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