COMMISSION DECISION

of 6 April 1992

imposing a fine pursuant to Article 19 of Council Regulation (EEC) No 4056/86

(IV/32.448 and IV/32.450) — Ukwal

(Only the English text is authentic)

(92/237/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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

After consultation with the Advisory Committee on restrictive practices and dominant positions in maritime transport,

Whereas :

I. THE FACTS

(1) United Kingdom West Africa Lines Joint Service (Ukwal) is a liner conference whose secretariat is at the following address :

Room 193, India Buildings,

Water Street,

UK-Liverpool L2 ORR.

Ukwal groups together shipping lines which provide scheduled liner services between ports situated in the United Kingdom and Ireland on the one hand and West Africa on the other (from Nouadhibou to Mocamedes). In December 1988 (most recent data available to the Commission), the shipping lines in question were :

— Elder Dempster Ltd,

— Palm Line Ltd,

— The Guinea Gulf Line Ltd,

— State Shipping Corporation (Black Star Line),

— The Nigerian National Shipping Line Ltd,

— Compagnie maritime zaïroise,

— Société ivoirienne de transport maritime,

— Nigerian Green Lines Ltd,

— Cameroon Shipping Lines BA,

— Compagnie beninoise de navigation maritime,

— Providence Liner Shipping Inc.

(2) In 1987, the Commission received a number of complaints under Article 10 of Regulation (EEC) No 4056/86 and which concerned shipping trades between Europe and West and Central Africa. The trades include those in the geographical area covered by the activities of Ukwal.

The identity of the complainants and the subject of their complaints are set out in the Commission Decision of 26 June referred to below.

(3) Following a preliminary examination of the complaints, the Commission considered that if the alleged facts should prove to be true 'the conduct of Ukwal' could :

— be incompatible with Article 85 (3) of the EEC treaty and might consequently prompt the Commission to withdraw the block exemption provided for in Regulation (EEC) No 4056/86 in accordance with Article 7 (2) of that Regulation in respect of the liner conference in the sphere of activities in which the alleged facts had been established,

— constitute an infringement of the provisions of Article 86 of the Treaty.

In order to establish whether the facts were true, and to obtain additional information and any available evidence, the Commission considered it necessary that a simultaneous investigation should be made at the offices of three Euro-African shipping conferences, including Ukwal.

Because of the serious nature of the presumed infringements and the risk of any evidence disappearing, the Commission also considered that an investigation without prior notice should be carried out in accordance with Article 18 (3) of Regulation (EEC) No 4056/86.

(4) On 26 June 1989 the Commission adopted a Decision under Article 18 (3) of Regulation (EEC) No 4056/86 requiring Ukwal to submit to an investigation to enable the Commission to establish whether :

(1) OJ No L 378, 31. 12. 1986, p. 4.

— Ukwal's conduct has resulted in the absence or elimination of actual or potential competition by closing the trade to competition and whether, in particular, Ukwal or its member lines have adopted agreements, decisions or concerted practices designed to share all the cargo carried on the shipping routes between Europe and Africa, in breach of Article 85 of the Treaty,

— the operation of outsiders is impeded in the trade falling within Ukwal's sphere of activity through the behaviour of third countries,

— Ukwal has committed an abuse of a dominant position within the meaning of Article 86 of the Treaty.

The text of the Decision refers in particular to the measures provided for by Article 19 (1) of Regulation (EEC) No 4056/86 if undertakings or associations of undertakings refuse to submit to an investigation ordered by decision issued pursuant to Article 18 (3).

On 28 June 1989, two officials of the Commission, accompanied by a representative of the Office of Fair Trading (OFT) proceeded to Ukwal's offices in order to carry out the investigation ordered by the Decision of 26 June.

They were received by Mr Birch, Chairman of Ukwal and showed him a certified copy of the aforementioned Commission Decision, along with authorizations to investigate, identifying them as the officials of the Commission authorized to carry out the inspection. In addition to this, Mr Birch was shown their staff cards and a paper identifying the appointed representative of the OFT. Mr Birch was also provided with an Annex to the Decision, explaining the rights and duties of Ukwal with respect thereto.

They explained the purpose of the visit, and the meaning and consequences of the documents presented to Mr Birch. They suggested that Mr Birch should read the Decision and Annex, and also stated that Mr Birch might wish to contact a solicitor. They stated that the Commission's representatives were willing to wait before commencing the inspection for a solicitor to be present, provided that the delay was reasonable, and that no documents were removed from Ukwal or destroyed in the meantime.

Mr Birch refused to read the Decision or the Annex and stated that he found it offensive that the Commission should arrive to undertake such an operation without prior notice. Mr Birch furthermore stated that Ukwal has no legal personality, it being simply an office grouping the interests of certain companies. For this reason, the papers in the offices of Ukwal belonged to the members individually and collectively. Some of these members are based outside the Community. As a consequence of this, Mr Birch would not submit to the investigation.

