II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 July 1985

relating to a proceeding under Article 2 of Council Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway (IV/31.029 — French inland waterway charter traffic : EATE levy)

(Only the French text is authentic)

(85/383/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway [1], as last amended by the Act of Accession of Greece, and in particular Articles 2 and 5 thereof,

Having regard to the complaints lodged with the Commission under Article 10 of Regulation (EEC) No 1017/68 by the following Dutch undertakings and associations : Algemene Schippersvereniging, Rotterdam, Onafhankelijke Nederlandse Schippersvakbond, Rotterdam, Federatie van Schippersbonden, Rotterdam, Vereniging Toerbeurt Noord-Zuid, Rotterdam and Benjamin Besjer, transport operator, Rotterdam,

Having decided on 1 August 1984 to open proceedings in the case,

Having given the undertakings concerned on 27 February 1985 the opportunity of replying to the objections raised by the Commission, in accordance with Article 26 (2) of Regulation No 1017/68 and with Commission Regulation (EEC) No 1630/69 of 8 August 1969 on the hearings provided for in Article 26 (1) and (2) of Regulation (EEC) No 1017/68 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions, in accordance with Article 16 of Regulation (EEC) No 1017/68, on 19 June 1985,

Whereas :

I. FACTS

(1) This Decision concerns an agreement signed in France on 13 June 1983 between the French Association of Self-Employed Waterway Carriers (Association Nationale des Travailleurs Indépendants de la Batellerie — ANTIB) and the French Federation of Inland Waterway Forwarding Agents (Chambre Syndicale Nationale des Courtiers de fret fluviaux) and in particular the introduction of a 10 % levy on all charters arranged through the inland waterway freight exchange system in France for destinations abroad. The levy has been referred to as the 'EATE levy', or, for the time being, the 'BASC levy', after the organizations receiving the proceeds (see paragraphs 22 and 23).

[1] OJ No L 175, 23. 7. 1968, p. 1.

[2] OJ No L 209, 21. 8. 1969, p. 11.

A. Structure of the charter market on French inland waterways

1. *Types of carrier*

(2) The French carriers operating on the charter market on French inland waterways fall into three categories :

(a) Owner-boatmen, most of whom own only one barge : there are about 2 800 such carriers operating 3 400 craft, 2 300 of them being one-barge firms. The vast majority (97 %) carry general cargo (fertilizers, cereals, coal, sand, etc.) ;

(b) The industrial fleet comprising three large shipping companies which operate altogether about 400 vessels : one of them operates on Rhine waters and the two others carry specialized cargoes (such as oil, cars) rather than general cargo, and have diversified interests throughout the transport field, in inland waterway forwarding, combined transport, warehousing, etc. ;

(c) Small fleet operators with altogether about 350 vessels, a group comprising about 40 firms also with diversified interests throughout transport.

2. *Types of charter-party*

(3) General cargo (unlike specialized cargo) is carried under three types of charter-party :

(a) Charters for one voyage or a number of voyages, arranged between a carrier and a shipper by a forwarding agent ;

(b) Time charters under which the craft is hired for a certain time (not very common) ;

(c) Tonnage charters, agreed directly between the owner and the charterer, and permitted only for craft above a certain (quite high) tonnage.

(4) Under the regulations, owner-boatmen are allowed to let their vessels only on voyage or time charters. To obtain tonnage charters, they must form groups. Small fleet operators (groups) can also let certain designated vessels on voyage charters. The large fleets hardly ever use voyage charters, but negotiate tonnage contracts or time charters directly with shippers.

3. *The 'queueing' system and the exchanges*

(5) The chartering of vessels on a voyage basis to carry general cargo to destinations within France or abroad — except for voyages commencing in France and passing along the Rhine or Moselle — are, by law, subject to the 'queueing' ('tour de rôle') system.

Under this system, all vessels which their operators wish to let on voyage charters must be entered in the 'queue' at the official exchange ('bourse') where shippers wishing to hire vessels on voyage charters are obliged to offer their cargoes.

(6) Voyage charter-parties may be arranged only at the official exchanges, which have been set up by ministerial decree at all the main ports of loading and are run under the supervision of the National Inland Waterways Board (ONN), an agency responsible to the Ministry of Transport. All charter-parties of this kind must be endorsed by the ONN as being in accordance with the regulations.

