II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION DECISION

**of 1 April 1992**

**relating to a proceeding pursuant to Articles 85 and 86 of the EEC Treaty**

**(IV/32.450: French-West African shipowners' committees)**

**(Only the French, German, English, Italian, Dutch, Danish and Spanish texts are authentic)**

(92/262/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 Articles 11 (1) and 19 (2) thereof,

Having regard to the applications lodged on 10 and 20 July 1987, for a finding of an infringement pursuant to Article 10 of Regulation (EEC) No 4056/86,

Having regard to the Commission Decision of 18 May 1990 to initiate proceedings in this case,

Having given the enterprises concerned (a list of which is attached hereto) the opportunity to make known their views on the objections raised by the Commission and to present any other comments in accordance with Article 23 (1) of Regulation (EEC) No 4056/86,

Having heard the Cameroon National Shippers' Council and the Gabon Shippers' Council in accordance with Article 23 (2) of Regulation (EEC) No 4056/86,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in the field of maritime transport,

Whereas:

### 1. THE FACTS

#### Introduction

(1) This Decision arises out of complaints submitted by the Danish Shipowners' Association and the Danish Government, pursuant to Article 10 of Regulation (EEC) No 4056/86, for a finding that the competition rules have been infringed by the shipping companies operating between French ports and the ports serving West and Central African States within the framework of cartels in the form of

[1] OJ No L 378, 31. 12. 1986, p. 4.

'shipowners' committees' (1) set up for the purpose of sharing liner cargo among their members.

## A. The market

1. *Liner transport services*

(2) This Decision concerns practices observed on the market for services supplied by liner vessels for the transport of general cargo between France and the following countries: Senegal, Gabon, Central African Republic, Niger, Burkina Faso, Guinea, Congo, Mali, Togo, Benin and Cameroon.

The linear services are normally supplied to or from French ports but may also be provided to or from ports in Member States adjacent to France.

(3) Trade between France and the countries of West Africa (see figures in Annex II) can involve the following means of transport:

(i) air transport: this mode concerns only limited quantities of high value-added goods. In terms of tonnage this share of trade may be regarded as insignificant;

(ii) tramp vessels: specially chartered to shippers for the bulk transport of specific categories of goods for which the vessels are specially designed (oils, minerals, cereals, etc.);

(iii) liner services: regular services carrying general cargo; on the Euro-Africa routes, the companies operate container vessels and also ships capable of carrying certain goods 'break bulk' or conventional (log carriers, banana boats) or mixed vessels capable of carrying both containers and bulk goods.

(4) Liner services constitute a separate market from that of tramp services. The gap has widened in recent years with the increase in container services: this new mode of transport produces such gains in productivity compared with traditional modes (according to some studies, the productivity gain is one to three times greater, and one to seven times greater in port operations which can be carried out much more quickly, thus speeding up vessel turn-around times (2) that bulk transport by chartered vessels of containerizable goods is no longer economically justifiable. In addition, charters are only viable (for non-containerizable goods) provided the shipper has a sufficiently large cargo, or is able to combine with other shippers for each trip.

(5) The secretariat of the shipowners' committees (Secrétama), at the request of the Commission, has produced an estimate of liner traffic between France and some of the 11 African States referred to in recital 2 (Senegal, Togo, Benin, Gabon, Congo, Niger). On the basis of the trade balance produced by French Customs for 99 items, Secrétama considered that the following items were transported in bulk (chiefly by chartered vessels and, to a lesser extent, by liner vessels equipped to carry bulk): 'cereals', 'steel', 'sugar', 'mineral oils and fuels' and 'malt'; a non-conference shipowner operating in the trade between Europe and West Africa suggested that the list should include 'iron ores' and 'salt, sulphur'. The other categories of goods are carried by liner vessels.

This is in substance confirmed by the expert in maritime economy quoted by the French members of the shipowners' committees, who suggests that potential trade on the liner routes between Europe and West Africa should be assessed on the basis of the foreign trade statistics produced by Eurostat, after deducting the figures for Categories 10 (cereals), 25 (salt, sulphur), 27 (mineral fuels) and 85 (transport by sea or inland waterway).

(6) The Commission concludes from these estimates that liner services constitute the sole mode of transport for most of the categories of products traded between France and West and Central Africa, in particular containerizable goods and some bulk cargoes.

(7) In 1989 (latest year for which data are available), trade between France and the 11 West and Central African countries referred to in recital 2 represented a total of 9,4 million tonnes in imports (into France) and 1,61 million tonnes in exports.

In 1980, the figures were 5,2 and 2,3 million tonnes respectively.

The considerable overall increase in French imports is due to the increase in purchases of raw materials

(1) A list of members of shipowners' committees is attached.

(2) S. Gilman and M. Graham *'The case for conference rate-making authority in the inland sector'*, July 1990.

(essentially oil from Gabon, Cameroon and the Congo) not usually carried by liner vessel. On the other hand, the fall in the flow of south-bound goods (– 29 %) directly affected liner transport services.

Despite this negative trend, which is essentially due to the current economic difficulties affecting the West and Central African States, and in spite of the productivity gains achieved in particular through the widespread use of container transport (1), the Mewac (Mediterranean West African Conference) and Cowac (Continental West African Conference) (south section) conferences to which most of the members of the shipowners' committees belong raised their rates by 39 and 34 % respectively between 1980 and 1985 and held them at this level between 1985 and 1989.

2. *The supply of linear services*

(8) Annex I to this Decision lists the shipping companies that are members of the shipowners' committees. These companies, as well as the Danish Maersk Line, are the only ones to supply liner transport services between the French ports and those serving the eleven African States referred to in recital 2.

## B. Legal aspects

The French members of the shipowners' committees claim that the committees and all the practices referred to in the complaints were set up in response to the wishes of the public authorities concerned as set out in documents having the force of law. It is therefore necessary, before examining the operation and practices of the shipowners' committees, to take account of the legal framework in which they operate.

1. *The Unctad code of conduct*

(9) Until the end of the Second World War, the liner trades between Europe and West and Central Africa were operated solely by European lines organized for the most part as liner conferences.

The desire of the newly independent African States to play an active part in the traffic generated by their foreign trade resulted in:

— the setting-up of national shipping companies,

— the companies' insistence that they be admitted to the Conference and benefit from a 'fair' cargo-sharing system.

(10) These demands resulted in 1974 in the adoption by the United Nations Conference for Trade and Development (Unctad) of a code of conduct for liner conference which provides that the national lines at each end of a given shipping route are to have equal shares of the cargoes carried by the conference operating on that route, non-conference lines being allocated a significant share of that trade, of the order of 20 %.

The conferences generally interpreted this provision by applying the 40:40:20 sharing rule: 40 % of the conference cargo to each of the home traders at both ends of a given bilateral trade and the balance (20 %) to the shipping companies of third countries that are members of the same conference.

The 40:40:20 rule was in principle adopted by the two liner conferences operating between France and West and Central Africa, namely Mewac to and from French Mediterranean ports and Cowac to and from ports on the western coast of France. Most members of the shipowners' committees are also members of those conferences (see Annex).

2. *The CMEAOC resolutions*

(11) In 1975 the African Ministers for Transport of the States of West and Central Africa set up a standing body for cooperation known as the Ministerial Conference of the States of West and Central Africa for Maritime Transport (CMEAOC).

In a series of meetings, this body adopted resolutions on the development of African merchant fleets which, in particular, invited the Member States to adopt shipping rules aimed at:

— giving their national lines priority in the allocation of freight,

— adopting freight monitoring systems on the basis of the 40:40:20 rule.

(1) From 1986 to 1990, productivity within the Delmas group (main operator in the Europe-West Africa trades), measured by the turnover/labour ratio, more than doubled (see Annual Report 1990).

The resolutions are, for the most part, based on the Unctad code of conduct and therefore concern the liner trades.

Other CMEAOC resolutions, however, extend the measures giving the West and Central African countries a share of the transport generated by their foreign trade to the bulk trades (not covered by the Unctad code).

3. *Rules adopted by the West and Central African States*

(12) The African States whose liner arrangements with France are covered by the activities of the shipowners' committees adopted [1], on the basis of the CMEAOC resolutions, rules on cargo-sharing. These rules:

— whilst they refer to the Unctad code of conduct, are applicable in most cases to all freight generated by the foreign trade of each State in question, including cargo carried by tramp vessels; only the rules adopted by Mali restrict the application of the 40:40:20 rule to liner trades [2],

— entrust African public or semi-public bodies rather than shipowners with the task of allocating cargo: only three of the eleven African States referred to in recital 2 adopted rules providing for the setting-up of shipowners' committees and gave them the task of allocating cargo.

4. *The 'bilateral agreements'*

(13) On 3 November 1981, the Director-General of the Société togolaise de navigation maritime and the Director of the merchant fleet under the aegis of the French Ministry of Shipping agreed 'to set up for a trial period of six months a cargo-sharing system in respect of French or Togolese goods carried on conference liner vessels from French ports to Togolese ports (and vice versa) in accordance with the code of conduct for liner conferences, in particular its cargo-sharing formula (i.e. 40 % for the shipping companies of each of the two countries and 20 % for the shipping companies of third countries'. A planning committee would be set up for this purpose.

(14) On 9 and 10 February 1981, 'delegations from the French and Senegalese Shipping Ministries met in Dakar' and held talks which were recorded in minutes. The talks resulted in a 'draft protocol' providing, 'for a transitional period', for the setting-up of a 'committee on maritime transport services between France and Senegal . . . responsible for organizing the transport of liner cargoes between France and Senegal on the basis of the 40:40:20 rule'.

Both administrations agreed 'to monitor the proper application of the system' through a 'joint shipping committee responsible in particular for monitoring maritime relations between the two countries'.

The joint committee has never met.

(15) On 17 February 1977, France and Gabon concluded a 'cooperation agreement on the merchant fleet'. Article 1 of the agreement provides that 'the two parties shall grant each other the same rights as regards the operation of vessels flying their respective flags. In any event, the vessels flying the flag of one of the two parties shall not be treated in the ports and territorial waters of the other party less favourably than the most-favoured nation'. Article 4 provides that 'pursuant to Article 1 above, as regards goods traded between France and Gabon and transported by sea, irrespective of the port of loading or of discharge, no shipping line of one country shall enjoy in the other country less favourable treatment than a national shipping line if a cargo-sharing rule is applied'.

## C. Conduct of the companies

1. *The shipowners' agreements*

(a) General agreements

(16) The 11 texts establishing the shipowners' committees vary in form and title according to the bilateral relationship in question [3].

The basic documents are usually supplemented by 'implementing texts' such as notices to shipowners and shippers issued by the Committee's Secretariat (Secrétama), or by 'practical implementing arrangements'.

[1] With the exception of the Central African Republic.
[2] See Annex III for a list of the rules referred to in this recital.
[3] A list of the agreements referred to in this recital is given in Annex IV.

The signatories to the bilateral agreements are the French lines and the national line flying the flag of the African State concerned. In some cases (Guinea, Cameroon, Mali, Gabon), the agreements are also countersigned by the bodies which, against remuneration, are responsible for monitoring their implementation, i.e. Secrétama in France and the shippers' council at the African end [1].

(b) Aim of the shipowners' agreements

(17) The main aims may be summarized as follows:

— to ensure a 'balanced distribution of trade' between the French and African carriers concerned 'without neglecting the share normally due to the third party carrier'. The distribution usually follows the 40:40:20 rule of the Unctad code of conduct (see recital 10) but, in the case of shipowners' committees, covers all the trades,

— to apply the cargo-sharing rule to all commodities of French origin (southbound) or originating in the African State in question (northbound) carried by liner vessels. It is specified [2] that, 'initially', the ratio is limited to goods loaded or discharged in French ports and that the agreement does not cover goods in transit through French territory or the African State concerned.

(c) Operating rules

(18) The shipowners' agreements provide for the following general operating rules, with some differences according to the bilateral trade concerned: monthly meeting on a specific date of a committee [3] which, taking account of:

— the performance of each shipping company in the preceding reference period,

— the quotas allocated to each shipping company, and.

— trade flow predictions,

fixes, for each company, a 'loading authorization'. The total loading authorizations (in freight tonnes) issued to shipping companies of third countries may not exceed 20 % of the entire trade in question [4].

