COMMISSION DECISION

of 17 December 1992

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

(IV/32.447)

(Only the French text is authentic)

(93/47/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 18 and 19 thereof,

Whereas:

I. THE FACTS

(1) Mediterranean Europe West Africa Conference (Mewac) is a liner conference whose secretariat is at the following address:

33, rue Jean-François Leca,
F-13002 Marseilles,
France.

Mewac is a group of shipping companies which provide a liner service between Spain, the Mediterranean coast of France, Italy and the former Yugoslavia, on the one hand, and the coast of West Africa, from the northern border of Mauritania to the southern frontier of Angola, on the other.

The companies are:

Members:

— Black Star Line (BSL),
— Cameroon Shipping Lines (Camship),
— Compagnie Béninoise de Navigation Maritime (Cobenam),
— Compagnie Maritime Zaïroise (CMZ),
— Compagnie Sénégalaise de Navigation Maritime (Cosenam),
— Garcia Minaur SA,
— Ignazio Messina,
— Linea Transmare SpA,
— Lloyd Triestino,
— Mac Lines SA,
— Maurel et Prom,
— Nigerbras Shipping Line Ltd,
— Nigeria America Line (NAL),
— Nigerian National Shipping Line Ltd (NNSL),
— Société Ivoirienne de Transports Maritimes (Sitram),
— Société Ivoirienne de Navigation Maritime (Sivomar),
— Navale Delmas,
— Société Togolaise de Navigation Maritime (Sotonam),
— Splosna Plovba Piran (SPP);

Associate members:

— Acoa Lines,
— Setramar.

(2) In 1987, the Commission received a number of complaints pursuant to Article 10 of Regulation (EEC) No 4056/86 concerning maritime trade between Europe and West and Central Africa, including that falling within the geographical area covered by the activities of Mewac.

(3) After carrying out an initial examination of the complaints, the Commission considered that, should the alleged facts set out in the complaints prove to be true, they could:

— be incompatible with Article 85 (3) of the EEC Treaty and so prompt the Commission to withdraw the block exemption provided for in Regulation (EEC) No 4056/86 from the liner conference in the sphere of activities in which the facts had been established,

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

In order for it to be able to identify and obtain additional information and any evidence, the Commission considered that an investigation should be carried out at Mewac.

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

In view of the serious nature of the alleged infringements and the risk of evidence disappearing, the Commission considered that a decision was required ordering Mewac to submit to an investigation pursuant to Article 18 (3) of Regulation (EEC) No 4056/86.

(4) On 26 June 1989 the Commission adopted a decision under Article 18 (3) of Regulation (EEC) No 4056/86 ordering Mewac to submit to an investigation in order to enable the Commission to establish:

— whether the acts of the conference had resulted or were resulting in the absence or elimination of actual or potential competition, in particular by closing the trade to competition and, notably, whether Mewac or member companies of Mewac had adopted agreements, decisions or concerted practies aimed at sharing all cargo carried on sea routs between Europe and Africa, in breach of Article 85 of the Treaty,

— wheter the operation of outsiders was impeded by the behaviour of third countries in trade covered by the activities of Mewac,

— wheter Mewac had abused a dominant position within the meaning of Article 86 of the Treaty.

The decision included a reference to Article 19 (1) (c) of Regulation (EEC) No 4056/86, which covers cases in which undertakings or associations of undertakings refuse to submit to an investigation ordered by decision issued pursuant to Article 18 (3).

(5) On 28 June 1989 at 10.00 a.m., two Commission officials, accompanied by two officials from the Direction Régionale de la Concurrence, presented themselves at the premises occupied by Mewac in Marseilles in order to carry out the investigation ordered by the decision of 26 June.

As the Secretary-General of Mewac was away in Paris, he was immediately contacted by telephone. The Commission officials informed him of the purpose of their visit and faxed copies of the Commission decision, their authorization and the explanatory note accompanying the authorization.

The Secretary-General of Mewac stated that he was the sole representative of Mewac in Marseilles, did not have a lawyer to represent him in that down and could not, therefore, allow the Commission officials access to any documents until he returned to Marseilles, i.e. on the following day at 8.30 a.m.

The Commission officials replied that his answer amounted to a refusal to comply with the Commission decision.

The Secretary-General nevertheless confirmed his position by fax.

The Commission officials, after informing the Secretary-General of the consequences of such a refusal, proceeded:

— to record in the minutes the notification and the refusal to submit to an investigation,

— to request the assistance of the French authorities in accordance with Article 18 (6) of Regulation (EEC) No 4056/86.

The French authorities proposed that, as a precaution, they take appropriate steps to seal the premises of Mewac until the following day. The Secretary-General of Mewac was informed of this and, in the presence of his legal adviser, suggested that the seals be placed by agreement between the parties.

(6) This solution was adopted and the investigation started the next day, in the presence of the Secretary-General. Subsequently, the investigation proceeded normally.

II. LEGAL ASSESSMENT

(7) Article 18 (1) of Regulation (EEC) No 4056/86 provides that 'in carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings'. Article 18 (3) states that 'undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission'.

Mewac is an associations of undertakings within the meaning of Article 18 of Regulation (EEC) No 4056/86; as such, it is required to submit to all Commission decisions adopted pursuant to Article 18 (3) and, consequently, to allow Commission

officials access on arrival to the documents relating to the subject-matter of the investigation, at their request.

Naturally the Commission's representatives ar prepared to wait for a lawyer to be present before commencing an inspection, provided that the delay is reasonable and that no documents are removed from the premises or destroyed in the meantime. In the present case, there was no material reason why the Commission decision could not be implemented: hat the Conference so wished, the Commission officials could have been joined either promptly by any legal representative or adviser designated by the Conference or, later in the day, by the Secretary-General himself or his Paris-based lawyer; in the latter case, the Conference could have allowed the Commission officials, with the help of the Conference staff persent at the time, to begin an initial examination of documents relating to the subject-matter of the investigation, on the understanding that the Secretary-General or his representative could, as soon as they arrived, add any appropriate comments.

In the circumstances, there are no grounds for claiming that the absence of the Secretary-General from the headquarters of the Conference (four hours and 40 minutes away by train and less by plane) constituted exceptional circumstances preventing the investigation from taking place. Furthermore, in view of the difficulaties experienced by the Secretary-General, the Commission officials sought to assist him by offering to allow him a reasonable period of time to return to Marseilles and to delay the start of the investigation. Even if the Secretary-General had believed the circumstances to be exceptional, he could have invited the Commission officials, also by way of exception, to remain on the Conference's premises after normal business hours.

In holding up matters for what was manifestly an unreasonably long period, the Conference effectively refused to submit to an investigation by the Commission on the date fixed, it being understood that it is not for an undertaking ordered by decision to submit to an investigation to decide on the date and time of the investigation.

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

(9) As is clear from the circumstances described above, Mewac refused to submit to an investigation ordered by the Commission pursuant to Article 18 (3). This attitude was intentionally maintained after the Commission officials had informed the Secretary-General of the Conference of the consequences of his refusal and of their intention to record the refusal in the minutes and to request the assistance of the national authorities.

The fact that the Secretary-General of the Conference finally agreed to the placing of seals which the national authorities, notified pursuant to Article 18 (6) of Regulation (EEC) No 4056/86, were in any event considering placing, does not mitigate the effect of the refusal of the Conference to comply with the investigation ordered by decision of the Commission.

The infringement is particularly serious in that Mewac's attitude severely jeopardized the purpose and effectiveness of the investigation by preventing it from taking place on the date fixed by the Commission and chosen by it with a view to carrying out simultaneous investigations on the premises of several liner conferences suspected of having collectively infringed the competition rules.

In determining the amount of the fine to be imposed, the Commission takes account of the fact that while Mewac objected to the investigation being carried out without the presence of its Secretary-General, it did consent to the investigation the following day. Therefore, its refusal was not outright.

In view of these considerations, it is appropriate to impose on Mewac a lesser fine than the maximum provided for in Article 19 of Regulation (EEC) No 4056/86,

HAS ADOPTED THIS DECISION:

Article 1

Mewac infringed Article 18 of Regulation (EEC) No 4056/86 by refusing to submit to an investigation ordered by decision of the Commission.

Article 2

A fine of ECU 4 000 (four thousand) is hereby imposed on Mewac. This amount shall be paid in ecu within three months of the date of notification of this decision, to the following account:

No 310-0933000-43,
Banque Bruxelles-Lambert,
Agence européenne,
Rond-Point Schuman 5,
B-1040 Brussels.

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 three and a half percentage points, i.e. 13,25 %.

Article 3

This decision is addressed to

Mewac,
33, rue Jean-François Leca,
F-13002 Marseilles.

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

Done at Brussels, 17 December 1992.

For the Commission
Leon BRITTAN
Vice-President