The Commission officials explained in the presence of Ukwal's legal advisor the possible consequences of a refusal :

— the provision in the Decision for the possible imposition of fines in such circumstances,

— the fact that the UK Government would be requested to enforce the Decision pursuant to Article 18 (6) of Regulation (EEC) No 4056/86.

Nevertheless, Mr Birch restated his position and explained that Ukwal had no legal personality, owned no assets, employed no personnel and neither rented nor owned any premises in its name.

The Commission officials again explained the consequences of a refusal, but Mr Birch insisted that the inspection could not go ahead.

The Commission officials therefore noted the refusal to submit to the inspection. Mr Birch was invited to sign a statement indicating his reasons for the refusal ; Mr Birch declined to do so.

The officials of the Commission then requested the national authorities, on the basis of Article 18 (6) of Regulation (EEC) No 4056/86 to lend the necessary assistance to enable them to carry out their investigation.

Having thus, on the afternoon of 28 June, obtained an order from the High Court in London, the Commission officials again presented themselves at 9.00 a.m. on 29 June at the offices of Ukwal, which then submitted to the investigation.

II. LEGAL APPRAISAL

(5) Article 18 (1) of Regulation (EEC) No 4056/86 provides that in carrying out the duties assigned to it by the Regulation, the Commission may undertake all necessary investigations into undertakings or associations of undertakings. Paragraph 3 of that Article provides that undertakings and associations

of undertakings are to submit to investigations ordered by decision of the Commission.

Ukwal, whatever its precise legal status, is an association of undertakings within the meaning of Articles 18 and 19 of Regulation No 4056/86. It is therefore obliged to submit to any Commission decision adopted under Article 18 (3), and to allow access, under the conditions specified in that decision, to documents physically in its possession, including those entrusted to it by its members.

The fact that some of the members of Ukwal are not based in Member States of the European Community does not relieve Ukwal or the members in question from the obligation to comply with Community rules on competition in as much as their activities (or part of their activities) relate to maritime transport to or from Community ports.

(6) Ukwal's denial of entry to the authorized Commission officials was a clear and flagrant breach of the obligation imposed by Article 18 (1) and (3).

(7) The Commission reiterates that full notification of all rights, obligations, duties and liabilities were explained to the Ukwal representative and that Ukwal was therefore on notice of the potential risk involved in a failure to comply with the request for entry when such entry was denied.

(8) In conclusion, the Commission considers that:

— Ukwal was in breach of the obligation imposed by Article 18 (3) of Regulation (EEC) No 4056/86,

— that this breach was committed intentionally after the conference's representatives, in the presence of their legal advisors, had been informed by the Commission's officials of their obligations and of the consequences of the refusal to comply.

(9) Article 19 (1) (c) of Regulation (EEC) No 4056/86 provides that the Commission may, by decision, impose on undertakings fines of between ECU 100 and 5 000 where, intentionally or negligently, they refuse to submit to an investigation ordered by a decision issued in implementation of Article 18 (3).

The Commission considers the infringement, in the light of the facts set out in paragraphs 1 to 4 above, to be most serious in nature 'because as a consequence of Ukwal's refusal to submit to it the effectiveness of the investigation was very seriously jeopardized, since it could not be carried out on Ukwal's premises on the date envisaged by the Commission in order to investigate simultaneously, on the premises of the different maritime conferences which were suspected to have participated collectively in a breach of the competition rules'. Ukwal, having been apprised of the relevant legal provisions, and of their application and effect, by the Commission officials who attended, and, having taken legal advice, refused to submit to the investigation as requested.

Accordingly, the Commission should impose the maximum fine permissible within the limit set by Article 19 of Regulation (EEC) No 4056/86,

HAS ADOPTED THIS DECISION:

Article 1

Ukwal has infringed Article 18 (3) of Regulation (EEC) No 4056/86 by refusing to submit to an investigation that was to be carried out under the powers conferred by and in accordance with Article 18 (1) of the said Regulation.

Article 2

A fine of ECU 5 000 is hereby imposed upon Ukwal, such fine to be paid in ecu within three months of the date of notification of this Decision. Payment is to be made to the account of the Commision of the European Communities, No 310-0933000-43, Banque Bruxelles-Lambert, agence européenne, rond point Schuman 5, B-1040 Bruxelles.

On expiry of that period interest shall accrue and be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points.

Article 3

This Decision is addressed to Ukwal, Room 193, India Buildings, Water Street, UK-Liverpool L2 ORR.

This Decision shall be enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 6 April 1992.

For the Commission

Leon BRITTAN

Vice-President