(19) The shipowners' agreements provide for the introduction of a mechanism to ensure that committee members do not exceed the quotas allocated to them.

To that end, Secrétama, for south-bound traffic, and the Shippers Council of the African State concerned [5] for north-bound traffic, are required to stamp, for each cargo, the manifests which must compulsorily be submitted by shipowners.

Shipowners are also required to provide the data used by Secrétama to produce statistics on the activities of the shipowners' committees.

Secrétama and the African Shippers Councils are empowered to carry out physical inspections of cargo.

[1] The above description is generic and covers a variety of different situations. Thus, for example:
— there is no formal shipowners' agreement between France and Togo, instead Secrétama sends circulars to shipowners,
— the France-Senegal agreement is supplemented by a form which third country shipowners must sign in order to participate in the trade covered by the committee; in signing the form, they undertake to adhere to the committee's operating principles and to ensure that French and Senegalese shipping companies benefit from 'trade participation arrangements that are at least equivalent' in the country of the home-trader,
— the France-Niger trade is not organized by a 'shipowners' committee' but by a 'commission' composed of shipowners, representatives of Secrétama and representatives of the Nigerian Transport Users Committee.

[2] except in the case of Gabon.

[3] The committees' titles vary according to the agreement concerned: 'planning' committee, 'cargo rationalization' or 'cargo regularization' committees; 'cargo allocations' are also known as 'loading authorizations' or 'loading and discharge programmes', etc.

[4] A variation of this more flexible arrangement but which adopts the same principles was introduced by the France-Gabon committee to ensure that cargo was allocated to the vessel operated by Sonatram. Lastly, in the France-Benin trade, the provision described above applies only to south-bound sailings.

[5] In the France-Cameroon trade, Secrétama monitors cargo in conjunction with the Cameroon National Shippers Council (south-bound). In Senegal and the Congo, cargo monitoring is carried out by an *ad hoc* body (Secretasen) and by the Congolese Directorate of the Merchant Navy.

These monitoring bodies act on behalf of the shipowners' committees and are remunerated by the members of these committees.

It should also be noted that one of the shipowners' agreements (France-Central African Republic) requires the monitoring bodies (Secrétama and the Central African Shippers Council) to 'report to the Central African national shipping company and the French shipping company, at least once a month, on the proper application of the agreement and, in particular, on the cargoes carried by the two national carriers and the third-country carrier'.

(20) If quotas are exceed, either an adjustment may be made the following month or, in the case of repeated infringement, the African authorities may impose a fine.

In several cases (the France-Mali, France-Guinea, France-Niger, France-Burkina Faso, France-Congo committees), the shipowners' agreement provides in this connection that 'any failure to apply the practical arrangements for the implementation of the organization of trade will be notified to the parties concerned for their information'. The agreement between France and the Central African Republic is more explicit: 'any infringement of the provisions of the agreement (loading without authorization, exceeding of quota, unstamped manifests, etc.) shall be immediately notified by Secrétama to the Central African Shippers Council with a view to the application to the offenders of the measures provided for in such cases by the Central African regulations'. Similarly, the France-Mali agreement provides that 'the National Transport Office and the Mali structures in the ports of transit will, in conjunction with the competent authorities of the country of transit, impose the penalties provided for by Mali regulations in both the north-bound and the south-bound trades'.

2. *Implementation of shipowners' agreements*

(a) Extension of cargo-sharing to the entire trade

(21) The shipowners' committees, as provided for in the agreements which set them up, share out among their members all the 11 liner trades for which they are responsible; this rules out any competition by independent shipowners not approved by the committees against the members of the committees. The Commission is, moreover, unaware of any shipping company that has been able to operate liner services on a lasting and significant basis on the routes controlled by the shipowners' committees without their approval.

This situation is confirmed in the following documents:

(i) memo dated April 1989 from a director of Delmas, a former chairman of shipowners' committees and co-director of Secrétama; the memo, which recommends extending the Franco-African committee system to other Euro-African trades, summarizes the committees' position on the scope of cargo-sharing: 'It seems essential to be adamant as regards the first point since it would be both ineffective and illogical to share only a part of the liner trade whilst leaving outsiders free to act as they will. It would also be the end of the conference system . . .';

(ii) memo dated 2 March 1988 in which the same person, still advocating the extension of the committee system to other Euro-African trades, confirms that the aim of such committees is to share cargo among members of the conferences and approved independent shipowners: 'The concept consists of a neutral "roof" or "umbrella" (e.g. Secrétama) which would cover both Cowac and outsider lines. It is best not to insist on the fact that this system already exists in other trades (it has been the subject of Danish complaints to the European Commission)';

(iii) record dated 1 March 1988 of a meeting (also concerning the extension to other trades of the committee system): 'The relevant conference lines agree in principle on a sharing of the national share between themselves and the independent lines of the same flag. Of course this could not be written in the minutes and neither was it noted the way the sharing of the totality of the trade is envisaged. The idea is to get together, under a single roof or umbrella, the Conference and the independent lines. This roof can be called a neutral body (of the Secrétama type)';

(iv) telex of 16 June 1988 in which the German company Woermann informed Cowac of the setting-up between the Federal Republic and Nigeria of a similar system to that of the shipowners' committees, described as follows: 'Such scheme will cover all German cargo

shipped and received via whatever port of loading/discharge and administered by a neutral body very soon now being established in Germany. Through that scheme the necessary programming arrangements will be made along the experience gained in other continental countries already (Secrétama shipowners' committees) where no major problems exist;'

(v) minutes of the meeting on 2 June 1986 of the France-Senegal shipowners' committee at which the Chairman of the committee 'reported that cargoes loaded on non-conference vessels to/from Dakar were not being controlled by the Committee'. The wording of this statement is apparently intended to draw the attention of those present at the meeting to a situation regarded as incidental and abnormal. If the committee members were being subjected to habitual and regular competition from outsiders, it would be generally known and the Chairman would not have to 'report' such an obvious fact;

(vi) introduction on the forms sent by Secrétama on 8 April 1981 to shipping lines wishing to operate between France and Senegal: 'We have noted your intention of taking part in the trade between France and Senegal ... We would inform you that such participation, in order to secure the authorization of the Shipowners' Committee, requires your approval of a certain number of principles...'. The logical link thus established between a company's intention to take part in a bilateral trade and the authorization of the shipowners' committee concerned makes it clear that no company may operate in that trade without such authorization;

(vii) 'notice to shipping companies' issued by Secrétama on 8 April 1981: 'We wish to remind the shipping companies operating in the trade between France and Senegal that, in order to be approved in that trade, they must contact the secretariat appointed by the Shipowners' Committee as the Secretariat in Paris. It must also be compulsory since 1 April 1981 in the trade in question for manifests to be stamped by Secrétama's inspectors';

(viii) letter dated 7 March 1986 to Maersk Line in which Secrétama drew the Danish company's attention 'to the fact that at present, the share of Franco-Senegalese trade allocated to vessels other than French and Senegalese vessels under the relevant bilateral agreement, has already been taken up by a very large number of shipping companies. Taken in conjunction with French-Senegalese companies, this trade is already more than adequately covered and reduces the monthly cargoes to be loaded by each line to ridiculously small proportions. We are sure that a traditional liner company such as yours will easily understand the pointlessness of adding additional capacity to this trade and that you will therefore not maintain your request to participate'. It is thus quite clear that the possibility of adding any new capacity could be considered only, according to Secrétama, if Maersk were to join the Shipowners' Committee and that, conversely, Maersk's exclusion from that committee was equivalent to exclusion from the trade.

(b) Effects of extending cargo-sharing to the entire trade

(22) Cargo-sharing, carried out according to the methods described in recital 18, takes place on a company by company basis. Thus, whilst French vessels in principle have a right overall to 40 % of the bilateral trade, their share of this 40 % is predetermined. Similarly, the 20 % allocated to third-country companies is distributed company by company. The main effect of the implementation of the shipowners' agreements is to freeze the market shares within the quota allocated to French and third-country companies, i.e. 60 % of the liner trade concerned.

(23) The second effect of the cargo-sharing, even though it is presented as the sole justification for the existence of the shipowners' committees, is that the remaining 40 % of cargoes is reserved for the shipping company of the African country concerned. But only the Cameroon and Gabon shipping lines, with two vessels each, are in a position to use part of this quota. The other lines transfer their rights corresponding to the 40 % quota (as do the Cameroon and Gabon lines for those cargoes they are unable to carry themselves).

The African shipowners are all members of Cowac or Mewac, or of both conferences, whose internal rules stipulate that member companies may exchange or charter space only to other conference members. As a result, African trading rights are necessarily transferred to conference shipowners that

are members of the shipowners' committees (1). Another consequence of this provision is that the shipowners who, under the cargo-sharing rules applied by the shipowners' committees, receive the largest cargo-shares, are in the best position to make use of the so-called African trading rights: being guaranteed a minimum volume of cargo under their own trading rights, they are able carry any additional cargo at a lower marginal cost than their competitors who are allocated much smaller cargoes. This is to the advantage of the French national lines of which there are only four or five (grouped into two entities) who share the 40 % allocated to French vessels (2), whilst the 20 % allocated to third-country vessels is shared by up to 20 companies in certain cases (Annex I).

(24) Whilst the machinery set up by the shipowners' agreements has not fostered the development of African fleets, it has on the other hand strengthened the trading position of the French companies on the trades in question. In return, the African party has an interest in the financial results of the companies effectively operating in these trades:

— the fee paid by the shipowners to the body responsible at the African end for controlling cargo-sharing (see paragraph 19),

— the commission paid to the African shipping companies for transferring their trading rights to companies having the vessels to make use of such rights.

(c) Closing of trade

(25) The only way the shipowners' committees can effectively control their trade is by imposing penalties on members exceeding their quotas and on independent lines operating without the approval of the committees. This is the reason why the members of the committees ensured that the African authorities adopted rules protecting their activities and providing for penalties, where such rules were not already in force. This is confirmed by the Chairman of the French-Senegal Committee as early as 1981 (memo of 19 May 1981): '. . . all the arrangements are ready at the shipowners' end. . . Obviously it all depends on the introduction in the meantime of an effective system for imposing administrative penalties on shipowners infringing the cargo-sharing rules'. This approach is confirmed in a subsequent note in which the same writer, advocating the extension to other Euro-African trades of the shipowner committee system, states that (memo of April 1989) 'all this. . . presupposes checks on arrival (in African ports) of duly stamped manifests and the application of penalties for failure to comply with the shipping rules thus set up'. The following documents relate to the efforts made by members of the shipowners' committees to secure the adoption by the African authorities of measures penalizing shipping companies failing to comply with the committees' rules:

(i) telex of 30 June 1981 to the Senegalese authorities: 'The French national shipowners of the shipowners' committee. . . are very pleased to learn of the imminent signing of the decree concerning the penalties to be applied to shipowners infringing the shipping rules adopted by the Shipowners' Committee. Once the decree has been adopted, the French shipowners will be prepared to increase the reallocation fee to 10 % (this is a commission paid by the French shipping companies to the Senegalese shipping companies for the use of their trading rights);

(ii) minutes of the meeting on 30 June 1987 of the France-Burkina Shipowners' Committee at which the representative of the Burkinabé Shippers Council (BSC) expressed concern at

(1) Guinea, whose national shipping company does not operate any vessels itself and is not a member of the conference, transfers its traffic rights to non-conference members of the shipowners' committees.

(2) Cargo charter contracts are concluded on a bilateral basis between the African companies holding the trading rights and the companies wishing to use those rights. Secrétama statistics do not systematically show the identity or flag of the company carrying African cargo in the trades for which the data was supplied; it would seem that in 1990, the French companies, by means of charter transactions, carried most of the cargo between France and the following countries:

| | |
|---|---|
| — Gabon (Mediterranean coast) | [. . .](*) |
| — Niger | [. . .] |
| — Congo | [. . .] |
| — Burkina | [. . .] |
| — Mali | [. . .] |
| — Senegal | [. . .] |
| — CAR | [. . .] |

The statistics for Togo and Benin show that (...) and (...) of cargo were allocated respectively to the national companies of these two countries; as these companies have no vessels, the cargoes therefore had to be reallocated, chiefly to companies operating under the French flag.