(7) The 'queueing' system operates as follows : All the cargoes offered by shippers are posted on the exchange's notice board and all the vessels awaiting cargo are listed in the 'queue'. The owners or operators of the vessels in the queue are called in turn and may take their pick of the cargoes offered. Carriers are not obliged to accept a particular cargo.

(8) Foreign carriers, i.e. those whose vessel is not registered in France, may join the queue at exchanges at the end of an outward trip, but only for a return international trip or a trip taking them back to the border. In exceptional cases they may take cargoes for inland French destinations which are left over for a second call. Like their French colleagues, they may not take cargoes outside the exchange system.

(9) Cargoes are offered to the exchanges by forwarding agents, who, by law, have a monopoly of representing shippers at the exchanges.

(10) Since 1973 all tonnage charter-parties agreed directly between the large or small fleet owners and shippers have been vetted by an Advisory Committee composed of representatives of the different types of carrier. On the advice of the Committee, the ONN may express reservations about the proposed price of a charter and may also order part of the cargo to be put out to the exchange system, in which case it will be carried under voyage charters.

4. *Freight rates*

(11) The freight rates on inland voyage charters are mandatorily laid down by the authorities. No official tariff exists for other types of charters, but the rates charged on tonnage contracts are influenced by the voyage charter tariff.

(12) Freight rates for international traffic are normally uncontrolled, but for international charters arranged through the exchanges a system of floor prices agreed between the forwarding agents and ANTIB is in operation.

(13) The freight for each cargo, inland or international, is posted up at the exchange against the cargo.

B. The relevant market

(14) The market concerned by the inter-association agreement is that for the carriage of general cargo from France to Belgium and the Netherlands, a market on which mainly owner-boatmen operate and which is organized through the exchanges. Inland waterway traffic between the three countries, which in all three is organized under the exchange system either by law or by agreement between those engaged in the traffic, is known as the 'north-south' traffic. The problems which the 'north-south' traffic as a whole poses from the point of view of competition are being investigated separately by the Commission.

(15) The industrial fleets are scarcely involved at all in north-south traffic, operating mainly on the Rhine and Moselle and the other major waterways and in specialized cargoes. The small fleets operate mainly in inland traffic along the waterways of the Seine and Rhône network and mostly outside the exchange system.

(16) The Commission understands that in 1982 the volume of north-south traffic from France allocated through the exchange system came to about 6 million tonnes and accounted for about 37 % of all cargoes passing through French exchanges. The bulk of the traffic (over 90 %) consists of cereals, and the remainder of sugar and various animal feedingstuffs, bound for Belgian and Dutch destinations. About 10 million tonnes of cargoes to inland destinations were also allocated through the French exchange system in 1982.

(17) The 6 million tonnes of cereals and other goods shipped by inland waterway to Belgium and the Netherlands represent only 40 % of the total northbound traffic in these commodities. The remaining 60 % (9 million tonnes) are transported by rail or road, which in recent years have been steadily increasing their share of this traffic.

(18) The total volume of traffic carried by inland waterway to inland destinations in France under or outside the exchange system in 1982 was around 41 million tonnes. The total volume of traffic carried by inland waterway to foreign destinations in 1982 amounted to some 19 million tonnes.

(19) The north-south traffic of about 6 million tonnes is shared almost equally between French carriers and Belgian and Dutch carriers, but Belgian and Dutch carriers play very little part in inland French traffic.

C. The undertakings

1. *ANTIB*

(20) ANTIB France, is a trade association governed by the Act of 21 July 1901 on contracts of association, which was set up pending the establishment of a national chamber of waterway carriers. Its objects are to assist the public authorities on all matters of general interest concerning the activities of self-employed waterway carriers and to further their professional interests. The Association is financed from members' annual subscriptions and from a 'professional levy' of 0,50 % deducted by forwarding agents from

freights earned on all charters arranged through the exchange system. Membership is open to non-incorporated firms or individuals engaging in the carriage of goods by inland waterway and having at their disposal for this purpose one or more vessels registered in France. Non-incorporated carriers of foreign nationality meeting the above criteria can become active non-voting members. The articles of association provide for ANTIB to be dissolved immediately a National Chamber of Small Waterway Carriers (Chambre Nationale de la Batellerie Artisanale — CNBA) is set up. The foundation of such a chamber is provided for in Act No 82-1153 of 30 December 1982 on the organization of inland transport and in Decree No 84-365 of 14 May 1984 on the operation of the CNBA.

