# COMMISSION DECISION

## of 5 June 1996

## relating to a proceeding pursuant to Article 85 of the EC Treaty

## (IV/34.983 — Fenex)

**(Only the Dutch text is authentic)**

(96/438/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 15 (2) thereof,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with the provisions of Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

### Subject of the proceeding

The Commission Decision relates to a decision of an association of undertakings regarding recommended forwarding charges in the Netherlands circulated by Nederlandse Organisatie voor Expeditie en Logistiek (Fenex) between 10 January 1989 and 1 July 1993. This proceeding was initiated by the Commission on it own initiative. On 26 May 1995 the representatives of Fenex notified the Commission of the decision of an association of undertakings which is at issue.

### I. THE FACTS

#### A. The association concerned

(1) The association of undertakings concerned is Fenex, an association under Dutch law. Until 22 June 1991, Fenex was a federation of Dutch forwarding organizations comprising four members:

— Vereniging van Nederlandse Expediteurs (VNE), Nijmegen,

— Vereniging van Expediteurs (VVE), Rotterdam,

— Vakgroep Expediteursbedrijven der Scheepvaartvereniging Noord (SVN), Amsterdam,

— Nederlandse Vereniging van Luchtvaartexpediteurs (NVVC).

(2) Since 22 June 1991, Fenex has been an association created through the merger of the former federation, the VNE and the VVE. The association is open directly to forwarding companies. It had some 400 members in 1989 and 294 members in 1995. According to Fenex, there were 2 812 forwarding companies in the Netherlands in April 1995.

(3) Fenex's representatives have stressed that the association comprises a large number of small firms.

However, the Commission notes that the association also comprises large firms, some of which are market leaders, including:

— Calberson BV,

— Compagnie française de navigation rhénane,

— Danzas International,

— Müller & Co.,

— Nedlloyd Road Cargo services,

— DHL International,

— Dutch Air BV,

— MSAS Nedlloyd Air Cargo.

(4) Fenex's objective is to represent generally the joint interests of its members. In particular, it provides them with information and advice.

(5) Fenex comprises a board of directors whose members were until 22 June 1991 representatives of the affiliated associations and since that date have been representatives of the affiliated firms.

(6) Until 1 July 1993, Fenex had a 'tariffs committee' which was responsible for drawing up opinions for the board of directors or carrying out preparatory work for it. On 1 July 1993, the tariffs committee was replaced by an 'economic affairs committee'.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No L 127, 20. 8. 1963, p. 2268/63.

### B. Forwarding activities in the Netherlands

(7) Forwarding agents are independent firms whose activities were originally confined to finding, on behalf of their principals, the best means of forwarding goods taking account in particular of their nature, how quickly the forwarding needed to be carried out, the destination and the price.

(8) The function of the forwarding agent has evolved over time to become that of a provider of logistical services, with his activities extending beyond the mere arrangement of transport.

The activities which a forwarding agent may carry out for his principal include:

— the organization and proper arrangement of the transport operation and any transhipment within Europe and elsewhere,

— the receiving of overseas cargo arriving for a purchaser in the Netherlands or in Europe,

— the handling of the customs documents relating to the goods,

— the packaging or repackaging of the goods,

— the insuring of the goods,

— the grouping of the goods,

— the inspection of the goods,

— stocking and distribution,

— compliance with the instructions of the letter of credit,

— arrangement of the transport of dangerous substances,

— the provision of information to the principal or to third parties,

— the carrying out of 'just-in-time' deliveries.

(9) As part of his functions, the forwarding agent may make use of several successive means of transport in carrying out the contract entered into with his client, but he does not in most cases carry out transport activities himself.

(10) The forwarding agent generally has a specialized staff that knows the best rates for the various means of transport and a network of agents abroad that allow him to give his clients the assurance that their consignments will be dealt with and distributed under optimum conditions.

(11) The forwarding agent's clients may range from small firms wishing to send occasional consignments to large firms regularly sending consignments to all parts of the world.

### C. Drawing up and circulation of recommended tariffs

(12) From the beginning of the century and up to 31 July 1993, Fenex drew up and distributed to its members documents setting out forwarding charges or tariffs (Expeditie Tarieven).

(13) These forwarding charges or tariffs were, until 1992, set out in two brochures entitled 'forwarding tariffs'. One brochure related to forwarding services in sea ports and the other to forwarding services at land frontiers. In 1993, a single brochure combining the two sectors and setting out an overall tariff was drawn up and circulated.

