PRICING POLICY (SHIPPING): THE ATLANTIC CONTAINER CASE

Subject: Pricing policy
Obligations (imposed by Commission)

Industry: Shipping (liners)
(Some implications for other industries)

Parties: Atlantic Container Line AB (and fourteen other applicants)
(2 interveners in support of the applicants)
Commission of the European Communities
(3 interveners in support of the respondent)

Source: Judgment of the Court of First Instance, dated 28 February 2002 in Case T-395/94 (*Atlantic Container Line AB et al v Commission of the European Communities*)

(Note. This is a complex judgment running to over four hundred paragraphs and, except on three points, is of limited interest. The first point of interest is that, behind all the technicalities of the case, the Court found that the tariff structure reflected an unacceptable pricing policy; the applicants therefore lost their case on almost all the main issues. The second point is the useful reminder, in paragraph 257, reproduced below, of the extent to which the Court is entitled to look at the economics of a case. The third point is that the Commission may impose obligations on the parties only if those conditions are both necessary and fully explained in the recitals to the Commission's formal decision. In paragraph 36 the Court set out the five Articles of the contested decision and, in paragraphs 410 to 415, the reasons for annulling Article 5.)

The contested decision

36. At the end of its analysis, the Commission decided as follows:

Article 1

The provisions of the TAA relating to price-fixing and capacity infringe Article 85(1) of the EC Treaty.

Article 2

Application of Article 85(3) of the EC Treaty and of Article 5 of Regulation (EEC) No 1017/68 to the provisions of the TAA referred to in Article 1 of this decision is hereby refused.

Article 3

The undertakings to which this decision is addressed are hereby required to bring an end forthwith to the infringements referred to in Article 1.

Article 4

The undertakings to which this decision is addressed are hereby required to refrain in future from any agreement or concerted practice which may have the same or a similar object or effect as the agreements and practices referred to in Article 1.

Article 5

The undertakings to which this decision is addressed are hereby required, within a period of two months of the date of notification of this decision, to inform customers with whom they have concluded service contracts and other contractual relations in the context of the TAA that such customers are entitled, if they so wish, to renegotiate the terms of those contracts or to terminate them forthwith.

Economic appraisals

257. Before examining the abovementioned agreements, it must be borne in mind as a preliminary point that, according to settled case-law, in the context of an action for annulment pursuant to Article 173 of the Treaty, the review undertaken by the Court of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 85(3) of the Treaty, with regard to each of the four conditions laid down in that provision, is necessarily limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (Joined Cases 142/84 and 156/84, *BAT and Reynolds* v *Commission*, paragraph 62; Joined Cases T-39/92 and T-40/92, *CB and Europay* v *Commission*, paragraph 109; Case T-17/93, *Matra Hachette* v *Commission*, paragraph 104; Case T-29/92, *SPO and Others* v *Commission*, paragraph 288; and Joined Cases T-213/95 and T-18/96, *SCK and FNK* v *Commission*, paragraph 190).

Obligations imposed on undertakings

410. It is clear from the case-law that, in the context of its power for the purpose of applying Article 3 of Regulation No 17, and thus also Article 11(1) of Regulations No 4056/86 and No 1017/68, the Commission may specify the scope of the obligations imposed on the undertakings concerned in order to bring an end to the infringements identified. That power must however be implemented according to the nature of the infringement declared (see, by analogy, Joined Cases 6/73 and 7/73, *Istituto chemioterapico italiano and Commercial Solvents* v *Commission*, paragraph 45; *RTE and ITP* v *Commission*, paragraph 90; and Case C-279/95 P, *Langnese-Iglo* v *Commission*, paragraph 74) and the obligations imposed must not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed (see Joined Cases 241 and 242/91, *RTE and ITP* v *Commission*, paragraph 93).

411. Article 5 of the TAA decision provides that the parties to the TAA must inform customers with whom they have concluded service contracts and other contractual relations in the context of the TAA "that such customers are entitled, if they so wish, to renegotiate the terms of those contracts or to terminate them forthwith".

412. The Commission acknowledges that the service contracts entered into by the applicants are not, in themselves, contrary to Article 85(1) of the Treaty. Those

contracts do not therefore form part of the infringements identified in the TAA decision. The Commission contends, however, that the order to the applicants to allow their customers to renegotiate or terminate those contracts was necessary, because the effects of the infringements identified in the contested decision might continue to exist if the addressees of that decision were able to continue to enjoy the economic advantages secured by ongoing contracts entered into on the basis of the horizontal agreement to fix prices and limit supply to which the TAA amounted.

413. It should be observed, in that respect, that most horizontal agreements to fix prices or divide up a market have such effects, more or less long-term, on third parties, but the Commission does not usually deem it necessary to include in its decisions declaring infringements an obligation comparable to that contained in Article 5 of the contested decision...

414. Moreover, apart from the penalty of nullity expressly provided for in Article 85(2) of the Treaty, the case-law establishes that the consequences in civil law attaching to an infringement of Article 85 of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract, are to be determined under national law (see Case C-453/99, *Courage and Crehan*, paragraph 29; and Case T-24/90, *Automec* v *Commission*, paragraph 50), subject, however, to not undermining the effectiveness of the Treaty.

415. It follows that, in any event, the measure contained in Article 5 of the contested decision was not obviously necessary and does not correspond to an established line of Commission decisions. In those circumstances, it fell to the Commission to explain its reasoning (see, to that effect, Case 73/74, *Papiers peints and Others* v *Commission*, paragraph 31). Not only did the Commission not explain in the contested decision the reasons for which, even if the said contracts are not contrary to Article 85(1) of the Treaty, in order to bring to an end the infringements identified it would be necessary for the applicants to afford their customers the opportunity to renegotiate them but, furthermore, no part of the TAA decision deals with the issue of the fate of those service contracts entered into with shippers.

416. It follows that Article 5 of the TAA decision must be annulled on the ground of breach of the obligation to state reasons.

Court's ruling

The Court of First Instance hereby:

1. Annuls Article 5 of Commission Decision 94/980/EC of 19 October 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34.446 - Trans-Atlantic Agreement);
2. Dismisses the remainder of the application...

[Paragraphs 3-5 of the Ruling concern Costs] ■