2. *The freight forwarding agents*

(21) The National Federation of Inland Waterway Forwarding Agents (Chambre Nationale Syndicale des Courtiers de fret fluviaux) brings together all inland waterway freight forwarders established in France. The forwarding agents have to meet statutory professional standards.

Forwarding agents represent shippers in all dealings concerning charters arranged through the exchange system and also provide commercial services to carriers, by paying them advances on freights, drawing up documentation and supervising performance of the contract, although without liability. The agent's commission (5 % of the freight for inland and 7,5 % for foreign trips) and a *del credere* commission are at present payable by the carrier.

3. *BASC*

(22) The Small Boatmen's Commercial Services Group (Batellerie Artisanale Service Commercial — BASC) is a commercial association formed in 1977 by 400 owner-boatmen owning vessels with a total hold capacity of about 200 000 tonnes with the object of undertaking activities in inland waterway transport. BASC was designed to be the commercial wing of ANTIB, which in practice controls the administration of BASC. Its role in this case was confined to keeping moneys on behalf of EATE pending EATE's foundation.

4. *EATE*

(23) The Boatmen's Cooperative ('Enterprise Artisanale de Transport par Eau' — EATE) is a cooperative which was ultimately to administer the proceeds of the EATE levy. EATE had not been legally incorporated when the inter-association agreement was signed or by the time it expired, because the legal formalities had not yet been completed. The main objects of the cooperative are to pursue a commercial policy designed to increase the traffic passing through the exchange system and to provide forwarding services to shippers on advantageous terms. EATE is not itself, strictly speaking, a carrier. All the charter-parties it makes are put through the exchange system and are open to all carriers, whether members or not. Even foreign carriers could benefit from its efforts (in the circumstances mentioned in paragraph 8).

The idea of forming EATE and the name given to it were put forward in a report on the development of French inland waterway transport prepared for the Ministry of Transport by the Grégoire Committee. The formation of the cooperative was made possible by virtue of Act No 83-657 of 20 July 1983 on the development of collective economic activities, which laid down the main requirements for worker cooperative (Title I, Articles 1 to 34)

(24) The rules governing membership of EATE are of significance in the present case. Act No 83-657 (Article 36) provides that cooperatives in inland waterway transport shall be formed of inland waterway carriers registered with the CNBA. Carriers or owner-boatmen with vessels not registered in France, i.e., foreign carriers, thus cannot be members of EATE. Membership is open to individuals or companies that are either owner-boatmen (registered with the CNBA) or carry on similar or complementary activities, provided in the latter case that they do not have more than 20 permanent employees. However, the total value of the business transacted with the cooperative by members in the second category must not account for more than a quarter of the cooperative's annual turnover (Article 10 (1) and (2) of EATE's articles of association and Article 6 of the Act of 20 July 1983). Membership is also open to persons who, though not in business as inland waterway carriers, have an interest in the activities of EATE or a close relationship with it and a good knowledge of the industry, such as forwarding agents.

D. Main provisions of the inter-association agreement of 13 June 1983

(25) On 13 June 1983, ANTIB and the National Federation of Inland Waterway Forwarding Agents signed an agreement on the 'reorganization of small-scale inland waterway transport'. It involved a revision of the freight tariff for charters arranged through the exchange system and the constitution of a 'regulation fund' administered by the future EATE.

(26) The agreement provided *inter alia* for :

(a) introduction of a levy of 10 % of freights on all charters arranged at French exchanges for destinations abroad, whether the carriage was to be undertaken by French or foreign carriers. The levy, to be collected by the forwarding agents, was called the 'EATE levy', or for the time being the 'BASC levy' ; and

(b) the possibility of the levy being refunded to EATE members.