(*) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 24 (2) of Regulation (EEC) No 4056/86 concerning non-disclosure of business secrets.

the fact that the 40:40:20 cargo-sharing rule was in practice being applied to the detriment of the Burkinabé party and asked that the method of application be changed; the exchange of views was minuted as follows: 'The French company agreed without prejudice that the trade should be entirely closed. The BSC considered that the closing of the trade should not be regarded as conditional';

(iii) minutes of the meeting of 28 July 1988 of the France-Mali Shipowners Committee:

'During the discussion, the French company stressed that it was essential that the agreement (1) be implemented properly and referred to the measures that would have to be taken in Mali in order to achieve effective control of the system. It would in particular be necessary rapidly to secure the legislation enabling infringements (shippers and shipowners) to be penalized';

(iv) working paper dated June 1987 from the Director of Foreign Relations of the French company Delmas to the Chairman of the Mali Shipping Company concerning the setting-up of the France-Mali shipowners' committee, which states that: 'action by the Mali authorities is necessary to determine the penalties for any failure to comply with the trade rules concerned. (. . .) In a system of sharing based on cooperation between national shipowners in the two partner countries, penalties apply essentially to shipowners. But shippers also have obligations, in particular that of indicating on the bill of lading the destination in Mali of goods. Failure to comply with this obligation should also be penalized. Several examples of decisions imposing penalties have been made available to the Mali authorities'. The examples in question concern infringements in trade other than the France-Mali trade, where shipowners' committees were already in operation;

(v) letter of 29 July 1988 to the Director-General of the National Transport Office (Mali) and the Chairman of the Mali Shipping Company from the French national line (SNCDV-Delmas, Société Navale de l'Ouest et Société Navale Caennaise) in which the latter expresses pleasure at the 'successful outcome of its recent talks with its Mali partners which resulted in the signing of an agreement on the organization of the liner trade between France and Mali. It hopes the agreement will be reflected in an official organization of the liner trade between the two countries to the advantage of both parties. It assures its Mali partners of its full cooperation in this field in order to achieve the anticipated results and hopes that its partners will, for their part, adopt as soon as possible the necessary legislation to allow full monitoring of the organization of the trade and the correction of any irregularities which might occur';

(vi) minutes of the meeting on 30 June 1987 of the France-Burkina Shipowners' Committee, 'SNCDV raised the problem of monitoring and controlling the trade. (. . .) Secrétama asked what happened when unstamped manifests were presented. SNCDV said that in other countries there was solidarity between customs and the Shippers' Council which enabled the trade to be strictly controlled. In reply to a question from SNO, Mr Bouda stated that a decree on penalties had been drafted. . . In reply to another question from SNO, the CBC stated that the penalty would apply to shipowners';

(vii) minutes of the meeting on 9 December 1987 of the France-Gabon Shipowners' Committee: 'SNCDV again referred to the lack of legislation imposing penalties at the Gabon end. It said that the French would like to know the penalties imposed for deflections of trade. It emphasized that, because of the liberal trend prevailing in Europe and to guarantee results, the French company was obliged to rely on its Gabon partners and on the introduction of certain laws in Africa'.

(26) It can be concluded from several documents in the file that the fact that the African authorities adopted rules imposing fines on shipowners failing to comply with the rules of the shipowners' committees does not mean that the penalties were actually applied by the authorities. This is why the members of the committees made efforts to secure their effective application. This is clear from the following documents:

(i) minutes of the meeting on 6 May 1987 of the France-Senegal Committee: 'the shipowners insisted on the fact that, under present arrangements, infringements could be checked only at the destination, chiefly by examining manifests. Cosenam considered for its part that the fines were not sufficient to dissuade Maersk Line from loading cargo. SNCDV then suggested that the shipping companies contact the

(1) The France-Mali shipowners' agreement.

Senegalese Customs. It was agreed to arrange a meeting between a shipowners' delegation, the Senegalese Merchant Navy and the Customs Directorate';

(ii) minutes of the meeting on 11 September 1986 of the same Committee: 'SNCDV again repeated its request for inspections of cargoes carried by outsiders from France. Mr Sarr [1] stated that, in his opinion, it was for the French authorities to take steps to prevent such cargoes being loaded. The chairman replied that, as matters stood, the French authorities could not be relied on to take such steps. SNO said it was necessary to be realistic. A certain number of rules governing the operation of the shipowners' committee had been adopted; the means of penalizing infringements lay in Senegal rather than France'. It thus seems that, in the case in point, a French shipping company (SNCDV-Delmas) had, at the meeting preceding the one in question, requested that an outsider, i.e. a shipping company not approved by the shipowners' committee, be penalized for having carried cargo to Senegal. Apparently its request had not been acted on. This was why SNO, seconding the SNCDV request, was calling for traffic leaving France to be controlled at its destination in Senegal.

(d) Involvement of the shipowners' committees in the imposition of fines

(27) The penalties without which the discipline imposed by the shipowners' committees would be ineffective can be imposed only in close cooperation with those committees. All vessels leaving France for one of the African States covered by the activities of a shipowners' committee are required to submit their manifests for stamping by the secretariat of that committee. The absence of a stamp entails a fine on arrival at the destination. This emerges from a telex dated 21 November 1988 from the Togo National Shippers' Council (TNSC) to the non-committee company Maersk: 'the vessel Maersk Mango 8815 which sailed from Marseilles was penalized for failure to obtain the Secrétama stamp. Before a company loads in a French port, it is required to apply to the Secrétama representatives to obtain a loading authorization in the form of a stamp placed on the manifest'. Consequently, the TNSC had forms printed which were sent on several occasions to shipping companies in breach and which state the amount of the fine imposed; the forms are headed as follows: 'freight charges for goods loaded on M/S (name of vessel) without the Secrétama stamp'.

(28) Fines are normally imposed by the African Shippers' Councils in the country of destination of the goods exported from France [2]. These bodies are remunerated by the shipowners and to a large extent depend on information provided by the latter: only the shipowners' committees, through their secretariat (Secrétama) can know whether a cargo leaving France has obtained their authorization. Because they are physically present in French ports, committee members are in the best position to learn of goods being loaded without their approval; the same is true of Secrétama which has branches in the main French ports. This is why the shipowners' agreements provide that any failure to comply with the rules they lay down will be notified 'to those concerned for appropriate action'.

The minutes of the meeting on 6 May 1987 of the France-Senegal Committee state that 'naturally, if information on non-committee cargoes is obtained by the shipping companies, it is for the latter to communicate such data to Secrétasen', which is confirmed by Secrétama at the meeting on 2 June 1988: 'Secrétama reminded members that all information reaching it concerning any non-committee cargoes is sent to Secrétasen'.

In the minutes of the meeting held on 30 June 1987 of the French-Burkina Faso Committee, Secrétama states that 'if it learns of cargoes loaded in breach, it will telex the Shippers' Council of the country of destination'.

By telex No 2195 sent non 14 May 1986 to Keller Shipping, Secrétama stated that 'all vessels having to our knowledge sailed without the authorization or stamp required under the Franco-African bilateral

[1] A representative of the Senegalese shipping company.

[2] Except in Senegal and the Congo where Secrétasen and the Directorate for the Merchant Navy respectively are responsible.

agreements which we operate, will be notified to the country of destination so that the appropriate action may be taken'.

On 25 March 1987 the France-Gabon, France-Burkina Faso and France-Congo Programming Committees met in order to organize cargo-sharing for the following months. By telex dated the same day, Secrétama informed Keller Shipping that it had been granted loading authorization by the Programming Committees.

On 27 April 1987 Keller Shipping loaded cargo exceeding its authorized quota.

As a result, by three telexes dated 4 May 1987, Secrétama informed Keller Shipping that it was suspending the stamped manifest of the vessel which had infringed the Committee's rules, and added that it was informing the African monitoring bodies of these infringements and asking them 'to apply the rules provided for in the liner agreements' between France and each of the three African States concerned.

Copies of the three telexes were indeed sent to the three African bodies referred to and, on 4 June 1987, Keller Shipping paid a fine of FF 54 000 to the Société Générale (Paris) into the Scadoa [1] account for Cotram so that its vessel would be authorized to leave the port of Pointe Noire (Congo).

(29) On several other occasions messages were sent either by Secrétama or by members of the shipowners' committees to the African authorities informing them of infringements of the committee's rules 'for appropriate action'. Annex V gives the details of these messages.

(30) The African Shippers' Councils (or similar bodies) also repeatedly penalized infringements of the liner rules adopted by the shipowners' committees as shown in the documents quoted in Annex VI.

(e) Attempts by the members of the shipowners' committees to evade the application of Community law

(31) The members of the shipowners' committees endeavoured to avoid the application of Community law either by concealing their practices or by promoting the adoption at the African end of the trade of rules more in line with their interests or by prompting third countries to take action to impede the procedure initiated by the Commission. This emerges, in particular, from the following documents:

(i) last sentence of the document referred to in recital 21, point (ii);

(ii) second sentence of the document referred to in recital 21, point (iii);

(iii) working paper referred to in recital 21, point (i) which refers clearly to the refusal to 'compromise' on the principle of extending cargo-sharing to the entire trade and which states that 'the African States must ensure that the shipowners' programming is adhered to by the participating lines since no controls or penalties are possible in European ports';

(iv) statement by a representative of the Delmas group at the meeting on 3 May 1988 of the Mewac Conference: 'the only way to ensure that any cargo-sharing system operates properly is, given current legislation at both ends of the Mewac route, through action by the African governments and African administrations responsible for imposing penalties';

(v) record dated 7 July 1987 drawn up by the Director-General of Secrétama of a meeting with the Chairman of the Mali company Sonam: 'I provided him with all the relevant explanations on the existing agreements and stressed the current restrictions on the application of a shipowners' agreement in view of the demands of the EEC. . . I also stressed how essential it was for a land-locked country to have . . . legislation providing for inspections and penalties on arrival if the system were to be effective and credible';

(vi) statement by a representative of Delmas at a meeting held on 9 December 1987 with the Gabon authorities contained in minutes, as follows: 'the French party would like to know what the penalties were for deflections of trade . . . in view of the liberal tendency prevailing in Europe . . . the French Line is obliged to count on the Gabon party and on the implementation of certain legislation in Africa';

[1] Scadoa: Service commun d'armements desservant l'Ouest africain formed by the companies L. Hoegh and Hoegh/Transatlantic (Norway), Societé navale caennaise (France) and Société navale de l'Ouest (France).

(vii) extract from a memo of April 1989 referred to above in recital 21, point (i): 'it seems essential and urgent that the CMEAOC take action at EEC level to put an end to the increasing action being taken by DG IV against both freight offices in Europe, and the liner conferences and Secrétama'.

## II. LEGAL ASSESSMENT

### A. Article 85

#### 1. *Applicability of Article 85*

(32) The French members of the shipowners' committees have alleged that the agreements and practices referred to in the complaints are not covered by Article 85 as they are solely the result of obligations imposed by public authorities. It is therefore necessary to examine the facts described above in the more general context of the public order provisions applicable to maritime transport between the Community and France on the one hand and the eleven African States listed in recital 2 on the other.

##### (a) The UNCTAD code of conduct

(33) As regards the Unctad code of conduct for liner conferences, the article of this international agreement which deals with cargo-sharing (Article 2) simply recommends that, where a conference operates in a liner trade, the national shipping lines of each of two countries the foreign trade between which is carried by the conference have equal right of access to cargoes carried by that conference, third-country vessels having a right to a 'significant share, such as 20 %' of the same cargo carried by the conference. Article 2 does not advocate the creation of conferences on trades where there are none or, in particular, the setting-up of such structures as shipowners' committees made up of all the shipowners, whether members of a conference or not, operating in a given trade. Consequently, the obligations imposed by the adoption of the Unctad code of conduct are applicable, where ratified by the Member States concerned, only to the liner conferences Cowac and Mewac which operate between French ports and those of West and Central Africa.

##### (b) National rules

(34) The rules adopted by ten of the eleven African States referred to in recital 2 [1] do not require shipowners to apply any kind of cargo-sharing system or to set up a monitoring system aimed at the imposition of fines by the African public authorities on shipping lines failing to keep to their quota.

