to fix the fines without exceeding the maximum amount permitted under Article 15(2) of Regulation 17, Article 22(2) of Regulation EEC/1017/68 and Article 19(2) of Regulation EEC/4056/86.

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

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

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

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

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

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

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

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

508. In reply to a written question from the Court, the Commission stated that it had calculated the upper limit of fines permitted in this case on the basis of the applicants' turnover for 1998 and that as a precaution it had also satisfied itself that the fines imposed did not exceed 10% of the applicants' worldwide turnover in 1993. The same explanations appear at paragraph 207 of the contested decision.

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

510. Furthermore, since the Commission felt able to calculate the permitted upper limit of fines on the basis of the turnover figures for 1998, which are not those for the last business year before the adoption of the contested decision, it could also have done so on the basis of the turnover figures for 1993 and 1994, which it had

in its possession since the request for information of 24 March 1995. The Commission does not explain why those turnover figures were not sufficient to enable it to check that the upper limit for fines had not been exceeded and that that fact made it necessary to send the requests for information of 30 June 1998 and 11 October 1999.

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

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

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

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

515. In the light of all of those factors, and without needing to consider why no decision was adopted following the issue of the request for information of 24 March 1995, it may be concluded that the purpose of the requests for information of 30 June 1998 and 11 October 1999 was not to enable the Commission to calculate the maximum permitted fines.

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

517. Consequently, Article 4 of the contested decision must be annulled in so far as it imposes fines, since they were imposed on 16 May 2000, after the five-year

limitation period laid down by Articles 1(1)(b) and 2(1) and (3) of Regulation EEC/2988/74, which started to run anew with effect from 24 March 1995, had expired.

[Paragraph 318 covers the question of costs.]

Court's Ruling

The Court of First Instance hereby:
1. Annuls Article 4 of Commission Decision 2000/627/EC of 16 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/34.018 - Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA));
2. Dismisses the remainder of the action;
3. Orders the Commission to bear its own costs and to pay half of the applicants' costs;
4. Orders the applicants to bear half of their own costs. ■

The FEFC (II) Case

As a footnote to the case reported above, it is worth recording that, after discussions with the Commission, the Far Eastern Freight Conference (FEFC) group of shipping companies, which provides freight transport services between Europe and the Far East, has decided that it will terminate, with immediate effect, its price-fixing regarding the transport of cars by sea. In addition, the Swedish/Norwegian maritime car carrier, Wallenius Wilhelmsen AS, has withdrawn from the FEFC.

Deep-sea car carriage is a highly concentrated sector with only a few major carriers world-wide; and the four largest specialised car carriers, NYK Line, Mitsui O.S.K Lines (MOL), K-Line and Wallenius Wilhelmsen AS, have all been members of the FEFC, the main activity of which is containerised liner shipping. These four shipping lines have been jointly fixing prices for the carriage of cars on their special vessels between Europe and the Far East.

Under the European Community's competition rules applicable to shipping services, liner conferences (groupings of shipping companies providing regular scheduled services) qualify for block exemption from the prohibition contained in Article 81(1) of the EC Treaty. Subject to certain conditions, a liner conference may fix maritime freight rates, regulate capacity and agree on other related activities. However, the Commission takes the view that specialised car carriage is not covered by the liner conference exemption.

Source: Commission Statement IP/03/450, dated 28 March 2003