(14) The tariffs relate to the following activities:

— in the case of services provided in sea ports, the tariffs are broken down under five headings:

1. customs declaration;
2. other customs formalities;
3. general forwarding formalities;
4. handling costs;
5. pallet tariffs,

— in the case of services provided at land frontiers, the tariffs are broken down under three headings:

1. customs declaration;
2. other customs formalities;
3. general forwarding formalities,

— in 1993, the single brochure combining the two different sectors gave the following breakdown:

1. customs declaration;
2. other customs formalities;
3. general forwarding formalities;
4. handling costs;
5. pallett tariffs.

(15) For each service, the tariffs are given in guilders, or, in the case of some services, in percentages, with a minimum tariff specified in guilders.

(16) Fenex's tariff scale as applicable up to 30 June 1993 was drawn up and updated annually by the Fenex tariffs committee which, interpreting the annual macroeconomic data compiled by amongst others, two government bodies, the 'Centraal Plan Bureau' and the 'Centraal Bureau voor de Statistiek', related the data to the activites to be supplied for the forwarding agents.

(17) The tariffs committee then delivered to the Fenex board of directors an opinion on the increases and other possible changes to be applied over the next year in respect of the activities in question.

(18) Fenex's board of directors then decided, on the basis of the Tariffs Committee's opinion, on the tariff increases to be recommended and notified to its members.

(19) The lists were distributed annually by Fenex to its members in the form of annexes to a circular.

Until 22 June 1991, Fenex circulated its recommended tariffs through the intermediary of the affiliated associations, and, after that date, it did so directly to its affiliated firms.

(20) The tariffs recommended by Fenex showed the following trends from 1989:

— from 1989 to 1990, the increases recommended by Fenex were of the order of 5 % for customs formalities and 3 % for the other types of service,

— from 1990 to 1991, the recommended increases were of the order of 5 % for all the activities listed,

— from 1991 to 1992, the recommended tariff increases relating to customs formalities at land frontiers were of the order of 10 %, in line with the double increase recommended by Fenex to its members in this sector,

— the increase for other land-frontier activities was 5 %. Fenex had also announced, and passed on in the lists sent to forwarding agents, increases of 9 %, then 16,5 %, in respect of certain forwarding formalities, such as bills of landing and consignment notes. Similar increases were recommended for the same activities in sea ports,

— lastly, the tariffs for other activities in sea ports were increased by 5 %,

— from 1992 to 1993, there was a general increase of 4,5 % compared with the previous year in the tariffs recommended in respect of land-frontier posts and sea ports. However, certain items relating to general forwarding formalities underwent increases ranging from 6 to 25 %.

(21) The relationship between, on the one hand, the trend in the tariff increases recommended by Fenex and, on the other, the trend in the consumer price index and in the price index for transport and communications in the Netherlands, expressed in percentage terms, is as follows:

**Fenex tariff increases**

*(in %)*

| Services | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|
| Customs declaration | + 5 | + 5 | + 10 | + 4,5 |
| Other customs formalities | + 5 | + 5 | + 10 | + 4,5 |
| General forwarding formalities | + 3 | + 5 | + 5 | + 4,5 |
| Handling costs | 3 | + 5 | + 5 | + 4,5 |
| Pallet tariff | + 3 | + 5 | + 5 | + 4,5 |

**Dutch consumer price index**

*(in %)*

| 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|
| + 2,4 | + 3,9 | + 3,1 | + 2,6 |

*Source:* Eurostat.

**Price index for transport and communications in the Netherlands**

*(in %)*

| 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|
| + 2,8 | + 3,6 | + 3,7 | + 2,8 |

*Source:* Eurostat.

## II. LEGAL ASSESSMENT

### A. Procedural regulation applicable

(22) During the administrative proceedings, Fenex's representatives argued that Regulation No 17 was not applicable in this instance, but that Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway [1], as last amended by the Act of Accession of Austria, Finland and Sweden, was alone applicable since forwarding agents are providers of services ancillary to transport, as referred to in the last sentence of Article 1 of Regulation (EEC) No 1017/68.

(23) The Commission considers that the question in this case is not to define whether forwarding agents are providers of services ancillary to transport within the meaning of the said Article 1 or not, but to examine the activities to which the decision by the association of undertakings relates.