(35) The French members of the shipowners' committees have alleged that if they had not themselves set up shipowners' committees, the African authorities would have adopted 'far more inflexible rules'. This argument confirms, first, that the shipowners had room for manoeuvre in relation to the African rules. Secondly, the companies concerned cannot claim that their restrictive practices are not covered by Article 85 on the grounds that, in the absence of such practices, the restrictions of competition imposed by the public authorities would have been even greater.

(36) Such a claim is not, moreover, borne out by the facts:

— although almost all the member countries of the CMEAOC adopted cargo-sharing rules similar to those in force in the African States covered by the activity of the committees, it would seem that the rules are not applied with equal vigour in all the trades: the desire of members of the Franco-African shipowners' committees to extend to other Euro-African trades the 'system' tested in the trades referred to in this Decision shows that the adoption of restrictive rules by the African national administrations is not in itself sufficient to create the right conditions for effective monitoring of trade. If, as stated, the existence of African rules on cargo-sharing required shipowners to allocate cargoes themselves through shipowners' committees, such committees would also have been set up between France and the members states of the CMEAOC other than the eleven States referred

[1] The 11th State (Central African Republic) has not adopted any rules on cargo-sharing.

to in recital 2 of this Decision, as most of the West and Central African countries have adopted similar cargo-sharing rules to those in force in the African States covered by the committees,

— as stated in recital 11, the CMEAOC resolutions on cargo-sharing cover the bulk trades and the resulting national rules apply in principle to all cargo generated by the external trade of most of the eleven African States covered by the activity of the shipowners' committees (see recital 12). The Commission, however, is not aware of any shipowners specializing in bulk trades having established a cargo-sharing system similar to that applied in the liner trades by the shipowners' committees. Nor is it aware of any such system having been imposed by the African administrations,

— there is no direct link between the adoption by an African member state of rules on cargo-sharing and the setting-up of a shipowners' committee. All the rules adopted by Cameroon in this area (which do not provide for the creation of shipowners' committees) are prior to 1978 whilst the France-Cameroon committee was set up only in July 1987. It cannot therefore be claimed that the committee was formed as a result of an obligation imposed by Cameroon legislation. In other cases (Senegal, Guinea), the committee was set up several years after the country had adopted cargo-sharing rules and several months before both countries adopted rules providing specifically for such committees in their trade with France [1]. In the case of Senegal, the French shipowners have themselves stated that the rules on the Franco-Senegalese liner trade were 'adopted by the Shipowners' Committee' (see recital 25 (i)). The Senegalese decree subsequently adopted concerns the shipowners only in as much as it imposes penalties on them for failure to comply with its rules. Lastly, a Franco-Central African Republic committee was set up although there are no cargo-sharing rules in the CAR.

(c) The 'bilateral agreements'

(37) It is stated that France concluded bilateral maritime agreements with some of the African countries covered by the activity of the shipowners' committees. The agreements, it is claimed, required the shipowners to set up committees. Only three documents, however, purporting to be Franco-African bilateral agreements have been brought to the attention of the Commission by the members of the shipowners' Committees:

(1) the France-Togo agreement (see recital 13) does indeed provide for the setting-up of a programming committee as part of establishing a cargo-sharing system. However:

— the text of the agreement specifically bases the cargo-sharing system on the principles of the code of conduct for liner conferences which, as fas as the French authorities are concerned, means that the 40:40:20 sharing rule applies only to conference cargoes,

— the agreement, concluded in 1981, applied only for a trial period of six months and the parties concerned have not provided the Commission with any evidence of its renewal,

— the agreement was concluded at the Togo end by the Director-General of a commercial enterprise which, even if it is a public undertaking, cannot be regarded as an agent of the Togo public authorities. The Commission therefore considers that the document in question is not an agreement between States and does not impose obligations on shipowners,

(ii) the text presented as a Franco-Senegalese agreement (see recital 14) is in fact no more than the minutes of meetings held in 1981 between delegations from the French and Senegalese Shipping Ministries. The status of the members of the delegations is not given and the document submitted to the Commission is not signed. The minutes include a 'draft protocol' providing, 'for a transitional period', for the organization of the bilateral liner trade and the creation of a shipping committee.

[1] The France-Senegal agreement entered into force on 1 April 1981, whereas Decree No 6678 is dated July 1981 (see Annex III); similarly, the Guinea Regulation of 3 December 1987 post-dates the shipowners' agreement of September 1987. The latter agreement does not refer to any Guinean public policy provisions whereas the Guinean regulation of 3 December 1987 refers in its preamble to the existence of the shipowners' agreement.

The Commission considers that this document does not constitute a bilateral agreement between States and its status and provisions are too vague to entail any obligations for economic operators. The temporary and imprecise nature of the text is further confirmed by the fact that the joint committee for which it provides never in fact met,

(iii) whilst the Franco-Gabon agreement (see recital 15) is in the nature of a bilateral agreement between States, it does not provide for the introduction of a cargo-sharing system managed by a shipowners' committee. It does not therefore impose any obligations on shipowners to set up such a committee.

It should also be noted that, generally speaking, bilateral agreements do not in principle impose any direct obligations on economic operators unless they are followed by the adoption of laws or rules under the legal systems of the countries concerned. Such was not the case, according to the documents supplied by the shipowners' committees, as regards the three agreements in question.

(38) It can therefore be definitively concluded that neither the shipowners' agreements nor the setting-up of committees to apply the agreements resulted from an obligation imposed on shipowners by the French or African public authorities. The shipowners' agreements and the practices of the members of the shipowners' committees are therefore caught by Article 85 (1) of the Treaty.

2. *Article 85 (1)*

(39) Article 85 (1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which share markets.

(a) Object and effect of the shipowners' agreements

(40) The shipowners' agreements have the object and effect, within the meaning of Article 85 (1) (c), of sharing among their members, whether conference members or not, the markets constituted by the cargoes carried by liner vessel between France and the eleven African States referred to in recital 2.

(41) The agreements also have the effect of limiting, within the meaning of Article 85 (1) (b), the supply of transport services available to shippers wishing to import or export goods between France and the 11 African States concerned: any third country lines wishing to supply such services have no choice but to be co-opted by the members of the committees and limit their supply to the cargo quotas imposed by the committees, or otherwise give up all activity in these trades, unless they are willing to run the risk of incurring fines. Similarly, because cargo-sharing freezes market shares, companies that are members of the committees cannot increase their supply of transport services over and above the quotas set by the committees.

(42) The shipowners' agreements clearly have an anti-competitive object: it is not therefore strictly necessary to demonstrate their harmful effect on competition. This is why, in particular, the Commission has not attempted to calculate what cargo levels or markets shares would have been in the absence of the structures set up by the shipowners' committees. Such an exercise would, moreover, have been pure speculation.

The Commission considers it sufficient in this respect to determine that the application of a permanent cargo-sharing and monitoring system by shipowners controlling most of the trade in question prevents market forces from interacting freely to produce a competitive price level.

(b) Effect on trade between Member States

(43) The shipowners' agreements affect trade between Member States of the Community as follows:

(i) the agreements are aimed at partitioning the trade between the Community and the eleven African States concerned: French shipping lines have privileged access to trade on the routes covered by the shipowners' committees in relation to the lines of other Member States or third countries. This mechanism has the effect of giving the former an undue competitive edge in world trade over all other lines, including the lines of other Member States;

(ii) the application of the shipowners' agreements also has the effect of distorting competition between European shippers operating on African markets: French exporters are in an unfavourable position compared with their competitors sailing to the same destinations from other Community countries; French importers are equally at a disadvantage as regards both the supply of services and freight rates,

(iii) the distortions described above can have repercussions on port activity in both Africa and Europe: the constraints imposed on French shippers by the restrictive practices of the committees discourage shippers in French ports from importing or exporting from the African countries concerned. French shippers that are dissatisfied with the quality of the services or freight rates offered by members of shipowners' committees are thus obliged:

— either to operate from ports in the countries adjacent to France. Such 'deflections of trade' have the effect of favouring those ports in relation to French ports even if the 'deflections' are impeded by the fact that shippers are required to produce documents showing the provenance and destination of their goods,

— or to give up trading with the African countries covered by the shipowners' committees, which has a depressive effect on the activity of French ports.

This produces distortions in the competition between French and other Community ports for the transport of goods to or from West Africa.

3. *Article 2 of Regulation (EEC) No 4056/86*

(44) The Commission considers that the agreements and concerted practices forming the subject of this Decision do not constitute technical agreements within the meaning of Article 2 of Regulation (EEC) No 4056/86 as they are aimed solely at commercial objectives and are therefore, on the basis of that Article, covered by Article 85 (1) of the Treaty.

4. *Article 3 of Regulation (EEC) No 4056/86*

(45) The agreements and concerted practices forming the subject of this Decision do not qualify for exemption under Article 3 of Regulation (EEC) No 4056/86. The exemption applies only to agreements, decisions and concerted practices engaged in by all or some of the members of one or more liner conferences, when they have as their objective the fixing of rates and conditions of carriage and, as the case may be, one or more of the other objectives set out in that Article. The objective of the shipowners' committees, however, is not to fix common rates.

Furthermore, in the present case, the conferences operating between France and West and Central Africa are Cowac and Mewac; these conferences qualify for exemption pursuant to Article 3 of Regulation (EEC) No 4056/86. The system set up by the shipowners' agreements brings together conference and non-conference lines for the sole purpose of sharing among those lines all the liner trades in question. Such systems are not covered by Article 3 of Regulation (EEC) No 4056/86.

5. *Article 85 (3)*

(46) The Commission also considers that the conditions for the application of Article 85 (3) have not been met in the case in point.

It recognizes that cargo-sharing is indeed an activity of the liner conferences which, established in accordance with Regulation (EEC) No 4056/86, generally provide regular, adequate and efficient maritime transport services that take account of consumers' interests on an equitable basis. This was why the Council exempted conference agreements such as those establishing Mewac and Cowac from the ban in Article 85 (1) of the Treaty.

The French members of the shipowners' committees alleged that the committees were set up on the initiative of the public authorities to implement the cargo-sharing rules which the conferences themselves should have organized. Aside from the fact that there is no evidence that the committees were set up at the instigation of the public authorities, there is no justification for conference members concluding cargo-sharing agreements with non-conference shipowners in order to remedy an alleged failure on

the part of the conferences. All the Cowac and Mewac members operating between France and the 11 African States are also members of the shipowners' committees and if they were able to join with independent lines in implementing a cargo-sharing system covering the entire trade, it is difficult to understand why they were unable to establish similar rules among themselves under the aegis of the conference. In fact, the evidence is that, far from resulting from a failure of the conference system, the creation of shipowners' committees led to the exclusion of the conferences since the conference lines adopted a system of cartellizing the entire trade which protected them from any outside competition.

(47) In addition, the shipowners' agreements do not constitute an improvement on the distribution of transport services that would have existed had the committee members that are also members of Cowac and Mewac simply adopted a cargo-sharing system limited to the scope of the conferences, as provided for in Regulation (EEC) No 4056/86.

(48) Nor do the agreements promote technical progress: in particular, their implementation did not promote the development of the African liner fleets.

(49) The extending of cargo-sharing rules which should have applied only to conference cargoes to the eleven bilateral trades in question imposed additional restrictions of competition to those imposed by the conferences. The restrictions were not essential to attain the conferences' normal objective of improving the supply of liner services whilst allowing consumers a fair share of the resulting benefit.

(50) Furthermore, the extension had the effect of enabling members of the shipowners' committees to eliminate competition in virtually all the transport services concerned. Any shipowner wishing to participate in one of the eleven bilateral trades concerned must be co-opted beforehand by the members of the appropriate committee. Since by definition applicants cannot lay claim to 'past performances', they are offered only a minimum share which does not justify, from an economic point of view, the initial investment usually needed to start up a new shipping link. A newcomer to the market is thus faced with the alternative either of giving up plans to provide the new service or of being satisfied with the cargo share offered in the hope that it will be increased as a result of a general surge in trade on the route concerned or of trade being withdrawn from other members of the shipowners' committee [1], or that he can make the new link pay by using 'trading rights' purchased from African companies [2]. Such conditions are liable to deter potential newcomers from operating liner services in the trades covered by the shipowners' committees.