(27) The EATE levy was to be deducted from the total gross freight posted up at the exchange. The amount payable to the carrier was based on 90 % of the total freight posted up.

(28) After deduction of the statutory and customary dues and charges (see paragraphs 20 and 21) the EATE levy together with 5 % of the forwarding agents' commission was paid via the local forwarding agents' association into a special account held by BASC on behalf of EATE, which was still being set up. BASC and not ANTIB was used to hold the funds because being a commercial association ('groupement d'intérêt économique') it was allowed to receive revenue arising from commercial transactions, which ANTIB was not. The Commission understands that about FF 5 million was collected under this levy sheme.

(29) The agreement also provided that the EATE levies collected and not refunded to non-members of EATE would constitute, together with other moneys, a 'regulation fund', the major part of which would be used for commercial purposes benefitting the entire trade and the remainder to help cover EATE's running costs.

(30) The Commission understands that the levy was abolished with effect from 17 October 1983, but that forwarding agents continued to pay their contribution to the fund after that date.

E. The activities of EATE and the use of the regulation fund

(31) EATE was constituted in the legal form of a 'société anonyme coopérative' with variable capital. Its objects were to promote the interests of waterway carriers lifting cargoes through the exchange system. It could engage in commercial activities of two kinds to compete with the large and small fleets on the tonnage contracts market and with the railways and road haulage :

(a) by entering into contracts itself with major shippers and then putting the cargo through the exchanges ;

(b) by offering shippers generating substantial amounts of traffic advantageous commercial terms to put their cargo through the exchanges.

In both cases the cargo would be carried under voyage charters at the exchange price. As EATE could require its members to undertake carriage on the terms it had agreed with the shipper, it could guarantee performance of the contract and assume liability.

For this purpose the regulation fund would be used to pay discounts to customers, to ensure that capacity was available to collect cargo by paying carriers for empty trips, to pay for waiting time and to provide any other incentives to member carriers operating through the exchanges.

(32) The EATE levy to constitute the regulation fund was introduced before EATE was officially set up so that it could start commercial operation in time for the cereal traffic in the second half of 1983. The Commission understands that EATE managed to capture some large contracts which

it was able to put into the exchange system, so increasing the traffic passing through the exchanges. However, the major part of the contracts it secured were for carrying goods to French seaports for export overseas, traffic from which foreign carriers are usually barred.

F. Refund of the levy

(33) EATE's long-term success depends on gaining the support of the greatest possible number of French boatmen working through the exchanges.

To encourage the boatmen to join the new organization a refund of the EATE levy was promised and is provided for in the inter-association agreement.

(34) On 2 August 1983 ANTIB began refunding the EATE levy through BASC to French carriers.

Foreign carriers paid the levy but could not obtain a refund since unlike their French counterparts, they cannot become members of EATE. To this day, foreign carriers receive no refunds.

G. The retaliatory measures taken in Belgium and the Netherlands

(35) On 20 June 1983 the organizations of Belgium and Dutch waterway carriers introduced various retaliatory measures against French carriers whereby they too were charged 10 % of the freights they earned on all charters from Belgium or the Netherlands to France. These measures are the subject of separate investigations by the Commission.

II. LEGAL ASSESSMENT

A. Article 2 of Regulation (EEC) No 1017/68

(36) Article 2 of Regulation (EEC) No 1017/68 prohibits as incompatible with the common market, subject to the provisions of Articles 3 to 6 of the Regulation, and without any prior decision to that effect being required, all agreements between undertakings, decisions by associations of undertakings and concerted practices liable to affect trade between Member States which have as their object or effect the prevention, restriction or distortion of competition within the common market.

1. *Undertakings*

(37) ANTIB, one of the parties to the inter-association agreement with which this Decision is concerned, is a trade association whose corporate function is the same as that traditionally performed by a federation of craftsmen's guilds.

(38) The other party to the agreement, the National Federation of Inland Waterway Forwarding Agents, is subject to the legislation on trade associations, the Inland Waterways Code and its own bye-laws.