(24) Pursuant to Article 1 of Regulation (EEC) No 1017/68 agreements, decisions by associations of undertakings or concerted practices are covered by that Regulation only if the anti-competitive practices in question have as their object or effect:

— the fixing of transport rates and conditions,

— the limitation or control of the supply of transport,

— the sharing of transport markets,

— the application of technical improvements or technical cooperation,

— the joint financing or acquisition of transport equipment or supplies where such operations are directly related to the provision of transport services and are necessary for the joint operation of services by a grouping of undertakings within the meaning of Article 4.

(25) The scope of application of Regulation (EEC) No 1017/68, like that of Council Regulation No 141 of 26 November 1962 exempting transport from the application of Council Regulation No 17 [2], as last amended by the Act of Accession of Denmark, Ireland and the United Kingdom, is clearly based solely on the substance of the activities concerned. Regulation (EEC) No 1017/68 covers conduct by undertakings or associations of undertakings that relates to the activities referred to in Article 1 thereof, regardless of the nature of the undertakings concerned.

(26) The scope of application of that Regulation is thus not in any way restricted to agreements concluded by land transport undertakings or by providers of services ancillary to transport. Conversely, not all agreements concluded by such undertakings necessarily fall within the scope of application of Regulation (EEC) No 1017/68.

(27) The Commission does not dispute the fact that, in certain circumstances, forwarding agents may perform a direct role as providers of transport services. However, in the case in point, it is clear that the recommended prices circulated by Fenex relate to the activities specified in recital 14, none of which falls within the scope of Regulation (EEC) No 1017/68.

(28) At all events, during the administrative proceedings, Fenex's representatives stressed that forwarding agents were fundamentally independent of transport undertakings (minutes of the hearing, page 28). A forwarding agent cannot therefore be deemed to be an ancillary forming an integral part of a transport undertaking, but an autonomous provider of services some of whose activities may fall within the transport sector, but others of which do not fall within that sector.

(29) The Commission does not exclude the hypothesis that an agreement between forwarding agents may fall within the scope of application of a procedural regulation relating to transport or may be covered by several procedural regulations where several activities are involved.

(30) In the case in point, however, having regard to the activities to which the decision taken by the association in question relates, the Commission considers that only Regulation No 17 is applicable.

### B. The concept of association of undertakings

(31) Until 22 June 1991, Fenex was a federation of Dutch forwarding organizations. Since that date, Fenex has been an association directly comprising forwarding companies, and its object is still to represent the joint interests of its members. Whatever the terminology used, Fenex is an association of undertakings within the meaning of Article 85 of the Treaty.

[1] OJ No L 175, 23. 7. 1968, p. 1.
[2] OJ No 124, 28. 11. 1962, p. 2751/62.

### C. The concept of decision by an association of undertakings

(32) During the proceeding, Fenex's representatives argued that the tariffs had merely the force of a recommendation which did not restrict the freedom of forwarding agents to set their tariffs. According to Fenex, such a recommendation does not constitute a decision by an association of undertakings within the meaning of Article 85 of the Treaty.

(33) It should be noted firstly that the drawing up and circulation of tariffs by Fenex is not an occasional activity, but one which on the contrary has been carried out since the beginning of the century.

(34) The tariffs are drawn up and updated annually by the specialized Fenex body, the tariffs committee, which presents an opinion to the board of directors, comprising representatives of the forwarding firms affiliated to Fenex.

(35) The tariffs are then adopted by the board of directors and were, until 22 June 1991, sent to the firms through the intermediary of the affiliated associations, and have, since that date, been sent to them direct.

(36) Account should also be taken of the fact that, although they are presented as non-compulsory recommendations, the tariffs are accompanied by circulars drafted in more mandatory terms.

(37) The Fenex circular of 24 November 1989 setting out the new scale of charges applying as from 1 January 1990 stipulates in this respect:

'The Board of Directors of the Federation of Dutch Forwarding Agents (Fenex), acting in accordance with the opinion of the Fenex Tariffs Committee, has decided as follows:

...

The tariff increases for the year [...] will be ... %. This is the result of the trend of costs with which the branch of industry is confronted.'

This formula is used each year by Fenex in its circulars.

(38) In the circular sent by Fenex to its members at the end of 1990 and stipulating the tariff increase for 1991, it is stated:

'In view of the result arrived at, members are urgently recommended to pass on the abovementioned tariff increase [5 %] in full to consignors.'

(39) Similarly, in a circular sent at the end of 1991 and relating to the increases to be applied at land frontiers in 1992, it is stated:

'Fenex recommends that an additional tariff increase of 5 % be applied for the carrying-out of customs formalities at land frontiers.'