This co-option mechanism thus effectively protects the shipowners' committees from all external competition; it is not comparable to the procedure for admission to a liner conference provided for in Article 1 of the Unctad code which does not stipulate membership of a conference as a prerequisite for participation by a shipowner in a trade since the latter remains free to operate outside the conference (outsiders).

(51) The French members of the shipowners' committees claim that the cargo shares are allocated in the form of physical units (i.e. tonnage) and that this method leaves room for some 'qualitative' competition (value of cargo, ease of loading and transport, etc. ) within the shipowners' committees. The Commission cannot accept this argument: the principal members of the committees are partners within the same conferences (Mewac and Cowac). Consequently, there can be very little competition between them as the cooperation within conferences on tariffs, capacity or allocation of tonnages forms the basis of their stabilizing role, and that role is the reason why they qualify for block exemption. In addition, the allocation of cargo to each company, followed by checks on each cargo loaded by committee members, does not leave room for any substantial competition. Lastly, the distinction suggested by the French members of the committees between 'quantitative' sharing and qualitative competition is artificial: a shipowner with a larger cargo quota will more

[1] In principle, when a line with a share in the 20 % reserved for third country companies withdraws, the 20 % are redistributed.

[2] Such transactions are however, authorized only between companies that are members of the conference.

usually be in a position to offer shippers a better quality service than a shipowner with a small quota (e.g. more frequent sailings attracting high-value cargoes that are expensive to store, or better door-to-door services as shipowners with large cargoes are in a better position to negotiate with land-base carriers).

## B. Article 86

(52) Article 86 of the EEC Treaty prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it, in so far as such abuse may affect trade between Member States.

(53) The shipping companies that are members of the shipowners' committees are undertakings within the meaning of Article 86.

### 1. *The relevant market*

(54) In the Ahmed Saeed case [1], the Court of Justice ruled that, for the application of Article 86 of the Treaty, a scheduled flight on a particular route may, if the alternative possibilities are not interchangeable with it, be regarded as a market in which a carrier may hold a dominant position.

The same reasoning may be applied to a sea route or a series of liner trades.

The relevant market for the purposes of Article 86 is composed of all the liner services involved in the carriage of general cargo between France and the eleven African States referred to in recital 2. A definition of the market is given in recitals 2 to 7 above.

From a geographical standpoint, France constitutes a substantial part of the common market and trade in general goods carried by liner vessel between France and the eleven French-speaking African States referred to in recital 2 represents a substantial part of the trade in the same goods between those eleven countries and the Community as a whole.

### 2. *Assessment on a collective basis of the position of members of the shipowners' committees*

(55) The companies that are members of the shipowners' committees are statutorily separate enterprises. Some of them, however, are connected in varying degrees: thus, as regards five French shipowners which in theory share 40 % of the trade [2]:

— Delmas controls Louis Martin SA as well as Maurel and Prom (Delmas also has holdings in African companies that are members of the committees),

— Société Navale de l'Ouest and Société Navale Caennaise form part of the Scadoa consortium (with the Scandianavian shipowners Hoegh and SWAL) [3].

These two large groups alone account for most of the cargo carried by committee members, as the number of cross-traders sharing the 20 % allocated to them is considerable (between 11 and 21 depending on the committee), and the African companies (with the limited exception of Gabon and Cameroon), do not operate vessels themselves. Delmas also runs 'coordinated services' with other committee members (EWAS, Lloyd Triestino, Sivomar, Splosna Plovba, Mac Line, Transmare, Setramar and Camship).

(56) Shippers requiring the services of members of a committee apply in principle to the shipowner of their choice since each one has its own commercial service. However, the method by which the shipowners each month share out liner cargoes and the fact that all loading is subject to control by bodies set up for that purpose have the effect of eliminating all effective competition within the committees, the Commission disagreeing with the claims of the enterprises that considerable 'qualitative competition' still exists within the narrow framework of the shipowners' committees (see recital 51).

(57) Most of the committee members are, moreover, also members of the Cowac and Mewac conferences. As such, they present a united front to shippers at their regular consultations, concerning, in particular, the fixing of freight rates.

(58) On the basis of the foregoing, the Commission concludes that the market position of the shipping companies that are members of the committees must be assessed collectively.

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(1) Case 66/86, [1989] ECR 803.

(2) Plus part of the 40 % of the African 'rights' not used by African ships.

(3) At the end of June 1991, the Bolloré Technologies group acquired the interests of the Hoegh group in the West African trades before acquiring control of the Delmas group in August.

3. *Dominant position*

(59) The effect of superimposing the shipowners' agreements on the agreements establishing Mewac and Cowac was to extend cargo-sharing to all cargoes carried by liner vessel to or from French ports between France and the eleven African States referred to in recital 2 (see Annex II).

(60) It has been claimed that the fact that shippers can operate to or from ports in countries adjacent to France, even if they do not make full use of this possibility (see recital 61), is a potential source of competition which must be taken into account by committee members. The Commission does not deny that there is a degree of substitutability between ports where catchment areas can overlap (e. g. some regions of north and north-east France are the same distance from French ports such as Le Havre, Dunkirk as they are from ports in neighbouring countries such as Zeebrugge, Antwerp or even Rotterdam). It should, however, be noted in this respect that:

(i) it would be economically illogical for a major part of French sea trade to travel through neighbouring countries when that country has a large number of adequate port infrastructures which are geographically closest to most of the regions of origin or destination of the goods: the cost of land transport is so much greater than that of sea transport (for the same distance, the cost of carrying a 40-foot container is seven to eight times greater by rail than by sea, whilst road costs are even higher) [1] that geographical proximity is a decisive factor in a shipper's choice of port of loading (or discharge);

(ii) the documents in the file clearly show that the members of the shipowners' committees were very anxious to dissuade shippers from adopting practices they refer to as 'deflections of trade' ('detra'). To that end, goods must be accompanied by documents indicating their origin and destination, the lack of such documents constituting fraud. In addition, the major operators that are members of the committees (such as Delmas and Scadoa) also carry a large proportion of cargoes between the eleven African States covered by the committees and ports such as Antwerp or Rotterdam. This further reduces the opportunities for shippers to avoid the activity of committee members;

(iii) the foregoing is confirmed in substance by the members of the committees: whilst deflections of trade apparently exceed [. . .] of goods exported from Picardy, Champagne, Lorraine and Alsace, they amount only to [. . .] in the Paris region (the national average being estimated at [. . .]). The Commission therefore considers that, whilst it is possible that shippers may in certain cases avoid the constraints imposed by committees by shipping their goods through ports in neighbouring countries, they are not sufficiently competitive to threaten the dominant position of committee members. As the Court of Justice ruled in the United Brands case [2], an undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position.

(61) The French members of the shipowners' committees also claimed that African shippers have a relatively wide choice of different West African ports. This statement ignores the particularly difficult transport conditions in inland Africa, as experienced and described by a member of the transport committees specialized in multimodal transport between Europe and Africa [3]: the choice of different means of transport (road, rail or inland waterway) depends mainly on the quality of the infrastructures, and on seasonal and climatic factors. The complexity of the adminstrative and customs formalities, which vary from one country to another, must also be taken into account. In the case of land transport on roads with poor facilities, cargoes must be grouped together in convoys of several vehicles to cover the risk of breakdowns. Landlocked countries and regions do not therefore have a wide choice of ports available in order, for example, to avoid any abusive practices of shipowners serving a given port. Coastal regions, for their part, depend on the nearest ports as land transport costs are far higher than in Europe.

[1] S. Gilman and M. Graham *The case for conference rate making authority in the inland sector,* July 1990

[2] Case 27/76, [1978] ECR 207.

[3] *'Intermodal Services Africa: Transport as a daily challenge'* in CMB News No 5, May 1990.

In addition, the ports described as interchangeable (Lomé, Cotonou, Douala, Abidjan and Lagos) are served (entirely, as regards the first three, and to a large extent as regard the other two) either to or from France by members of the shipowners' committees.

The claim by the French parties that the African ports are substitutable is therefore not such as to jeopardize the dominance of members of the committees in their market.

(62) In the United Brands case, the Court ruled that in order to conclude that a dominant position exists, regard must be had to the market share of the enterprise or enterprises concerned and the strength and number of the competitors. To the Commission's knowledge, only Maersk Line operates outside the structure of the committees between French ports and ports in the 11 African States covered by the committees. (The Commission underlines that in 1991 the *Merchant Navy and Multimodal Transport Journal,* to which the French members of the shipowner' committees refer in reply to the Commission's statement of objections, does not indicate any sailing from France to Western Africa by any vessel of a company operating outside the shipowners' committees.) Maersk Line vessels sail every two weeks between the ports of Rotterdam, Antwerp, Le Havre and Marseille/Fos and nine West African ports, including Dakar (Senegal), Lomé (Togo), Cotonou (Benin) and Conakry (Guinea). These ships are able to load cargoes at Rotterdam and Antwerp for shipment to all the West and Central Africa countries, including the eleven States referred to in recital 2. In French ports, however, they load only cargoes for African countries whose trade with France is not covered by the shipowners' committees. This is because, since it is not a committee member, Maersk is unable to obtain the necessary authorization from Secrétama, and all cargoes loaded without approval are liable to be fined at the port of arrival.

Since 1987, the total cargo carried by Maersk from French ports to all the countries of West Africa was less than [. . .] of total exports to those countries. This is explained by the fact that the number of Maersk sailings to the African countries covered by the shipowners' committees is insignificant.

(63) It has been submitted that 'new outsiders' endeavouring to gain permanent access to the trades between Europe and West Africa are tending to take the place of temporary operators who, traditionally, competed against the conferences on a load-by-load basis. This trend is due partly to the fact that access to the increasingly containerized trades served, at the African end, by ports that are frequently poorly equipped, entails considerable initial investments (e. g. fitting-out of vessels and acquisition of containers) which, in addition to the commercial investments, are economically justifiable only if a shipowner can reasonably expect to operate a regular service for a certain number of years. This would not be possible for shipowners operating outside the structure of the committees who run the risk of being fined at any time [1]. The constant threat of such penalties can be regarded as having the same dissuasive effect on potential newcomers as the actual imposition of a fine. Whilst it is possible that, as claimed by the French members of the committees, non-committee shipowners (not named, except for Maersk Line) have occasionally been able to load cargoes and avoid the fines applicable under African rules, such transactions are precarious and do not satisfy the needs of shippers operating regularly on the trades in question. Such shippers thus have no option but to have recourse to committee members for most of their requirements, thus helping to maintain the dominant position of the latter.

The fact, moreover, that a shipping company as powerful as Maersk (second largest liner company in the world) has been unable, contrary to its obvious wishes, to gain access to the trades covered by the committees, is confirmation of the system's effectiveness in excluding independent companies.

(64) The Court of Justice has ruled that Article 86 is applicable to an undertaking holding a dominant position in a particular market, even where that position is due not to the activity of the undertaking itself but to the fact that by reason of provisions laid down by law there can be no competition or only very limited competition on that market [2].

The rules adopted by the relevant African States stipulate that the whole of their maritime trade with France must be governed by the 40:40:20 sharing

(1) Fines can be very high, in certain cases (see Annex 6) reaching 50 % of freight value.

(2) Judgment of 3 October 1985 in Case 311/84, CBEM v. CLT and IPB [1985] ECR 3261.

rule. In the case in point, the shipowners took it on themselves to organize the sharing using the device of shipowners' committees, whilst the African authorities agreed to impose a system of penalties. The committees are the only bodies in France with the right to manage the trade; their members therefore hold a collective dominant position.

(65) More generally, the collective dominant position of committee members is the result, taking account of the above and compared to their present or potential competitors, of the size of their fleet, the network of sea routes they cover and the frequency of sailings they can offer to shippers from the main French ports.

(66) The Commission therefore considers, in view of the foregoing, that the setting-up of shipowners' committees by a group of shipowners covering virtually the entire market resulted in the creation of a collective dominant position to their advantage.

4. *Abuse of a collective dominant position*

(67) The practices by which the members of the committees endeavoured, on the basis of the shipowners' agreements, to eliminate effective competition from non-committee shipping lines also constitute an abuse of a dominant position within the meaning of Article 86. Such practices have the effect of limiting, within the meaning of Article 86 (b), the supply of liner services available to shippers.

(68) The practices are as follows:

(i) involvement of the committees in the imposition of fines by informing the African authorities of infringements justifying, in their view, such penalties, and their requests to those authorities that the penalties be imposed.

For the reasons given in recitals 32 to 39, the Commission rejects the claim made by the French parties that in acting this way, the committee members were only submitting to the rules in force in the African countries concerned. It notes that, on the contrary, the committee members repeatedly endeavoured to secure the adoption by the African authorities of rules which would, in their own words, 'close' the trade (see recital 25 (i)) and also establish and impose penalties on non-committee shipowners or those exceeding their cargo quotas.

The Commission also rejects as without basis the argument that the abovementioned practices were a 'lesser evil' compared with the trade control measures which the African countries could, according to the committee members, have adopted in the absence of such practices (see recitals 35 and 36).

The Commission acknowledges, lastly, that the fact that an association of undertakings approaches a public authority in the common interests of its members is not in itself an infringement of the competition rules. In this instance, however, the approaches made by the committees to the authorities of certain African States had the sole purpose of securing the adoption of measures aimed at strengthening their dominant position. Recourse to such practices does not exempt their authors from the application of Community competition rules since it is to say the least paradoxical that enterprises should ask the public authorities to cover their restrictive practices only to maintain subsequently that the practices are not caught by Article 85 as they were imposed by the same public authorities;

(ii) co-option of lines allowed to participate in the bilateral trades managed by the committees.

As stated in recital 16, the admission of third-party lines (cross-traders) is, in some cases, conditional on their acceptance of clauses imposed by national companies to protect their own interests. In addition, the initial cargo quota allocated to newcomers is insufficient to allow them to develop their business in economically acceptable conditions; nor can they expect a substantial increase in their market share as long as the committee rules remain in existence.

Conditions of admission such as these amount in practice to refusing newcomers access (or granting purely symbolic access) to the trade or making it economically unviable.

(69) The abovementioned practices of members of the shipowners' committees, which have the effect of harming competition in the liner trades between France and the eleven African States referred to in recital 2 are liable, for the reasons given in recitals 43 to 45, to affect trade between Member States within the meaning of Article 86 (b).

## C. Measures taken by the Commission

### 1. *Article 11 (1) of Regulation (EEC) No 4056/86*

(70) Pursuant to Article 11 (1) of Regulation (EEC) No 4056/86, the Commission may, if it finds there has been an infringement of Article 85 (1) or Article 86 of the Treaty, require by decision that the undertakings or associations of undertakings concerned bring such infringements to an end.

The Commission considers it is necessary, pursuant to the abovementioned provisions, to require the shipping companies concerned immediately to terminate the shipowners' agreements and the practices referred to in recital 69 of this Decision.

### 2. *Article 19 (2) of Regulation (EEC) No 4056/86*

(71) Pursuant to Article 19 (2) of Regulation (EEC) No 4056/86, the Commission may, by decision, impose on undertakings or associations of undertakings fines where, either intentionally or negligently, they infringe Article 85 (1) or Article 86.

The Commission considers it appropriate in this case to impose a fine pursuant to Article 19 (2) of Regulation (EEC) No 4056/86 on members of the shipowners' committees for having infringed Article 85 (1) by applying, within the framework of the shipowners' committees, a cargo-sharing system between France and the 11 West and Central African States referred to in recital 2.

(73) On the basis of the same provisions, the Commission considers that a fine should be imposed on the members of the shipowners' committees for having infringed Article 86 (b) by:

— effectively taking part in the imposition of penalties on shipowners having exceeded the cargo quota allocated by the committees or having operated without the approval of the committees,

— applying a co-option mechanism to shipping lines authorized to take part in the bilateral trades managed by the said committees.

(74) To determine the amount of the fines, the Commission has taken the following factors into consideration:

(a) The nature of the infringements

The infringements described in this Decision are of a particularly serious nature inasmuch as they enabled shipowners' committees to share the entire liner trade between France and each of the 11 African States listed in recital 2, with the sole exception of cargoes transiting through European ports not on French territory. The infringements also had the effect of impeding the attainment of a single market in so far as, on the routes in question, they promoted French shipping lines to the detriment of their competitors in other Member States.

(b) The intentional nature of the infringements

Regulation (EEC) No 4056/86 was adopted following intensive consultations between the Commission and the representatives of shipowners. Apart from the general legal principle that ignorance of the law is no excuse, the members of the shipowners' committees cannot in the circumstances claim legal uncertainty as regards their obligations under Community law.

The French members of the shipowners' committees claim, however, that they were faced with rules which varied from trade to trade and that they were therefore in a position of legal uncertainty. The Commission acknowledges in this connection that some of the positions adopted by CMEAOC and embodied in the domestic law of the member countries of that organization may conflict with the Community rules on competition. It considers, however, that in such a situation, it is for the enterprises concerned to take a neutral position by complying solely with the absolute obligations imposed on it by the various laws and regulations. Such was not the case in this instance and the members of the shipowners' committees intentionally infringed Community law by voluntarily adopting restrictive practices.

In addition, in order to avoid the application of Community law, they deliberately sought to have their conduct concealed by the authorities of third countries beyond the Commission's jurisdiction.

(c) The conduct of the enterprises

The attention of the members of the shipowners' committees was drawn in 1987 by the complainants to their obligations under the Community competition rules. It must be noted that neither after the submission of the complaints, nor after the requests for information sent by the Commission, nor after the latter's inspection of the premises of Cowac, Mewac and Secrétama, did the conduct of the members of the committees change in any way whatsoever. There is every indication that the infringements described in this Decision have not to date been terminated.

(d) The nature and value of the goods

The infringements referred to in this Decision affected all the eleven liner trades concerned; they therefore directly affected the conditions under which all goods were traded (with the exception of basic products carried by tramp vessels) between France and the African States referred to in recital 2.

It should be noted that the incidence of freight rates on the prices of goods carried by liner vessels is generally estimated at between 4 % and 12 %; the incidence can be even higher in the case of low or average value added products which form a large proportion of the trade between Europe and Africa [1].

It is not possible to assess the exact market shares of members of the shipowners' committees had there been no committees. It can be concluded, however, that their present market shares are not the result of their own competitive capacity, as would have been the case in trades open to competition. It should be stressed in this respect that the principal effect of the shipowners' committees is to freeze the shares of the shipowners operating on their trades. Committees members that are also members of the Cowac and Mewac conferences (see Annex) carry over 95 % of the committees' cargoes, whereas on the Euro-African trades where there are no committees the market share of the conferences is less than 60 % [2]. It thus seems clear that the shipowners' committees had the effect, to a significant degree, of protecting the position of the conferences (of which all the French and African companies operating between France and West Africa are members) against all competition from non-conference shipowners. A similar disparity is to be found in price levels, since the southern section of Cowac which operates to or from French ports was able to increase its general tariff by 34 % between 1980 and 1989, whereas in the northern section (ports located between North Cape and Zeebrugge), the same tariff rose by only 22 % in the same period.

(e) The degree of involvement in the agreement

The shipowners' agreements were concluded and signed by the French national lines and each of the African States in question, and countersigned in certain cases by the monitoring bodies (Secrétama and the African Shippers' Councils or similar bodies).

The entry into force of the agreements had the main effect of establishing the supremacy of the Delmas and Hoegh groups: according to statistics supplied by Secrétama, the companies carried over [. . .] of total cargo on the eleven trades in question [3].

In the same period, the companies forming part of the Delmas Group (Delmas, L. Martin and Maurel et Prom) carried [. . .] on the eleven trades, Scadoa's share (SNO, SNC, Hoegh and SWAL) totalling [. . .]. No other line operating on the eleven trades acquired a market share of

(1) '. . . transportation costs are clearly a barrier to trade and in that sense ought to be analysed exactly like a customs tariff' (Juda/Abrahamsson).
According to the French committee members, freight expenditure in 1987 represented 11,3 % of the value of foreign trade of the countries of West and Central Africa.
An independent study revealed that in the Ivory Coast the incidence of freight rates in 1976 on FOB prices was 18 % for imported motor vehicles and 53 % and 35 % for exported wood and fruit respectively (E. Gouvernal 'Politiques maritimes et développement' Minstère de la Coopération et du Développement, Paris, 1988).

(1) According to data supplied by the French members of the shipowners' committees.

(2) This figure should be regarded as a minimum: Secrétama's statistics refer to cargoes allocated to African companies (Cobenam, Satonam) which, lacking vessels, were unable to carry the cargoes themselves, and to other African companies (Sonatram, Camship) with only limited capacities (two small vessels each) and where there is no proof that they were able to carry their entire quota.

more than [. . .], with the exception of Camship (Cameroon), Sonatram (Gabon) and Sotonam (Togo) whose effective transport capacities are limited, as far as the first two lines are concerned and non-existent as far as the latter is concerned.

Furthermore, only the companies that are members of the Delmas and Scadoa groups operate in each of the eleven trades, Delmas also being the only one to operate in French Mediterranean and west coast ports (North Sea, Channel, Atlantic).

Finally, it is clear from the facts referred to in this Decision (see recitals 21, 25, 26 and 31 and Annex V) that most of the activities of the members of the committees objected to were engaged in by members of the Delmas group (either alone or in association with members of Scadoa) or by Secrétama (one of whose co-managers is director of foreign relations at Delmas) in its capacity as secretariat of the shipowners' committees. The Delmas group thus bears a much higher degree of responsibility, all the more so since it controls a considerably larger proportion of the trade than its partners on the committees and its actions therefore have a far greater impact on the market.

Nevertheless, the Commission takes into consideration the fact that in 1991 the Bolloré Group took over Delmas including the shipowners that were members of the Scadoa Group. The new management adopted measures likely to encourage a more balanced competition in the trade concerned.

Third-country shipowners *(cross-traders)* claim that they were obliged to comply with the rules of the committees unless they wished to cease operating in the trades covered by the committees. The Commission is aware in fact, that shipping companies operating as cross-traders were confronted with the following alternative: to accept the restriction imposed by the shipowners' committees or withdraw from an important trade.

It nevertheless considers that an undertaking which is under strong pressure to associate it with practices contrary to the Treaty rules always has the possibility of appealing to the Commission or the national courts to request that such practices be brought to an end. This is why the Commission concludes that the shipping companies operating as cross-traders in the trades managed by the committees should not be totally exempt from payment of a fine, although account should be taken, in determining the fine, of the fact that:

— the *cross-traders* operated under a monitoring scheme which they did not set up and from which they did not benefit. For this reason the fines to be imposed on them should be much less than those applicable to the founding shipping companies, sole beneficiaries of the shipowners' committees,

— the degree to which the *cross-traders* participated in the shipowners' committees varies from one company to another. Some operated in different committees, and even in the eleven, others in only one. On the other hand, some of them have been members since the shipowners' committees came into being while others joined recently. Therefore, in distributing the amount of the fines, a system should be used which would take into account, for each *cross-trader,* the size of the cargo which was effectively transported in the total trade covered by the committees during the period under consideration.

Furthermore, there are grounds for exempting from fines the four shipping companies which although members of the committees contributed in drawing the attention of the Commission to the practices dealt with in this Decision.

As regards the African lines operating as national companies within the committees, it should be noted that:

— their share of the total trade of the eleven committees (1987 to 1990) is as follows:

| | | |
|---|---|---|
| — Sonatram (Gabon) | [. . .], | ([. . .] of France-Gabon trade), |
| — Sotonam (Togo) | [. . .], | ([. . .] of France-Togo trade), |
| — Cobenam (Benin) | [. . .], | ([. . .] of France-Benin trade), |
| — Comaunam-Co Fama-Sonam (Mali) | [. . .], | ([. . .] of France-Mali trade), |
| — Camship (Cameroon) | [. . .], | ([. . .] of France-Cameroon trade), |
| — Cosenam-Express Navigation (Senegal) | [. . .], | ([. . .] of France-Senegal trade), |
| — SNG (Guinea) | [. . .], | ([. . .] of France-Guinea trade), |

— Comaunam, Cosenam and SNG have no vessels; Sotonam ceased operating its own ships in 1988 and sold them, and gave up chartering vessels in 1989; Cobenam sold its only, small vessel in 1990; of Camship's six vessels existing in 1987, only two small-capacity ships remain; lastly, Sonatram also operates two small vessels [1]. It is thus clear that a large part of the cargoes allocated to these seven companies was reallocated to other shipping companies,

— these enterprises control a very small part of the trade (the fact that they only serve the trade of countries whose flags they fly, to the exclusion of other African countries, considerably weakens their development potential) and the impact of their actions is of little importance,

— these enterprises are confronted with serious difficulties that threaten their survival as shipping lines. The resale of trading rights (which is the sole activity of some) according to the UNCTAD code of conduct, cannot be considered a maritime activity but rather a levy on the shipowners who in fact carry on the liner transport of cargoes,

— broadly speaking, the companies in question did not gain any commercial benefit from the system set up within the shipowners' committees (for example, Camship's share of the cargoes allocated by the eleven committees was reduced from [. . .] in 1987 to [. . .] in 1990).

On the basis of the foregoing, it is clear that no fines should be imposed on these African countries which would further weaken their presence in the market.

(f) The duration of infringements

All the shipowners' agreements were concluded and took effect before the entry into force of Regulation (EEC) No 4056/86, with the exception of the France-Guinea agreement of 29 September 1987 and the France-Mali agreement of 29 July 1988.

Regulation (EEC) No 4056/86 entered into force on 1 July 1987. Prior to that date the Commission took no action on the basis of Article 89 of the Treaty in respect of the infringements to which this Decision relates. Consequently, the conduct of the undertakings prior to that date should not be taken into account in order to calculate the fine.

(g) The first application of Regulation (EEC) No 4056/86 to infringements

This Decision constitutes the first application of Regulation (EEC) No 4056/86 for the purposes of imposing a fine for infringement of Articles 85 and 86. It is customary in such cases for the Commission to show moderation in determining the amount of the fine in order to take account of the fact that the parties concerned by the Decision may not have been fully informed of their obligations under the Community rules on competition or may have underestimated the gravity of the infringements they committed.

This is clearly not the case here since, as stated above, the members of the shipowners' committees were fully aware of the provisions applicable to them as regards competition.

In particular, the principal members of the shipowners' committees, also members of the Mewac and Cowac conferences, were fully informed of the fact that the block exemption granted under Regulation (EEC) No 4056/86 to liner conferences (after extensive consultations with the parties concerned) does not allow the latter to extend the effects of their agreements to all the liner trades in which they operate.

It is not desirable in these circumstances to give the members of the shipowners' committees the benefit of any particular advantage by virtue of the fact that this is the first time Regulation (EEC) No 4056/86 has been applied to a case of infringement.

(h) The situation of the sector

As indicated in recital 7, the trade carried out by the members of the shipowner's committees was appreciably lower during the past few years creating a situation of overcapacity which was accentuated by the improvement in production achieved by most of the shipping companies. This situation might help to explain the efforts made by the shipping companies to dissuade new operators from entering the trade.

It should be emphasized, however, that the reorganization brought about by the members of the shipowners' committees as well as the control which they exercised over their trade allowed them to maintain the freight rates at a sufficiently profitable level to entice other operators to try to enter the trade, even referring

[1] By comparison, Delmas operates a fleet of fifty modern and efficient vessels in the total trade (African and non-African) covered by the group.

the matter to the Commission in order to be in a position to achieve this objective.

The difficulties encountered by the members of the committees due to the declining market in which they operate should not, in any case, justify the behaviour adopted by them.

However, the manner in which the acquisition of Delmas by the Bolloré Group was conducted (especially the fact that after it bought the majority share of the assets, the Bolloré Group was legally obliged to purchase the minority shares) had the effect of appreciably increasing its debt and, consequently, weaking its financial structure,

HAS ADOPTED THIS DECISION:

*Article 1*

The enterprises that are members of the shipowners' committees, a list of which is attached as Annex 1 to this Decision, have infringed Article 85 (1) of the EEC Treaty by sharing, within each committee, cargoes carried by liner vessel in bilateral trade between France, on the one hand, and Gabon, Guinea, Mali, Cameroon, Senegal, Benin, Central African Republic, Burkina Faso, Togo, Congo and Niger on the other.

*Article 2*

The enterprises to which this Decision is addressed shall bring to an end the infringement referred to in Article 1 and shall refrain in future from adopting any agreements or concerted practices having a similar or identical effect, including all exchanges of information notifying participants or third parties of cargoes loaded by each or by several members.

*Article 3*

The provisions of Article 2 shall not prejudice the right of enterprises that are members of the shipowners' committees to participate in the activities of liner conferences of which they may be members, in accordance with Regulation (EEC) No 4056/86.

*Article 4*

The enterprises that are members of the shipowners' committees infringed Article 86 of the EEC Treaty by abusing their collective dominant position in the following manner:

— by participating in the application of a system of penalties to shipowner members of the shipowners' committees in breach of the cargo-sharing rules established by the committees, or shipowners who, without the authorization of the committees, nevertheless attempted to provide liner services on the bilateral shipping routes on which the committees operate,

— by applying a co-option mechanism which in practice amounted to excluding certain shipowners from the trade or reducing their involvement to an extent bearing no relation to their competitive strength.

*Article 5*

The enterprises concerned by this Decision are hereby required to bring to an end the infringements referred to in Article 4.

*Article 6*

Fines are hereby imposed on the enterprises concerned by this Decision by reason of the infringements referred to in Articles 1 and 4.

The fines are as follows

| | *(in ECU)* |
|---|---|
| — Delmas (L. Martin and Maurel and Prom included) | 11 628 000, |
| — Hoegh SWAL | 651 000, |
| — RMS Afrika | 2 400, |
| — UWAS | 56 400, |
| — Splosna Plovba | 2 800, |
| — Deep Sea Shipping | 3 400, |
| — East Asiatic Company WAS | 55 800, |
| — I. Messina | 4 600, |
| — Lloyd Triestino | 32 800, |
| — Transmare | 12 800, |
| — Van Uden | 10 100, |
| — Nedlloyd | 25 800, |
| — Compagnie Maritime Belge | 46 000, |
| — Mac Lines | 10 100, |
| — Société Navale de l'Ouest | 1 751 000, |
| — Société Navale Caennaise | 970 000, |
| — Deutsche Afrika Linien-Woermann | 43 200. |

*Article 7*

The fines imposed in Article 6 shall be paid in ECUs within three months of the date of notification of this Decision to the account of the Commission of the European Communities No 310-0933000-43, Banque Bruxelles-Lambert, Agence Européenne, Rond-Point Robert Schuman 5, B-1040 Bruxelles.

On expiry of that period interest shall automatically 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 8*

This Decision is addressed to the enterprises listed in the attached Annex 1.

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

Done at Brussels, 1 April 1992.

*For the Commission*

Leon BRITTAN

*Vice-President*

*ANNEX I*

**List of shipping lines participating in or authorized to participate in the trade of the shipowners' committee**

(List provided by Secrétama)

| | Senegal | Gabon | Central African Republic | Niger | Burkina Faso | Guinea | Congo | Cameroon | Benin | Togo | Mali | Conference Member |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| RMS Afrika | | | | | | × | | | | | | |
| OT African Line | | | × | × | × | | | × | | × | | |
| UWAS | × | | × | × | × | | × | × | × | × | × | × |
| Splosna Plovba | | × | × | × | × | × | × | × | × | × | × | × |
| L. Hoegh | × | × | × | × | × | × | × | × | × | × | × | × |
| SWAL | × | × | × | × | × | × | × | × | × | × | × | × |
| Deep Sea Shipping | × | | | | | | | | | | | |
| East Asiatic Company | × | | × | × | × | | | × | | × | × | × |
| I. Messina | × | | | | | | | | | | | × |
| Lloyd Triestino | × | × | × | × | × | × | × | × | × | × | × | × |
| Transmare | × | × | × | × | × | × | × | × | × | × | × | × |
| Van Uden | × | | × | × | × | × | | × | | × | × | |
| Nedlloyd | × | × | × | × | × | × | | | × | × | × | × |
| Cobelfret | | | | | | × | | | | | | |
| Compagnie maritime belge | × | × | × | × | × | × | | | × | × | × | × |
| Mac Lines | × | × | × | × | × | × | × | × | × | × | × | × |
| Grimaldi | | | | | | × | | | | | | |
| Delmas | × | × | × | × | × | × | × | × | × | × | × | × |
| Sivomar | × | | | × | × | | | × | × | × | × | × |
| Sotonam | | | | × | × | | | | × | × | × | × |
| Société navale de l'Ouest | × | × | × | × | × | × | × | × | × | × | × | × |
| Société navale caennaise | × | × | × | × | × | × | × | × | × | × | × | × |
| L. Martin | × | × | × | × | × | × | × | × | × | × | × | × |
| Camship | | × | × | × | × | × | × | × | × | × | × | × |
| Compagnie maritime zaïroise | × | | | × | × | | × | | | × | | × |
| Cobenam | | | | × | × | | | | × | | | × |
| Express Navigation | × | × | × | × | × | × | × | | × | × | × | × |
| Maurel et Prom | × | | | | | | | | | | × | × |
| Sitram | × | × | × | × | × | × | × | | × | × | × | × |
| Société navale guinéenne | | | | | | × | | | | | | |
| Comaunam | | | | | | | | | | | | × |
| Keller Shipping | × | × | × | × | × | × | × | × | × | × | × | |
| Sonatram | | × | | | | | | | | | | × |
| Cosenam | × | | | | | | | | | | | × |
| Deutsche Afrika Linien-Woermann | | × | × | × | × | × | × | × | × | × | × | × |

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B-2000 Antwerpen

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Grimaldi Compania di navigazione SPA
Palermo operative Departments
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Navale Delmas Afrique (SNCDV)
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SIVOMAR
Immeuble Sivomar — BP 1395
Abidjan
Côte-d'Ivoire

SOTONAM
93, voie Express
BP 4086 Lomé Port
Lomé
Togo

Société navale de l'Ouest
Tour Franklin — Cedex 11
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Société navale caennaise
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SOFIMAR
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Camship
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Douala
Cameroun

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Cobenam
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Dakar
Sénégal

Maurel et Prom
c/o Navale Delmas Afrique (SNCDV)
Tour Delmas-Vieljeux
31-32, quai de Dion-Bouton
F-92811 Puteaux cedex

Sitram
4, avenue Lamblin — BP 1546
Abidjan
Côte d'Ivoire

Société navale guinéenne
BP 6
Conakry
Guinée

Comaunam
BP 799
Nouakchott
Mauritanie

Keller Shipping
Holbeinstraße 68
PO Box 3479
CH-4002 Basel

Sonatram
(Société nationale de transports maritimes)
BP 3841
Libreville
Gabon

Cosenam
(Compagnie sénégalaise de navigation maritime)
BP 683
Dakar
Sénégal

Deutsche Afrika Linien-Woermann Linie
PO Box 500369/Palmaille 45
D-2000 Hamburg 50

RMS Afrika
Hafenstraße 27—29
D-4100 Duisburg 13

OT African Line
ABS House
No 1 Frying Pan Alley
UK-London E1 7HS

UWAS (u./West African Service)
c/o Managers POL, ESC, DSR
107 A1 Wosska Polskiego
70483 Szczecin
Pologne

SPLOSNA PLOVBA PO
Obala 55, PO Box 60
YU-66 320 Portoroz

LEIF HOEGH and Co
PO Box 2596 Solli
N-Oslo

Scandinavian West Afrika Lines Ltd
(SWAL)
Fack S-403-36
S-Göteborg

Deep Sea Shipping
Henningsens Allé 8
DK-2000 Copenhague

East Asiatic Company (Was)
Holbergsgade 2
DK-1099
Copenhague

Gnazio Messina & C.
Via G. d'Annunzio 91
Casella postale 1951
I-16121 Genova

Lloyd Triestino SpA
Piazza dell'Unita d'Italia 1
BP 583/584
I-34121 Trieste

Linea Transmare SpA
Via Freschi, N. 1/22
I-16121 Genova

Van Uden Maritime BV
postbus 1123
NL-3000 BC Rotterdam

Nedlloyd Lijnen BV
Trade Directorate Europe
Dept LTE
PO Box 240
NL-3000 DH Rotterdam