(39) Both ANTIB and the National Federation of Inland Waterway Forwarding Agents are associations of undertakings within the meaning of Article 2 of Regulation (EEC) No 1017/68. The Commission has no criticism to make of the activities of the two associations from the point of view of the competition rules in so far as they are aimed at satisfying the common needs of their members and performing the typical functions of a trade association, such as :

— maintenance of professional standards by means of rules on training, compulsory registration of members, etc. ;

— study of matters of common interest relevant to the activities of their members and maintenance of relations with other trade associations and the public authorities, in order to give members the necessary support and assistance to enable them technically to carry on their occupation ;

— promotion of the interests of the trade in the areas of securing better remuneration for its services and improved working conditions.

However, with the agreement of 13 June 1983 the activities of the two associations entered a commercial area in which they have a direct effect on competition and, in particular, on the competitive position of third parties. Article 2 of the Regulation applies to the two trade associations in so far as their own activities, or those of their members, have the effects referred to in the Article.

2. *Agreement between undertakings*

(40) Although Article 2 of Regulation (EEC) No 1017/68 mentions only agreements between undertakings, it also applies to agreements between associations of undertakings (Commis-

sion Decision 74/433/EEC) (1), upheld by the Court of Justice in its judgment in Case 71/74 Frubo v. Commission (2). The agreement between ANTIB and the National Forwarding Agents' Federation must therefore be considered in its form as an agreement falling within the scope of Article 2 of Regulation (EEC) No 1017/68 because it was intended to have effects prohibited by that Article.

(41) The agreement is binding on the members of the Forwarding Agents' Federation as if they had entered into it individually. Although the Federation has the power to impose mandatory requirements on its members, in the present case the implementation of the agreement is required of the membership by virtue of a recommendation (cf. in this connection Commission Decision 82/371/EEC in Case IV/29.995 Navewa-Anseau (3).

(42) The agreement is not binding on the members of ANTIB, but the obligations under it (such as the expenditure of the regulation fund) lay solely upon the association. Nevertheless, ANTIB members (and non-member foreign carriers) using the exchange system cannot avoid paying the EATE levy because they have to deal with forwarding agents.

(43) As far as the EATE levy was concerned, such an arrangement was perfectly effective and satisfactory. For collection of the levy it was sufficient to have the support of the forwarding agents since they were always involved in charters arranged on the exchanges. As for the expenditure of the regulation fund and the refund of the levy, this could be decided wholly by ANTIB on its own until EATE was set up. Thus, there can be no doubt as to the causal link between the agreement between the two parties and the effect of the agreement on competition.

3. *Effect on trade between Member States*

(44) As floor prices for international charters are freely negotiated between the representatives of the carriers and the forwarding agents representing the shippers, it was on export traffic that the EATE levy was charged under the interassociation agreement.

(45) The imposition of the EATE levy on carriers transporting cargoes from France to destinations abroad, together with the possibility of selective refund of the levy, is liable to affect trade between Member States and it will tend to obstruct the carriage of goods from France to other Member States and so help to prevent the Member States becoming a single market.

(46) Given the scale of international traffic from France arranged through the exchange system and the share of this traffic held by foreign carriers (see paragraph 19), it is clear that the effect of such an agreement on trade between Member States is significant.

4. *Distortion of competition*

(47) The Commission considers that two provisions of the inter-association agreement, namely the imposition of the levy on export traffic and the possibility of a selective refund of the levy, are discriminatory and have effects referred to in Article 2 of Regulation (EEC) No 1017/68, in that they place certain inland waterway carriers not party to the agreement at a competitive disadvantage. It has been established by the Court of Justice (Joined Cases 56 and 58/64 Consten-Grundig v. Commission (4). that for an agreement to infringe the competition rules it is not necessary that it involve a restriction of competition between the parties, but it is sufficient that the practice complained of significantly affects the position of third parties.

(48) The discriminatory and anti-competitive effect of the inter-association agreement is more clearly appreciated when seen against the background of the economic and legal context in which it operates :

(a) Although the levy is charged only on international traffic, the regulation fund into which the proceeds flowed is to be used to promote all traffic, inland as well as interna-

(1) OJ No L 237, 29. 8. 1974, p. 16.
(2) [1975] ECR 563 and 583.
(3) OJ No L 167, 15. 6. 1982, p. 39.
(4) [1966] ECR 299.

tional, passing through the exchanges. Foreign carriers account for almost half of the international traffic, which is on an economically significant scale. However, the bulk of the major new business EATE has managed to secure for the exchange system with the funds collected while the levy was in operation (FF 5 million over four months) was traffic to inland French destinations, in which foreign carriers play scarcely any part.

