Anti-competitive conduct of Greek ferry operators

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EUROPEAN UNION

ANTI-COMPETITIVE CONDUCT OF GREEK FERRY OPERATORS

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In December 1998, the Commission made a Decision[1] pursuant to Article 81 EC (formerly Article 85, EC) imposing various fines and penalties on a number of Greek ferry operators for tariff-fixing in breach of competition law. A few of the operators brought actions for annulment against the Commission. These included cases T-56/99, T-59/99, T-65/99 and T-66/99, judgments of 11 December 2003 (*Marlines SA, Ventouris Group Enterprises SA, Strintzis Lines Shipping SA* and *Minoan Lines SA*).

In the *Marlines SA* action, the company argued that it was unaware of the collusion that went on between the larger companies; that it was prevailing practice for transport companies in the region to exchange information on prices or on conditions of sale and transport; and that the official who had agreed to the same tariffs was not authorised to do so. It also pointed out that as it was the smallest participant in the cartel, its role was insignificant and the number of passengers affected was negligible. The Court of First Instance rejected the company's action, holding that the Commission had established clearly to the requisite legal standard that the company had participated in a price cartel for ro-ro ferry services between Patras and Ancona. The court was not persuaded that the fact the company was the smallest in the cartel was at all material in an enforcement action for breach of Article 81 EC. Case law requires that where an infringement has been committed by several undertakings, the Commission must take into account the role played by each of the undertakings. The fact that the company concerned was 'perceived by its partners as an undertaking whose opinion should be ascertained in order to establish a common position' was indicative of its active and actionable participation. The company also relied on a technicality arguing that the Decision had no effect on it as it was not established in Greece but in Liberia. It submitted that the Decision had been adopted without its knowledge and it had been deprived of a chance to respond to the allegations prior to the Decision. The court ruled that it was too late to raise such a defence. Under the court's Rules of Procedure, such a plea must be put forward at the time when the reply was lodged.

In *Ventouris SA*, the Court of First Instance made one concession to the applicant. It allowed the company's application to have its fine reduced as it found that the financial penalty imposed on the company was unfair. There was no justification for a penalty of the same severity as the other participants when the company concerned was only charged with one infringement whilst the others were charged with two. Ventouris was only guilty of fixing tariffs for the carriage of goods vehicle; there was no evidence that it was part of the price fixing cartel in respect of passenger traffic. The court held that in fixing the amount of the fine, the gravity of the infringement was to be appraised by taking into account in particular the nature of the restrictions on competition, the number and size of the undertakings concerned, the respective proportions of the market controlled by them within the EU, and the situation of the market when the infringement was committed.[2] Additionally, it must have regard to the principles of equity and proportionality. For that reason, it was wrong to punish the company with the same severity as its fellow participants who were guilty of more serious breaches.

[1] Decision 1999/271/EC (OJ 1999 L109/24).
[2] Case 41/69 *Chemiefarma v Commission* [1970] ECR 661, para. 176.

In *Strintzis SA*, it was argued that the Commission had wrongfully carried out investigations at company premises other than those of the company to which the Decision was addressed. The Commission had in fact searched the premises of ETA, an agent of Minoan, another defendant company, and in the course of the search found incriminatory documentation relating to Strintzis. The court held that as long as the undertaking's right of defence is not prejudiced, there was no good reason to limit the Commission's right of access to documents. The court said:

> It is [important] to preserve the effectiveness of investigations as a necessary tool for the Commission in carrying out its role as guardian of the Treaty in competition matters . . . the right of access would serve no useful purpose if the Commission's officials could do no more than ask for documents or files which they could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified. Without such power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertaking concerned refused to cooperate or adopted an obstructive attitude (Joined Cases 46/87 and 227/87 *Hoechst v Commission* [1989] ECR 2859).

As to whether the Commission should have withdrawn upon discovering that ETA was a company unrelated to Strintzis, the court held that the Commission was entitled to take the view that the premises should be treated as being used by Minoan, one of the lead undertakings, for the conduct of its business which was the subject matter of the investigations.

The case was made in *Minoan SA* that the company was clearly one of the lead infringers of Article 81. Aside from the argument that the Commission had infringed its rights by carrying out investigations at premises of ETA instead of Minoan's own premises (which was dismissed by the Court of First Instance on the above grounds), Minoan also argued that the Commission had failed to take into account its willingness to cooperate with the Commission when setting the fine. The court did not find evidence that the Commission had disregarded that factor when calculating the fines payable.

These cases reveal the disinclination of the Court of First Instance to entertain too liberally an appeal against the procedures or process of investigation undertaken by the Commission in carrying out its duties under Articles 81 and 82 EC. The court was concerned that the rules of procedure should not be construed too strictly – it held that a purposive approach was sufficient. The key issue is whether the investigatory procedures undertaken would deprive the undertakings of natural justice. In most cases, how the evidence came about was immaterial to the Court of First Instance; it was more important that the undertakings be given an ample opportunity to respond to the evidence produced. As for guidance on calculating fines, the court ruled that the Commission was fully entitled and, indeed, duty bound to consider the entirety of the circumstances in deciding whether a reduction in the penalty was warranted.