Cobelfret
Sneeuwbeslaan 14
B-2610 Antwerpen

*ANNEX II*

**Estimated liner trade between France and the 11 West and Central African States covered by the activity of the shipowners' committees; estimated market share of the committees (1988)**

| | Senegal | Togo | Benin | Gabon | Congo | Niger | Guinea | Central African Republic | Cameroon | Mali | Burkina Faso |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Total trade | 283,2 | 117,0 | 84,1 | 172,7 | 123,3 | 118,7 | 229,3 | 43,8 | 443,7 | 68,1 | 75,5 |
| Liner trade | 145,8 | 37,8 | 20,9 | 102,9 | 50,0 | 26,1 | 95,7 | 10,6 | 107,1 | 24,4 | 25,6 |
| Shipowners' committees | 130,8 | 45,4 | 38,6 | 109,0 | 99,6 | 46,0 | 82,8 | 29,6 | 107,8 | 25,9 | 62,3 |
| % | 90 | 120 | 185 | 106 | 199 | 176 | 87 | 279 | 101 | 106 | 243 |

*Methodological note*

The foreign trade statistics for France drawn up by customs do not distinguish between modes of transport. Professor Bauchet, the expert quoted by the shipowners' committees, suggested defining liner trade by deducting from total trade those items in the trade balance corresponding to goods usually carried by tramp vessel: cereals (item 10), salt (item 25), oil or mineral fuels (item 27), inland waterways (item 89); the secretariat of the shipowners' committee (Secrétama) suggested adding to this list items 72 (pig iron, iron and steel), 11 (malt) and 17 (sugar). The data given in this Annex are based on this methodology. They call for the following comments:

— in the four largest trades by volume (Cameroon, Senegal, Guinea and Gabon) the shipowners' committees cover virtually the entire liner trade (between 90 % and 106 %),

— in the other trades, the share of the shipowners' committees exceeds that of the liner trade alone, as far as it can be assessed by the methodology adopted, particularly in the case of the smaller trades (Central African Republic, Burkina Faso). It thus seems that in these trades the committee members also carry goods that are usually carried by tramp vessels, but which when the amounts concerned are very small, can be carried by liner vessel (cereals, malt, etc.).

*ANNEX III*

**Regulations in force in the African States whose foreign trade with France is covered by the shipowners' committees.**

*Benin*

Order No 79-49 of 13 September 1979

Decree No 79-240 of 13 September 1979

Decree No 23 of 14 May 1984

Decree No 24 of 14 September 1984

*Burkina Faso*

Decree No 82-0358 of 15 September 1982

Implementing Decree of 5 March 1984

*Guinea*

Decree No 423 of 4 August 1981

Decree No 10924 of 3 December 1987

*Cameroon*

Law No 74/19 of 5 December 1974

Decree No 70/309 of 13 November 1975

Decree No 39 of 16 January 1976

Law No 78/09 of 12 July 1978

*Congo*

Decree No 85-045 of 22 January 1985

Law No 27-85 of 19 July 1985

Circular of 11 December 1985

*Gabon*

Order of 7 September 1978

*Senegal*

Decree No 78-179 of 2 March 1978

Interministerial Decree No 8454 of 25 July 1980

Interministerial Decree No 14460 of 21 October 1987

Interministerial Decree No 6678 of 8 July 1981

*Mali*

Decree No 180 of 23 July 1985

Decree No 5415 of 21 May 1986

*Niger*

Decree No 56 of 13 November 1985

*Togo*

Order No 80-11 of 9 January 1980

Ministerial Decree No 4 of 19 February 1981

Interministerial Decree No 25 of 6 November 1985

Decree No 8 of 19 September 1988

*ANNEX IV*

**Shipowners' agreements (or equivalent documents)**

1. *France-Togo*

Circular of 8 February 1982 from Secrétama to the shipping lines

Secrétama notice to shipping lines (28 January 1982)

2. *France-Benin*

Detailed rules for the implementation of the agreement between the French and Benin national shipping lines relating to the organization of maritime trade between France and Benin (Cotonou, 14 March 1985)

3. *France-Senegal*

Detailed rules for the implementation of the organization of maritime trade between France and Senegal (not dated)

Letter to shipping lines from the Chairman of the Shipowners' Committee (26 June 1981)

Circular No P/PL/010733 from Secrétama inviting shipping lines having announced 'their intention to participate in the trade between France and Senegal' to submit their manifests for approval as from 1 April 1981

4. *France-Central African Republic*

Organization of the France-Central African Republic trade (and vice versa) (not dated)

5. *France-Niger*

Practical arrangements relating to the organization of maritime trade between France and Niger and vice-versa (not dated)

Circular from Secrétama to 'all shipping lines participating in the France-Niger trade with a copy of the text relating to the practical arrangements for the organization of the France-Niger trade and announcing the implementation of the agreement from 1 January 1986.

6. *France-Gabon*

Notice from Secrétama to liner companies operating in the two-way France-Gabon trade (30 November 1978)

Notice from Secrétama to shippers (30 November 1978)

Arrangements for the application of the France-Gabon maritime agreement — North Channel-Atlantic sector — (following plenary meeting on 9 December 1986)

Secrétama document headed 'France-Gabon agreement, basic documents' (12 March 1980)

Notice from Secrétama to shipowners

Notice from Secrétama to shippers

Notice from Secrétama to liner companies in the two-way France-Gabon trade (13 December 1978)

7. *France-Cameroon*

Shipowners' agreement of 13 February 1985

Rules of procedure of the programming committee responsible for the organization of the two-way France-Cameroon trade (15 May 1987).

8. *France-Mali*

Shipowners' agreement (29 July 1988)

Rules of procedure of the programming committeee responsible for organizing the two-way France-Mali trade (not dated)

9. *France-Guinea*

Shipowners' agreement (29 September 1987)

Rules of procedure of the programming committee responsible for organizing the two-way France-Guinea trade (not dated)

Circular from Secrétama to 'all third-party lines authorized to participate in the France-Guinea trade' (16 September 1987)

10. *France-Burkina Faso*

Practical arrangements for the organization of the trade between France and Burkina Faso and vice-versa (not dated)

Notice from Secrétama to shippers (not dated; reference 861233)

11. *France-Congo*

Protocol on the organization of the trade between France and the Popular Republic of the Congo and vice-versa (not dated)

Practical arrangements for the implementation of the agreement between the French and Congolese national lines relating to the organization of the maritime trade between France and the Popular Republic of the Congo (not dated)

*ANNEX V*

**Documents relating to the involvement of the shipowners' committees in the imposition of fines for failure to comply with the rules of the committees**

1. On 21 December 1987 Secrétama notified the Cameroon National Shippers' Council by telex No 4650 that 'the vessel *Rota* is apparently now loading 3 000 tonnes of flour . . . for Douala'. It also stated 'as the lines participating in the trade do not appear to have approved this load, please inform port of destination of this unauthorized load'. Secrétama added 'would also remind you of following vessels without authorization' (it gives the names of two vessels with the dates and places of loading).

2. On 13 and 26 May 1986 Secrétama sent telexes (Nos 1220 and 2321) to the Togo National Shippers' Council to inform it of the forthcoming departure from a French port of a vessel belonging to a non-committee Italian shipowner; in both instances, Secrétama stated that it had not stamped the relevant manifest and ended its telexes with the following statement: 'We would ask you to take the necessary steps at the destination and to keep us informed of subsequent events'.

3. On 10 February and 10 March 1986 Secrétama sent two telexes (Nos 690 and 1165) to inform the Gabon Shippers' Council of the departure from a French port of two vessels belonging to Danish and Israeli lines respectively, both non-committee vessels. As in the case described in the preceding paragraph, and in the same terms, Secrétama stated that it had not stamped the manifest and invited the Gabon Shippers' Council to 'take the necessary steps' and keep it informed of subsequent events.

4. On 9 March 1988 the shipowner Delmas notified Secrétama and the Cameroon National Shippers' Council by telex that a cargo for Chad loaded in a French port by a Dutch shipowner member of the shipowners' committee was in fact intended partially for Cameroon as its final destination. Delmas ended its telex as follows: 'we therefore hope that this apparently unauthorized cargo will be penalized at its destination'.

5. On 19 April 1988, Scadoa [1] informed the Cameroon National Shippers' Council and Secrétama by telex No 7467 of the departure for Cameroon from a French port of two vessels in breach of the rules of the shipowners' committee. Scadoa ended its telex as follows: 'hope that sanctions will be taken against both vessels'.

6. By telex No 174 of 27 April 1988, the Paris representative of the Cameroon National Shippers' Council informed the headquarters of his organization at Douala that non-committee Greek and Liberian vessels had loaded cargo in a French port in breach of the committee's rules. The telex closes as follows: 'all the parties that are members of the shipowners' agreement hope that the severest sanctions will be imposed on all shippers or shipowners in breach of the rules'.

7. By telex No 6457 of 27 October 1988 Camship informed Secrétama of a Ghanaian vessel loading cargo intended for Cameroon in a French port in breach of the committee's rules; Camship asked Secrétama 'to take the measures appropriate in such cases'.

8. In October 1989 Delmas informed Secrétama by telex of two vessels leaving a French port for Cameroon in breach of the committee's rules. By telexes No 4978 and No 5142 of 4 and 19 October 1989 Secrétama informed Delmas that it had forwarded copies of the latter's telexes to the Cameroon National Shippers' Council 'for appropriate action'.

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[1] See recital 44.

*ANNEX VI*

**Documents relating to fines imposed for infringement of the rules imposed by the shipowners' committees**

1. On 12 February 1986 the Togo National Shippers' Council informed the non-committee Maersk Line by letter No 021/CNCT/86 that it had received a cheque for CFAF 1 032 255 in payment of a fine for loading goods without authorization in Marseille for transport to Lomé.

2. By letter of 25 March 1986 the TNSC noted that Maersk had loaded goods in French ports 'without the Secrétama stamp'. A fine of CFAF 4 226 847 was imposed; by letter dated 2 April the TNSC confirmed it had received the sum.

3. On 31 March 1986 the TNSC sent Maersk a payment form for a fine of CFAF 7 070 537, specifying that it was equivalent to 50 % of the freight value; the reason for the fine was given as follows: 'Goods loaded without Secrétama stamp'.

4. By letter dated 2 May 1988 to Maersk, the TNSC agreed to cancel two fines: one concerned goods apparently loaded in Marseille but which Maersk was able to prove were in transit through that port; the other concerned the loading of personal goods of no commercial value belonging to an agent of that shipping company.

5. On 13 June 1988 Maersk received a demand from TNSC for the payment of CFAF 3 098 750 for the unauthorized loading in Marseille of eight trucks.

6. By telex of 21 November 1988, the TNSC confirmed that a Maersk vessel that had taken on cargo in Marseille 'had been fined for failing to obtain the Secrétama stamp'.

7. In a 'Presentation Report' attached to a Senegalese draft Interministerial Decree of October 1987, the Senegalese administration referred to 'sanctions . . . applied in our maritime trade with France'. In minutes drawn up by the France-Senegal shipowners' committee on 5 May 1987, Cosenam considered that 'the fines were not sufficiently dissuasive to prevent Maersk Line from loading', thus confirming that fines were effectively imposed.

8. The minutes of the meeting held on 2 July 1986 of the France-Niger shipowners' committee are headed as follows:

   'Unauthorized loading by OT Africa Line (double penalties in the event of excess loads: fine and recording of results in statistics).'

   The wording implies that if OT Africa Line, a member of the shipowners' committee, were to exceed its quota, it would not only be fined but the excess tonnage loaded would be deducted from its quota for the following month.

   It is stated further on in the minutes that 'the Chairman pointed out that a Ministerial Decree provides for payment of a fine and confirmed that OT Africa Line had been penalized for the cargo under discussion'.

9. In the minutes of a meeting of the France-Senegal committee held on 2 June 1986, reference is made during a discussion on monitoring of cargoes not covered by the shipowners' agreement to the fact that Nedlloyd and Woermann had been penalized.