(b) The legal aspect is no less important. The limited involvement of foreign carriers in French inland traffic is due to the fact that transport is excluded by Article 61 (1) of the EEC Treaty (as the Court of Justice confirmed in its judgment in Case 167/73 Commission v. France [1]) from the Treaty's provisions on the opening up of the service industries to non-residents and the Council, although required by Article 75 (1) (b) of the Treaty to lay down the conditions under which non-resident carriers may operate transport services within a Member State, has not yet done so. Inland waterway transport in France is therefore still subject to a national transport policy, which accounts for the only very limited liberalization of the market.

(49) A consideration of the context in which the agreement operates makes it at least likely, first of all, that the refunding of the EATE levy from 2 August 1983 onwards only to French carriers who intended to become members of EATE discriminates against foreign carriers, who thereby suffer a competitive disadvantage by comparison with their French counterparts and are prevented from competing on equal terms.

The introduction of retaliatory measures against French carriers in Belgium and the Netherlands (see paragraph 35) is no excuse for refunding the EATE levy only to French carriers and does not take the French action outside the scope of Article 2 of Regulation (EEC) No 1017/68.

(50) Secondly by giving certain carriers an unjustified advantage over other carriers the EATE levy actually impairs competiton. As the resources of the regulation fund are used to increase the overall volume of business passing through the exchanges, carriers engaged in inland traffic have benefitted under the scheme without having to contribute to it. At all events, the levy involved a clear discrimination against foreign carriers, since being involved only to a very limited extent in inland French traffic they cannot benefit from the extra business attracted to the system as much as their financial contribution warrants, with the result that their competitive position is artificially worsened.

(51) Finally, the Commission considers that the discretion to selectively refund the EATE levy is no less discriminatory, in that it has the object of giving EATE members a financial advantage and the effect of artificially worsening the competitive position of carriers who are not members by making international charters less profitable for them than they would otherwise have been, without any economic justification for so doing.

It is also likely that the promise of a refund of the levy to carriers announcing their intention of joining EATE was too strong an inducement for the carriers to resist. Whatever requirements for becoming a member (EATE shares cost FF 100 each), the Commission considers that this measure is contrary to the competition rules since it restricts the commercial independence of the carriers. Carriers ought to be able to choose freely whether to become members of EATE in the light of their particular economic circumstances. Since the commercial independence and freedom of choice of economic agents are an essential condition for the existence of effective and adequate competition on the market, this practice is liable to significantly impair competition.

At all events, this practice involves a clear discrimination against foreign carriers since they can

[1] [1974] ECR 359.

not become members of EATE. For the reasons stated in paragraph 24, the Commission does not subscribe to the interpretation put forward by ANTIB at the oral hearing that it is possible for foreign owners of craft not registered in France to become members of EATE and obtain the refund. However, even if this were the case, the effect on competition could not have been any less significant.

B. **Article 5 of Regulation (EEC) No 1017/68**

(52) Under Article 5 of Regulation (EEC) No 1017/68, the prohibition in Article 2 may be declared inapplicable with retroactive effect to any agreement or category of agreement between undertakings, any decision or category of decision of an association of undertakings, or any concerted practice or category of concerted practice which contributes towards improving the quality of transport services, promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation, increasing the productivity of undertakings, or furthering technical or economic progress and at the same time takes fair account of the interests of transport users and neither imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives nor makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

(53) To be eligible for exemption under Article 5 of Regulation (EEC) No 1017/68, an agreement does not need to have been notified. The preamble of the Regulation (14th and 15th recitals) states :

'It is for the undertakings themselves, in the first instance, to judge whether the predominant effects of their agreements, decisions or concerted practices are the restriction of competition or the economic benefits acceptable as justification for such restriction and to decide accordingly, on their own responsibility, as to the illegality or legality of such agreements, decisions or concerted practices ... . Therefore, undertakings should be allowed to conclude or operate agreements without declaring them. This exposes such agreements to the risk of being declared void with retroactive effect should they be examined following a complaint or on the Commission's own initiative, but does not prevent their being retroactively declared lawful in the event of such subsequent examination.'