(40) Lastly, it is common ground that it was in the forwarding agents' common interest to coordinate their conduct within Fenex by setting the tariffs for the services in question, which constitute elements of competition between the forwarding agents.

(41) On the basis of the above, the drawing-up and circulation of the tariffs recommended by Fenex must be interpreted as the faithful reflection of the association's resolve to coordinate the conduct of its members on the relevant market.

(42) In accordance with the case-law of the Court of Justice [1], these recommended tariffs constitute decisions by an association of undertakings within the meaning of Article 85 (1).

### D. The relevant market

(a) *Relevant service market*

(43) This case concerns the services provided by forwarding agents acting in accordance with the instructions received from consignors. Such services consist mainly in arranging transport, principally by sea and land, by other undertakings on behalf of the principal and in carrying out, or having carried out, activities such as the receiving, storage, management, customs clearance and handling of goods.

(b) *Relevant geographic market*

(44) The relevant geographic market is the area in which the services defined above are marketed, i.e. essentially the territory of the Netherlands, where the members of Fenex are established. Consignors in that area will use forwarding agents established in the same area, where the conditions of competition are similar for all operators. At the relevant time, the market share of Fenex's members was about 11 %.

### E. Restrictions of competition

(45) During the administrative proceedings, Fenex's representatives stated that the tariffs did not restrict competition since they were merely recommended and left forwarding agents entirely free to set their own tariffs. In addition, Fenex represented only a small part of the forwarding business in the Netherlands. Lastly, the tariffs had not had any effect since only one forwarding agent had acknowledged having complied with them.

[1] See in particular the judgment of 27 January 1987 in Case 45/85, *Verband der Sachversicherer* v. *Commission*, [1987] ECR, p. 405, paragraphs 26 to 32.

(46) On the subject of recommended tariffs, the Court of Justice has ruled that 'if a system of imposed selling prices is clearly in conflict with that provision [Article 85], the system of "target prices" is equally so. It cannot in fact be supposed that the clauses of the agreement concerning the determination of "target prices" are meaningless. In fact the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be' [1].

(47) In its judgment of 27 January 1987 relating to the insurance industry [2], the Court took account of three factors in concluding that a tariff recommendation was anticompetitive:

— the common interest of the members of the association in putting the market on a viable footing by means of an increase in premiums,

— the nature of the recommendation, which, although described as non-binding, laid down in mandatory terms a collective increase in premiums,

— the statutes of the association, which empowered it to coordinate the activities of its members.

(48) In the case at issue, it should be noted that Fenex has for very many years regularly and consistently engaged in the horizontal practice of drawing up and circulating recommended tariffs.

(49) The association's member companies clearly had a common interest in drawing up and circulating such tariffs, which enabled each of them to predict with a reasonable degree of certainty what the pricing policy of the other companies would be.

(50) The fact that the recommended tariffs relate to only part of the services provided by the forwarding agents is immaterial in this respect.

(51) It is common ground that, in the forwarding industry, as the relevant undertakings have acknowledged, profit margins are generally very small and that consequently any anti-competitive practice, even if restricted to part of the total price, affects competition.

(52) Similarly, it was acknowledged by a Fenex representative at the hearing (minutes at page 28) that competition exists between forwarding agents in respect of the services they provide, quite apart from transport services.

(53) Fenex's members thus had a clear interest in coordinating their conduct as regards the tariffs for the services which are the subject of this proceeding and in respect of which they are in competition.

(54) Fenex's desire to coordinate its members' conduct on tariffs is apparent from a circular issued on 17 February 1993 which states as follows:

'the Tariffs Committee wishes to make it clear that the tariff is a minimum tariff and that in general Fenex's tariffs constitute a guideline on the basis of which each member can set its individual forwarding charges.'

(55) Similarly, at the Fenex general assembly held on 24 November 1992, the chairman of the association stated in reply to a question from a member on the usefulness of the Fenex tariffs as follows: 'although they are actually free to determine their tariffs, the members seem clearly to need guidance ... the value of the annual adjustment of tariffs lies in the fact that the firms can apply such adjustment more or less in full to the tariffs which they themselves apply.'

(56) Account must also be taken of the fact that the tariff recommendations circulated by Fenex are accompanied by circulars expressing the associations' firm desire that its recommendations should be put into effect.

(57) Reference should be made in this respect to the circulars referred to in recitals 37, 38 and 39.

(58) The drawing up and circulation of recommended tariffs was, moreover, an activity for which Fenex was clearly empowered. The procedure for drawing up the tariffs described in recitals 16 to 19 shows that it was an important and habitual activity of the association. This activity is also specified in the association's presentational booklet which states that in order to prepare policy and advise the governing body, the association has a number of working groups dealing with specific subjects such as legal affairs, quality, insurance and tariffs.

[1] Judgment of 27 October 1972 in Case 8/72, *Cementhandelaren* v. *Commission* [1972] ECR, p. 977.
[2] Case 45/85, *Verband der Sachversicherer* v. *Commission*, [1987], p. 405.

(59) During the proceeding, Fenex's representatives stated that the association's intention was not to affect the proper functioning of the market, but to provide assistance to its members. Such assistance was necessary because of the limited size of some undertakings, which did not have sufficient resources for drawing up their selling prices.

(60) While it is normal practice for a trade organization to provide management assistance to its members, it must not exercise any direct or indirect influence on competition, notably in the form of tariffs applicable to all undertakings regardless of their own cost price structure.

(61) The circulation of recommended tariffs by a trade organization is liable to prompt the relevant undertakings to align their tariffs, irrespective of their cost prices. Such a method dissuades undertakings whose cost prices are lower from lowering their prices and thus creates an artificial advantage for undertakings which have the least control over their production costs [1].

(62) Such a risk is not, however, inherent in the circulation of information that would help the firms to calculate their own cost price structures so as to enable them to establish their selling prices independently.

(63) In the case in point, it is common ground that Fenex did not circulate to its members information that would enable them to determine their selling prices on the basis of their own costs, but that the documents circulated relate to selling prices.

(64) Furthermore, account must be taken of the fact that, in the case of certain services, Fenex's recommended prices are explicitly represented as minimum prices.

(65) During the proceeding, Fenex's representatives stressed that the association had only a limited number of members and that consequently the impact of the relevant practice was very limited.

(66) It should be pointed out in this respect that, according to the case-law of the Court of Justice, 'an agreement may escape the prohibition in Article 85 (1) when it affects the market only to an insignificant extent, having regard to the weak position which those concerned have in the market in the products in question' [2].

(67) Although Fenex comprises a large number of small firms, its membership also includes large firms that provide services worldwide and may act as market leaders.

(68) Similarly, some firms which are members of Fenex are subsidiaries of firms established in other Member States, or themselves have subsidiaries in other Member States, which provide the same services on the same tariff terms.

(69) Account should also be taken of the fact that some Fenex members are active in sea, air or land transport and that in those sectors some of them are market leaders. The circulation of tariff recommendations to undertakings of such size inevitably has a knock-on effect on other undertakings in the sector.

(70) Consequently, having regard to the case-law of the Court of Justice, the Commission considers that the object of the horizontal practice in question is to affect the market significantly and that it falls within the scope of Article 85 (1).

(71) As regards the anti-competitive effects, it should be pointed out that, as the Court of Justice has consistently held, it is unnecessary to consider the actual effects of an agreement or decision by an association of undertakings if it is apparent that it has the object of preventing, restricting or distorting competition [3].

(72) In the case in point, of the 23 Fenex members questioned by the Commission, only one acknowledged having applied the tariffs recommended by Fenex.

(73) However, the circulation of tariffs recommended by Fenex over a period of more than 20 years cannot fail to have had a knock-on effect on two levels:

— first, on the members of Fenex who, even if they did not apply to the letter the tariffs recommended, were inevitably influenced by them in their business activities,

— second, on firms which are not members of Fenex, but which are aware of the tariff increases advocated by Fenex and published in the trade press. Such information has enabled firms which are not members of Fenex 'to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be' [4].

[1] See 'Conseil de la Concurrence' Decision No 93.D.30 of 7 July 1993 on the competitive situation regarding the provision of town planning services. *Annual Report 1993*, Paris.

[2] Judgment of 10 July 1980 in Case 30/78, Distillers Company v. Commission, [1980] ECR, p. 2229.

[3] See in particular, Case 45/85 cited at footnote 2, p. 33.

[4] See footnote 1, p. 33.

(74) All in all, the Commission considers that the drawing up and circulation of the tariffs recommended by Fenex until 1 July 1993 had an anti-competitive purpose within the meaning of Article 85 (1) of the Treaty.

### F. Effect on trade between Member States

(75) The tariffs in question concern the services which Dutch forwarding agents provide for Dutch clients and for clients from other Member States.

(76) The Court of Justice clarified the concept of a significant effect on trade between Member States in a judgment delivered on 25 October 1983 in which it stated that an undertaking possessing roughly 5 % of the market concerned is an undertaking of sufficient importance for its behaviour to be, in principle, capable of affecting trade [1].

(77) Furthermore, the services in question relate to goods coming from or going to not only the Netherlands, but other Member States as well.

(78) The recommended tariffs circulated by Fenex are thus liable to affect trade between Member States within the meaning of Article 85 of the Treaty.

### G. Article 85 (3) of the Treaty

(79) It should be emphasized first that the decision by the association of undertakings in question relates to the selling prices of the undertakings. Anti-competitive practices relating to prices are one of the most serious forms of restrictions of competition under Community law. Such restrictions of competition can therefore qualify for exemption from the ban on restrictive agreements only in quite exceptional circumstances.

(80) In the case in point, the Commission takes the view that it is not evident that the drawing up and circulation of recommended tariffs by Fenex is likely to contribute to economic progress within the meaning of Article 85 (3) and that consumers can derive a fair share of the benefit.

(81) On the contrary, it may be considered that the practice in question is liable to promote the maintenance of an artificially high level of tariffs on the market, at the expense of consumers.

(82) Nor is it evident that the decision by the association of undertakings in question is indispensable to the attainment of the claimed objective, which is to help Fenex members calculate their tariffs in negotiations with consignors.

(83) It should be noted in this respect that, since 1994, Fenex has circulated to its members an outline for calculating the trend in costs, and this allows the abovementioned objective of providing assistance to members to be achieved by very different means.

(84) Consequently, the Commission takes the view that the conditions are not met for granting an exemption pursuant to the provisions of Article 85 (3) of the Treaty.

### H. Article 15 (2) of Regulation No 17

(85) Pursuant to Article 15 (2), the Commission may impose on undertakings or associations of undertakings fines of from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently, they infringe Article 85 or 86 of the Treaty, with regard being had to the gravity and duration of the infringement in fixing the amount of the fine.

(86) During the proceeding, Fenex's representatives stated that the association had established the recommended tariffs through inexperience and that any conflict with the competition rules that had arisen was unintentional.

(87) Furthermore, during the hearing, Fenex's representatives stated that the circulation of the recommended tariffs over many years had been a matter of negligence.

(88) It should be pointed out first that, pursuant to the provisions of Article 15 (2), the fact that an infringement has been committed negligently is not sufficient to protect the undertakings from the imposition of a fine.

(89) However, the following factors should also be taken into consideration:

— Fenex voluntarily stopped circulating the recommended tariffs so as to comply with Dutch and Community competition law. Furthermore, Fenex notified at once the new cost structure tables circulated from 1994 on so as to ensure their lawfulness under Community law,

— while the practice in question was applied for more than 20 years, the infringement has been at an end since 1 July 1993.

[1] Case 107/82, AEG v. Commission, [1983] ECR, p. 3151, paragraph 58.

(90) The Commission considers that a fine should be imposed on Fenex in view of the abovementioned factors, taking as the duration of the infringement the period 10 January 1989 to 1 July 1993, this being the period not covered by prescription.

HAS ADOPTED THIS DECISION:

*Article 1*

The association 'Nederlandse Organisatie voor Expeditie en Logistiek' (Fenex) infringed Article 85 of the EC Treaty by drawing up and circulating recommended forwarding tariffs from 10 January 1989 to 1 July 1993. The request for exemption lodged by Fenex on 26 May 1995 in respect of the recommended tariffs is rejected.

*Article 2*

A fine of ECU 1 000 is hereby imposed on Fenex in respect of the infringement referred to in Article 1.

*Article 3*

The fine referred to in Article 2 shall be paid, in ecus, within three months of the date of notification of this Decision to the European Commission's account No 310-0933000-43, Banque Bruxelles-Lambert, Agence Européenne, 5 Rond-Point Schuman, B-1040 Brussels,

On expiry of that period, interest shall automatically be payable on the amount of the fine at the rate charged by the European Monetary Institute on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 7,75 %.

*Article 4*

This Decision is addressed to:

Nederlandse Organisatie voor Expeditie en Logistiek
Adriaan Volker Huis
Oostmaaslaan 71
NL-3063 An Rotterdam.

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

Done at Brussels, 5 June 1996.

*For the Commission*

Karel VAN MIERT

*Member of the Commission*