(54) However, under Article 12 of the Regulation, undertakings wishing to verify the legality of agreements, decisions or concerted practices to which they are party may call upon the Commission's assistance in doing so and if the restrictive practices fall within Article 2 of the Regulation may apply for their exemption under Article 5.

(55) The parties to the inter-association agreement have never applied to the Commission for negative clearance or for an exemption under Article 12.

(56) Where a complaint is lodged against an agreement, the Commission is required to scrutinize the agreement as to its conformity with the competition rules and may in an appropriate case exempt it retroactively. In the present case, the Commission considers that the inter-association agreement falls within the scope of Article 2 of Regulation (EEC) No 1017/68 but cannot be exempted for the following reasons :

(a) The benefits anticipated and indeed achieved in terms of the volume of traffic passing through the exchange system cannot be said to compensate for the serious disadvantages which the measures complained of have entailed for competition.

In these circumstances, the measures are considered to be disproportionate and unsuited to the benefits the parties sought to achieve through the agreement. By arranging, purely to protect the vested and commercial interests of the association, for the regulation fund to be collected, only from carriers engaged in international traffic, the levy scheme discriminates against a particular category of boatmen, particularly foreign boatmen, and significantly impairs competition.

(b) In any case, the Commission does not see how the levy scheme, in the manner in which it was applied, could have contributed to improving the standard of service, promoting greater continuity and stability in the satisfaction of transport needs, increasing productivity or furthering technical or economic progress. The discrimination involved in the scheme is absolutely unjustified. Nor is there any reason for thinking that the scheme could benefit the users of the services.

(c) Finally, the fact that the formation of EATE was recommended by a public authority as a means of alleviating the critical situation faced by small French barge operators is no excuse for the levy scheme. The scheme and the resultant impairment of competition are entirely attributable to the agreement between ANTIB and the forwarding agents, and not to any intervention by the French Government.

C. Termination of the infringements

(57) Article 11 (1) of Regulation (EEC) No 1017/68 provides that where the Commission finds that there has been an infringement of Article 2 of the Regulation it may by decision require the undertakings or associations of undertakings concerned to bring such infringements to an end.

For the reasons set out in sections II A and B, the Commission has no alternative but to find that between 13 June and 17 October 1983 ANTIB and the French Forwarding Agents' Federation committed infringements of Article 2 of Regulation (EEC) No 1017/68. Only the second indent of clause 1 and the first sentence of clause 4 of the inter-association agreement between ANTIB and the Forwarding Agents of 13 June 1983, relating to the imposition of the EATE levy on international traffic only and the discretion to refund the levy to EATE members respectively, infringe Article 2. These two provisions can be severed from the rest of the agreement and fall under the prohibition laid down in Article 2,

HAS ADOPTED THIS DECISION:

Article 1

The inter-association agreement signed on 13 June 1983 between the French Association of Self-Employed Waterway Carriers (Association Nationale des Travailleurs Indépendants de la Batellerie) and the French Federation of Inland Waterway Forwarding Agents (Chambre Syndicale Nationale des Courtiers de fret fluviaux) constitutes an infringement of Article 2 of Council Regulation (EEC) No 1017/68 in so far as it impairs the normal operation of competition. The main provisions concerned are the second indent of clause 1, which provides for the imposition of an 'EATE levy' on charters for destinations abroad, and the first sentence of clause 4, which allows a discretion not to refund the levy to non-members of EATE.

Article 2

The agreement referred to in Article 1 is hereby refused exemption under Article 5 of Regulation (EEC) No 1017/68.

Article 3

This Decision is addressed to:

— the Association Nationale des Travailleurs Indépendants de la Batellerie (ANTIB), 16 Boulevard Vincent Auriol, 75013 Paris, France, and

— the Chambre Syndicale Nationale des Courtiers de fret fluviaux, 32 rue de Londres, 75009 Paris, France.

Done at Brussels, 10 July 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission