

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 16 September 1998

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

(Case No IV/35.134 – Trans-Atlantic Conference Agreement)

*(notified under document number C(1998)2617)*

(Only the Danish, German, English and Swedish texts are authentic)

(Text with EEA relevance)

(1999/243/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement establishing the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty<sup>(1)</sup>, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 3 and 15 thereof,

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway<sup>(2)</sup>, as last amended by the Act of Accession of Austria, Finland and Sweden, in particular Articles 11 and 22 thereof,

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<sup>(3)</sup>, as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Articles 11 and 19 thereof,

Having regard to the Commission Decision of 24 May 1996 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission and to present any other comments in accordance with Article 19 of Regulation No 17, Article 26 of Regulation No (EEC) 1017/68 and Article 23 of Regulation (EEC) No 4056/86, read in conjunction with Commission Regulations No 99/63/EEC<sup>(4)</sup>, (EEC) No 1630/69<sup>(5)</sup> and (EEC) No 4260/88<sup>(6)</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Advisory Committee on Restrictive Practices and Dominant Positions in the Transport Industry and the Advisory Committee on Restrictive Practices and Dominant Positions in Maritime Transport,

Whereas:

<sup>(1)</sup> OJ L 13, 21.2.1962, p. 204/62.

<sup>(2)</sup> OJ L 175, 23.7.1968, p. 1.

<sup>(3)</sup> OJ L 378, 31.12.1986, p. 4.

<sup>(4)</sup> OJ L 127, 20.8.1963, p. 2268/63.

<sup>(5)</sup> OJ L 209, 21.8.1969, p. 11.

<sup>(6)</sup> OJ L 376, 31.12.1988, p. 1.

## THE FACTS

## I. THE APPLICATION

- (1) On 5 July 1994, the parties listed below ('the TACA parties', further details of which are set out in Annex I) submitted an application to the Commission pursuant to Article 12(1) of Regulation (EEC) No 4056/86 seeking an exemption under Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement in respect of the Trans-atlantic Conference Agreement (TACA):
 

A.P. Møller-Maersk Line (Maersk)

Atlantic Container Line AB (ACL)

Hapag-Lloyd AG (Hapag Lloyd)

Nedlloyd Lijnen BV (Nedlloyd)

P&O Containers Limited (P&O)

Sea-Land Service, Inc. (Sea-Land)

Mediterranean Shipping Co. (MSC)

Orient Overseas Container Line (UK) Ltd (OOCL)

Polish Ocean Lines (POL)

DSR/Senator Lines (DSR/Senator)

Cho Yang Shipping Co., Ltd (Cho Yang)

Neptune Orient Lines Ltd (NOL)

Nippon Yusen Kaisha (NYK)

Transportación Marítima Mexicana SA de CV (TMM)

Tecomar SA de CV (Tecomar).
- (2) Tecomar has been a subsidiary of TMM since January 1994. In 1997, Nedlloyd Lijnen BV and P&O Containers Limited merged to form P&O Nedlloyd. Also in 1997, Hapag Lloyd AG transferred its containerised liner shipping activities to Hapag Lloyd Container Linie GmbH and Hanjin Shipping Company Limited (Hanjin) acquired control of DSR/Senator.
- (3) Pursuant to Article 4(8) of Regulation (EEC) No 4260/88, the TACA parties were informed and invited to comment on the fact that the Commission also intended to examine the application for individual exemption made under Regulation No 17 and Regulation (EEC) No 1017/68, for the reason that some of the notified activities fell outside the scope of application of Regulation (EEC) 4056/86.
- (4) The TACA replaced the Trans-atlantic Agreement (TAA), an agreement originally notified to the Commission on 28 August 1992. The Commission adopted Decision 94/980/EC<sup>(7)</sup> on 19 October 1994 prohibiting the TAA (The TAA Decision). The TAA Decision prohibited the parties to whom it was addressed from engaging in, *inter alia*, price-fixing activities which have the same or a similar object or effect to those contained in the TAA.
- (5) The parties formerly party to the TAA are all party to the TACA. Hanjin became a party to the TAA on 26 August 1994 and a party to the TACA on 31 August 1994. Hyundai Merchant Marine Co. Ltd (Hyundai) became a party to the TACA on 31 August 1995.
- (6) On 15 December 1994, the Deputy Director-General of the Directorate-General for Competition of the Commission wrote to the TACA parties informing them of the preliminary assessment that certain provisions of the TACA did not appear to fulfil the conditions of Article 85(3), and inviting the observations of the TACA parties on the preliminary assessment.
- (7) On 21 June 1995 and 1 March 1996, the Commission adopted a Statement of Objections and a supplementary Statement of Objections addressed to the TACA parties (with the exception of Hyundai, since it had not been a party to the TACA at the time of the adoption of the first Statement of Objections) stating that the Commission was disposed to adopt a decision withdrawing any immunity from the imposition of fines which resulted from the notification of the TACA in respect of the agreement between the parties to the TACA to fix prices for inland transport services supplied within the territory of the Community. A Decision to withdraw any such immunity was adopted on 26 November 1996<sup>(8)</sup>.
- (8) On 24 May 1996, the Commission adopted a Statement of Objections<sup>(9)</sup> addressed to the TACA parties stating, *inter alia*, that it considered that the TACA falls within the prohibition contained in Article 85(1) of the Treaty and that it contains a number of elements which do not fall within the scope of Article 85(3) of the Treaty. The Statement of Objections stated that the Commission was

<sup>(7)</sup> OJ L 376, 31.12.1994, p. 1.

<sup>(8)</sup> C(96) 3414 final.

<sup>(9)</sup> The Statement of Objections was based on Article 3 of Regulation No 17, Article 10 of Regulation (EEC) No 1017/68 and Article 10 of Regulation (EEC) No 4056/86.

disposed to adopt a decision finding the TACA parties to be in breach of Article 85(1) and requiring them to bring to an end those practices which fall outside the scope of Article 85(3). The Statement of Objections also stated that the Commission considered that the TACA parties had abused their dominant position, contrary to Article 86 of the Treaty.

'It seems to me that the changes we propose are so substantial that they result in a new agreement rather than an amended old one.

This being so, I think the most clear-cut thing we can do is to notify the Commission that the lines are abandoning the old TAA and formally notify the new agreement.' (letter dated 21 June 1994).

(9) A supplementary Statement of Objections was adopted by the Commission on 11 April 1997, in which it was stated that notwithstanding the notification of the TACA hub-and-spoke system (see recital (47)), the Commission remained disposed to adopt a decision finding the TACA parties to be in breach of Article 85(1) and requiring them to bring to an end those practices considered in the Statement of Objections of 24 May 1996 to fall outside the scope of Article 85(3), including the practice of the TACA parties of fixing prices for carrier haulage services supplied within the Community where these fall outside the scope of the TACA hub-and-spoke system.

(10) The TACA parties presented their views at oral hearings held on 6 May 1996 and 25 October 1996. Annex II contains an outline of the main procedural steps relating to the TAA and the TACA.

(13) The TACA provides for agreement by its members on the rate, charges and other conditions of carriage applicable under its common tariff, including ocean rates, inland portions of through-rates and multimodal rates. The common tariff contains a matrix of prices for the carriage of cargo between defined points: 26 classes of cargo are defined and a rate is specified for each class. The tariff is published by the TACA and is available to all shippers.

(14) The scope of the TACA is eastbound and westbound shipping routes between, on the one hand, ports in Europe situated in latitudes from Bayonne, France to the North Cape of Norway (except non-Baltic ports in Russia, Mediterranean ports and ports in Spain and Portugal), and points in Europe via those ports other than points in Spain and Portugal, and on the other hand, ports in the 48 contiguous States of the United States of America and the District of Columbia and points in the United States via those ports (the Trade).

## II. THE NOTIFIED AGREEMENT

(11) In the notification of the TACA to the Commission, the parties argued that it was a liner conference falling within the scope of the group exemption for liner conferences contained in Regulation (EEC) No 4056/86. The parties applied in the alternative for individual exemption. Although the TACA had been notified to the Commission on 5 July 1994, it did not come into effect until 24 October 1994, the earliest date on which it was permitted to do so under American law.

(12) Two weeks before notification of the TACA, Lord Sterling of Plaistow (in his capacity as Chairman of TACA) wrote to Mr Van Miert, Member of the Commission responsible for competition matters, in the following terms:

(15) Apart from the increase in membership from 11 to 17 lines (and down to 16 with the merger of P&O and Nedlloyd), among the more significant differences between the TAA and the TACA are the following:

(a) the TACA parties have abandoned their complex arrangements relating to the non-utilisation of part of their maritime capacities (the Capacity Management Programme);

(b) the TACA parties have formally abandoned the different categories of membership and the two-tier tariff structure which were features of the TAA;

(c) the TACA parties have abandoned their detailed provisions relating to the exchange between them of vessel slots and equipment;

- (d) the TACA parties have modified their rules relating to the taking of independent action (IA)<sup>(10)</sup>;
  - (e) the TACA parties have changed their rules on service contracts so as to allow unilateral action<sup>(11)</sup> on TACA service contracts and individual service contracts;
  - (f) the TACA parties have agreed among themselves to withdraw from membership of the Gulfway and Eurocorde Discussion Agreements<sup>(12)</sup>.
- (16) The TACA contains identical provisions relating to the fixing of prices for inland transport services provided within the territory of the Community to those contained in the TAA.
- (c) agreement of service-contract rates, loyalty-contract rates and rates and charges for inland transport services and other services related to the maritime transport of cargo in the Trade. Examples of the latter include terminal handling charges, currency and fuel adjustment charges, equipment handover/usage charges as well as other charges relating to the use of containers on land such as detention and demurrage charges;
  - (d) agreement on the rates and other terms and conditions of service contracts (including charges for services provided in addition to maritime transport services) between shippers and one or more TACA parties in accordance with the following mechanism:

#### A. The July 1994 version of the TACA

- (17) The July 1994 version of the TACA contained the following principal provisions:
- (a) agreement on the rates, charges and other conditions of carriage applicable under its common tariff including ocean rates, inland portions of through rates and multimodal rates;
  - (b) entitlement to depart from all ocean tariff rates and inland portions by taking independent action<sup>(13)</sup> on the expiry of five working days' notice in writing. Independent action on other tariff rates and other charges required 10 days' written notice;
  - (i) parties to the TACA could, following the agreement of not less than a majority minus two of the parties voting under the agreement, enter into service contracts with any shipper that agrees a minimum cargo commitment of 100 teu (20-foot equivalent unit) or USD 100 000 net ocean port/port freight revenue;
  - (ii) if a party to the TACA did not wish to participate in a particular service contract it could take 'unilateral action'<sup>(14)</sup> in respect of not less than 100 teu (20-foot equivalent unit) in addition to the minimum agreed under that service contract, provided the unilateral action is for the same duration as the service contract, and
- where the minimum volume agreed under the service contract was not more than 1 000 teu, the unilateral action was in respect of not more than 100 teu, or

<sup>(10)</sup> I.e. charge a rate different from the tariff rate. Under American law, the right of members of an exempted conference to take independent action is mandatory with regard to tariff rates: this means that any member of a conference has the right to depart from the conference tariff in respect of a particular class of goods, providing that notice is given to the other members of the conference.

<sup>(11)</sup> The equivalent of independent action.

<sup>(12)</sup> The Gulfway and Eurocorde Discussion Agreements were agreements dating from 1985 whereby the members of the conferences operating between the United States and Northern Europe discussed prices and transport conditions with the non-conference liner shipping companies operating on those trades.

<sup>(13)</sup> See footnote 10.

<sup>(14)</sup> I.e. charge a rate different from the service contract rate.

- where that minimum volume was more than 1 000 teu, the unilateral action was in respect of not more than 10 % of that minimum, subject to a maximum of 200 teu;
- (e) agreement on prices for intermodal service contract rates and on independent action or unilateral action in respect of those rates;
- (f) the restriction of all service contracts (other than for certain seasonal or non-containerisable cargo) to a maximum period of one calendar year (Article 14(2)(a)). None of the parties to the TACA could participate, individually or with any other party to the TACA, in more than one service contract at a time with any particular shipper in respect of cargo to be carried on the Trade (Article 14(2)(d));
- (g) a prohibition on the inclusion in service contracts of any clause which provided for a reduction in the rate payable under that service contract by reference to terms agreed with other shippers under other arrangements (Article 14(2)(b)). Such provisions are called 'contingency clauses' by the TACA and are discussed further at recitals (489) to (490);
- (h) the regulation of the capacity available for carrying cargo in both the eastbound and westbound sectors of the Trade in accordance with the following principles:
- (i) the parties to the TACA would continuously review conditions of supply and demand in the Trade and would consult with the services of the Commission and with transport users for this purpose;
  - (ii) the aggregate capacity to be made available would be 125 % of forecast demand for cargo carried between ports and points in the Trade, subject to quarterly adjustment. Of that aggregate capacity, 85 % would be allocated between the individual parties to the TACA and the remaining 15 % would be unallocated. The capacity of the TACA parties' ships in excess of 125 % of forecast demand could not be offered to the market.
- (18) The TACA is said to be of indefinite duration (Article 9). Parties may withdraw without penalty on giving 90 days' notice in writing (Article 7(3)).
- (19) The notification made reference to a further 25 provisions of the agreement which, in the view of the parties, might have affected their commercial freedom to take independent commercial decisions. These included provisions relating to:
- (a) agreements concerning amounts, levels or rates of brokerage and freight-forwarder remuneration, including the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers (Article 5(1)(c)(3));
  - (b) minimum and maximum prices to be paid to rail, air, motor or water carriers for the European inland segment of through-transport services (Article 5(1)(c)(6));
  - (c) the ability to meet together and with other persons for the purpose of negotiating and entering into other agreements, including information-exchange agreements (Article 5(1)(f)).
- (20) The July 1994 version of the TACA also contained detailed provisions relating to space/slot chartering and equipment exchange, although the parties did not include these provisions in their list of provisions of the agreement which, in their view, may affect their commercial freedom to take independent commercial decisions. These provisions allowed the parties to inform the other parties of any need for, or availability of, spare vessel capacity for chartering purposes. The parties to the TACA were also authorised to charter to other TACA parties space or slots on line-haul, feeder or relay vessels used for transporting cargo falling within the scope of the TACA (Annex B, Section 3).
- (21) Article 10 of the TACA provides for the setting up of 'the Enforcement Authority', whereby the

parties agree to establish and finance an independent body to police the duties and obligations of the parties under the agreement. The role and scope of the Enforcement Authority are defined in Annex C of the TACA (Rules governing self-policing). Under these rules the Enforcement Authority may, acting on its own initiative or following a complaint, investigate any alleged breach of the terms of the agreement.

- (22) The Enforcement Authority has 'total unfettered access ... to all documents which may be related to a carrier's activities in the Trade' and is authorised to inspect records and property, interview and take statements from persons. The Enforcement Authority is also authorised to impose fines of between USD 100 000 and USD 150 000 for any breach of the agreement and in particular the various price-fixing arrangements. Furthermore, any refusal to allow access by the party under investigation carries mandatory fines of USD 75 000 for the first incident, USD 150 000 for the second and USD 250 000 for each incident thereafter within a two-year period. Recidivism, in respect of all breaches, is subject to maximum fines of USD 300 000 within any one year period. All such sums collected are distributed to the other parties.

- (23) In the Notification of 5 July 1994, the TACA parties also offered to make to the Commission the following undertakings, to come into effect if the Commission granted the TACA individual exemption or stated that the TACA fell within the scope of the group exemption for liner conferences.

- (a) The TACA parties would produce an interim report to the Commission on actual capacity and forecast demand with a view to rationalising such services in the most efficient way.
- (b) The TACA parties would consult with the services of the Commission and with transport users in order to assess the requirements of transport users and, in particular, to forecast future demand.

- (c) The TACA parties would notify business plans and modifications of rates three months (including current month) before their entry into force.

- (d) The TACA parties would, on request, review rate modifications which caused individual shippers substantial competitive disadvantage and, failing satisfaction after such review, the matter could be put to a panel of TACA and shipper representatives which would recommend a solution.

- (e) Those TACA parties which were also parties to the Eurocorde Discussion Agreement and/or the Gulfway Agreement would withdraw from those agreements.

- (f) The TACA parties would not exchange confidential business information with other carriers serving Europe/Canada and Europe/Canadian Gateway/USA trades except for the purpose of rationalising their services.

- (g) The TACA parties would provide quarterly reports to the Commission on the operation of the Agreement.

- (h) The TACA parties would inform the Commission of any contacts between the Agreement and other carriers concerning price-fixing or capacity regulation.

#### B. October 1994 version of the TACA

- (24) On 17 October 1994, the TACA parties notified to the Commission the modifications to the TACA described below.

- (25) The detailed provisions relating to capacity non-utilisation were deleted. Notwithstanding the deletion of the detailed provisions relating to the capacity regulation programme, the TACA continues to provide that the parties may cooperate with the objective of regulating the carrying capacity offered by each of them (Article 5(3)). The notification gives no explanation of how the TACA parties intend to do this.

- (26) Article 5(1)(c)(6) which provided for common agreements with rail, air, motor, or water carriers for the European inland segment of multimodal transport services and the minimum/maximum prices to be paid to such carriers in connection with such transport services was deleted.
- (27) Article 5(1)(f) concerning activities with other persons, including the exchange of relevant information, statistics and other data in connection with inter-conference agreements and exclusive, preferential or cooperative working arrangements with marine terminal operators or vessel or non-vessel operating common carriers was deleted.
- (28) The notice period for taking independent action on ocean tariff rates and inland portions (under Article 13(1)(a)) was reduced from five to three business days.
- (29) The minimum volume commitment for service contracts (referred to in Article 14(2)(b)) was reduced. A new provision that the unilateral action must be agreed with the shipper and provided to the TACA secretariat for filing with the Federal Maritime Commission (FMC) no later than 15 days following the filing of the original contract and must have the same termination date as the original contract was introduced.
- (30) The formula for permitting TACA parties to enter into service contracts (a majority less two) was replaced by approval by any five of the parties to the agreement (Article 14(3)(b)). The arrangements for the negotiation of service contracts are described at recital (132).
- would abandon their 1995 business plan, revert to 1994 rates and make a number of modifications to the TACA agreement. The main provisions of the proposed Settlement Agreement were as follows:
- (a) the cancellation of several other agreements between liner shipping companies relating to the Trade (including the Eurocorde and Gulfway Agreements);
  - (b) a number of technical modifications to the TACA's independent action provisions whereby the following requirements were imposed:
    - (i) that the secretariat would publish immediately notices of intention to take independent action,
    - (ii) that the TACA parties should have the right but not the obligation to discuss independent action with other parties in advance,
    - (iii) that each line should adopt its own policy as to who within the organisation was entitled to authorise independent action;
  - (c) space chartering arrangements (other than *ad hoc* arrangements)<sup>(15)</sup> were taken outside the scope of TACA: connective carrier arrangements<sup>(16)</sup> were cancelled;

#### C. February 1995 version of the TACA

- (31) On 3 February 1995, the TACA parties informed the Commission that they had concluded a conditional settlement agreement with the FMC. In return for the FMC's agreeing to put an end to a number of investigations into alleged breaches of the American Shipping Act 1984 by the TACA parties, the TACA parties

<sup>(15)</sup> Following receipt of the preliminary observations of the Commission (see recital (6)), the TACA parties had written to the Commission on 24 January 1995 informing it that the TACA parties proposed to amend the TACA to limit the scope of the TACA to *ad hoc* slot and space chartering arrangements.

<sup>(16)</sup> Connective carrier arrangements concern the inclusion in vessel sharing agreements (VSAs) of provisions such as the following, 'A party may utilise space made available to it hereunder to provide space to a non-party ocean common carrier (pursuant to another agreement). ... A party may make a available to another party hereunder space provided by a non-party ocean common carrier (pursuant to another agreement), ...'. An example of how this works in practice is as follows. Carriers A, B and C are parties to TACA. Carriers A and B participate in different VSAs. Under the 'connective space chartering authority', carrier A may make space available to carrier C (space that is provided to carrier A on a carrier B vessel) without carrier C needing to be a party to the VSA between carriers A and B.

- (d) the promotion of greater carrier participation in service contract negotiations (but existing approval arrangements were retained and the TACA secretariat was given the option of attending service contract negotiations with shippers); the removal of certain discriminatory practices against non-vessel operating common carriers (NVOCCs);
- (e) changes to the practices of a number of TACA parties in relation to charges for access to American land-based container pools;
- (f) the roll-back of 1995 price increases to 1994 rates (at an estimated cost to TACA lines of USD 60 to 70 million).
- (32) On 9 March 1995, the TACA parties informed the Commission that the FMC had imposed a further condition on the TACA parties. This condition required the TACA parties to amend the TACA so as to allow individual TACA parties to enter into 1996 service contracts without having received the approval of the other TACA parties, provided that those contracts complied with the provisions of Article 14(2) of the TACA.
- coordinated reaction to the application by the Commission of the Community's competition rules to inland price fixing.
- (34) According to the TACA parties:
- ‘the effects of the changes are perceived to be as follows.
- (1) So long as one party takes overall responsibility for the entire import/export movement, the shippers who actually make use of the import and export legs may be different.
  - (2) Now that the import movement may start and the export movement may finish in different ports, and now that the inland location for unloading the import movement and reloading the export movement may be different, more shippers will find that an import/export combination could be used to meet their haulage requirements.
  - (3) The import/export combinations remove the requirements to pick up an empty container from a port and to return it to the same port. They therefore reduce both empty container movements and reduce shippers' costs for such combinations’<sup>(18)</sup>.

#### D. October 1995 version of the TACA

- (33) In October 1995, the TACA parties informed the Commission of a set of changes concerning ‘inland arrangements relating to import and export combinations of haulage under both carrier and merchant haulage’ which had come into effect on 20 July 1995. These changes reflect recommendations made by the Intra-industry Intermodal Committee (IMC) concerning steps to be taken to remove ‘any discriminatory inland transport rules and regulations in conference tariffs’<sup>(17)</sup>. The IMC had been set up by the liner shipping industry to ensure that the industry produced a

<sup>(17)</sup> See letter of Mr V. L. Bijvoets, Chairman of the IMC and Chief Executive Officer of Nedlloyd, to the Commission dated 28 July 1995.

#### E. November 1995 version of the TACA

- (35) On 24 November 1995, the TACA parties informed the Commission that changes had been made to Article 14(2)(a) and 14(2)(f) of the TACA concerning service contracts. The changes increased the maximum duration of a TACA service contract from one to two years<sup>(19)</sup> and allowed for currency adjustment factor (CAF) levels to be subject to limits on their variation during the term of service contracts.

<sup>(18)</sup> See letter of Lovell White Durrant, the legal advisers to the TACA parties, to the Commission dated 3 October 1995.

<sup>(19)</sup> According to ‘Contracts between shippers and shipping conferences’, a study carried out on behalf of EC Directorate-General for Transport by Brinkman-ship Ltd in February 1996, ‘Only 17 two-year contracts were signed’.



- (36) On 29 November 1995, the TACA parties notified to the Commission the establishment of the 'European Inland Equipment Interchange Arrangement' (EIEIA).
- (37) The objective of the 'European Inland Equipment Interchange Arrangement' is said to be to improve efficiency with regard to the inland positioning of empty containers in Europe by promoting interchanges of empty containers between the applicants. The Arrangement provides a computerised reporting system through which individual TACA carriers can enter information on their container surpluses and deficits at various European locations so that other TACA carriers can easily have access to the information to determine whether they can use the containers to serve a particular customer demand at that or a nearby location.
- (38) For example, the Arrangement enables a TACA carrier requiring an empty container at a particular port or inland point, to ascertain from the information in the reporting system whether any other TACA carrier has or expects to have empty equipment available at or near that location. Equally, the Arrangement would enable a carrier with an actual or anticipated surplus stock of containers at a location to contact a carrier with a reported shortage to see if its equipment can be supplied for use by that carrier.
- (39) This system went into operation with the first reporting under the Arrangement by carriers on 1 August 1995 for the Benelux area, and with reporting extended to other Member States within the TACA's geographic scope at various dates up to 10 October 1995<sup>(20)</sup>. The key locations are, primarily, ports and cities (such as Antwerp or Paris), each of which are taken to include the surrounding region and, in some cases, named regions (the Rhine or the Ruhr). The Arrangement, like the TACA, is of indefinite duration, although any TACA party may terminate its participation in the Arrangement at any time.
- (40) Each applicant reports:
- (a) its name;
  - (b) the weeks to which the report relates;
  - (c) any surplus or deficit of each equipment type, namely standard equipment (dry van and high cube containers) at the key locations;
  - (d) details of the person at that carrier whom interested carriers should contact to reach agreement on a case-by-case basis for the interchange of equipment.
- (41) Reports are made using standard 'symbols'. Imbalances are stated as (i) a significant surplus ['++'] (where a carrier has a significant number of surplus containers); (ii) a less significant surplus ['+']; or (iii) a shortage ['-']. The reports are made fortnightly with each report providing a summary of equipment inventory projections for the following two weeks. Reports of actual transactions under the Arrangement are made to the TACA secretariat every four weeks.
- (42) The applicants have agreed standard documentation which may be used by the exchanging parties whenever they have not negotiated or will not in the future negotiate specific bilateral interchange agreements. This standard documentation consists of the pro-forma interchange agreement terms (pro-forma terms) and the Interchange Agreement (Shortform Agreement). The standard set of terms contained in the pro-forma terms deal with such aspects as maintenance and insurance of containers as well as the delivery re-delivery of containers. The Shortform Agreement would incorporate the pro-forma terms and add the particular details of the interchange in question.
- (43) The applicants have agreed guideline *per diem* charges for each of the equipment types but are said to be free to negotiate other levels. The guideline *per diems* are said to reflect typical market rates on the basis of *ad hoc* or occasional interchanges.
- <sup>(20)</sup> 29 August 1995 – France; 12 September 1995 – Germany; 26 September 1995 – United Kingdom, Ireland; 10 October 1995 – Austria, Italy, Denmark, Sweden, Finland.

- (44) The TACA parties have stated <sup>(21)</sup> that during the first seven months of operation of the European Inland Equipment Interchange Arrangement over 3 600 containers had been exchanged, 'leading to a reduction in the number of container moves inland and to increased efficiency'. However, this information was qualified by the following statement made by the parties:

'This figure represents the total number of container interchanges in which [the TACA parties] participated. In addition to the relevant authority under the EIEIA some of the respondents are also party to other agreements containing similar authority' <sup>(22)</sup>.

- (45) Accordingly, the figure of 3 600 exchanges of containers does not relate to exchanges of containers which have taken place as a direct result of the European Inland Equipment Interchange Arrangement. That figure relates to all exchanges between the TACA, including those pursuant to bilateral arrangements concluded before the European Inland Equipment Interchange Arrangement entered into effect. No information as to the practical effects of the European Inland Equipment Interchange Arrangement have been supplied to the Commission. At the oral hearing held on 6 May 1996, counsel for the TACA parties stated that it was impossible to determine how many of the 3 600 exchanges of containers could be directly attributed to the European Inland Equipment Interchange Arrangement <sup>(23)</sup>.

- (46) Thus, in relation to the EIEIA, the TACA parties have provided no information as to the number of exchanges of empty containers which have resulted from the Arrangement. They have provided no information as to which of the TACA parties have participated in the exchange of containers. They have provided no information as to cost savings or other benefits. They have provided no information as to how

any such benefits have been passed on to shippers. As will be seen below, the TACA parties have provided no evidence to support the conclusion that price-fixing for inland haulage can be said to be indispensable to the operation of the European Inland Equipment Interchange Arrangement.

#### F. January 1997 version of the TACA

- (47) On 10 January 1997, the TACA parties notified the implementation, with effect from 1 January 1997, of a 'hub-and-spoke' system of inland cooperation for three trial locations, Frankfurt/Mainz, Lyons and Munich. According to the notification, the TACA parties may extend the system to up to 15 hub locations.

- (48) The TACA parties have argued that this new cooperation, in addition to the other forms of cooperation already existing between them, causes the conditions in Article 85(3) of the EC Treaty to be met for the grant of exemption for the collective fixing of prices for all their inland transport activities.

- (49) Under the hub-and-spoke system, the price fixed by TACA parties for carrier haulage between an ocean port and an inland destination is calculated on the basis of two inland movements:

- (a) the haulage between the ocean port and the inland hub (the trunk leg);
- (b) the haulage between the inland hub and the shipper's premises (the local leg).

<sup>(21)</sup> Paragraph 3.17 of the reply to the supplementary Statement of Objections.

<sup>(22)</sup> Footnote 3 to Annex VIII of the reply to the supplementary Statement of Objections.

<sup>(23)</sup> In any event, it may be noted that the figure of 3 600 exchanges over a period of seven months amounts to one container exchanged per carrier per day.

- (50) For 1997, the trunk leg rates under the hub and spoke tariff (called the 'basic hub rates') are claimed to have been fixed by the TACA parties at, or close to the average cost to the TACA parties of providing the inland service. The basic hub rates are composed of four elements:

(a) *the average one-way laden transport cost incurred by the TACA parties*

this is said to reflect the rates payable by the TACA parties to the relevant national inland operator. For example, where the trunk leg between a German port and Munich is served by rail, the applicable tariff rate will reflect the average rate at which that inland haulage is purchased by the TACA parties from the relevant inland operator — in that case, Transfracht; similarly, rates payable between Le Havre and the Lyons hub will reflect rates paid by the TACA parties to the French national rail freight operator, CNC.

It is claimed that the introduction of one-way rates will significantly reduce the amount payable by shippers and forwarders in respect of the repositioning of empty containers. (Under the existing tariff, the inland rate is a round-trip rate calculated on the basis of 100 % of the cost of transporting a full container from the ocean port to the point of destination and 85 % of that sum in respect of the cost of repositioning the empty container at the port);

(b) *inland handling*

this is said to include the following cost elements:

- release and receipt of the container at the terminal,
- inspection and reporting of the condition of the container equipment,
- lifting of the container onto/off a trailer/barge/rail wagon,
- movement of the container to/from a container stack, and
- storage of empty/laden containers;

(c) *empty positioning/imbalance factor*

this is said to be the average cost to the TACA parties of positioning empty containers at the hub locations in order to address cargo imbalances;

(d) *administration*

this is a fixed-fee charge to cover administrative matters such as completion of any necessary customs documentation.

- (51) Under the hub-and-spoke systems, the trunk leg of a container move is required to be made either by rail or by inland waterway. The basic hub rate is fixed at a single level applicable to all carriers, regardless of the address of the nominated terminal and the election by the individual carrier to operate that leg via rail or barge.

- (52) Where a shipper or forwarder elects also to use carrier haulage for the local leg, the tariff provides a rail/road or barge/road rate which is a combination of the basic hub rate and the tariff rate for the inland transport by road between the hub and the shipper's premises. However, a shipper may use carrier haulage for the trunk leg but switch to merchant haulage for the local leg. In such cases, that shipper will be allowed access to the inland depot subject to payment of the basic hub rate and payment of a handling charge. No further additional charge is payable by the shipper for the switch to merchant haulage for the local leg provided that the container is collected and returned to the same hub location. The shipper who is importing goods from the USA will be able to collect a laden container from the hub and subsequently drop off the empty container, and a shipper who is exporting goods will be able to pick up an empty container from the hub and drop off the laden box.

- (53) Although it is claimed in the notification that the basic hub rates have been fixed by the TACA parties 'at or close to the average cost to the TACA parties of providing the inland service' <sup>(24)</sup>, subsequent information provided by the TACA parties has revealed that the trunk leg rates have been based not on the average costs of all of the TACA parties but on the costs of only seven of them. Furthermore, it is clear from this information that a nominal figure has been taken for administration costs and not an estimate of actual administration costs. While rates for Frankfurt and Munich appear to be close to the average of the seven lines, from information supplied by the TACA parties it would appear that the basic hub rates for the Lyons hub via Benelux ports are up to (Business secrets omitted) % higher than the average costs of the seven lines on which those hub rates are claimed to be based, as the following table shows.

Table 1

## Comparison of Lyon hub rates with average costs

Lyons via Benelux	TEU (< 13T)	TEU (> 13T)	FEU
Average cost (FRF)	(Business secrets omitted)		
Basic hub rate (FRF)	4 215	5 150	5 795
Difference (FRF)	(Business secrets omitted)		
(%)	(Business secrets omitted)		

Source: TACA parties.

- hub-and-spoke system, therefore, would 'contribute to a reduction in transport by road', thereby reducing congestion and bringing environmental benefits.
- (55) On 17 February 1997, the Commission sent the TACA parties a request for information pursuant to the provisions of Article 16 of Regulation (EEC) No 4056/86 and Article 19 of Regulation (EEC) No 1017/68, requesting confirmation that the Munich and Lyons hubs could be served by container barge transport. The TACA parties replied on 10 March 1997 to the Commission, confirming that both hubs could be served by barge transport: 'The TACA parties confirm that both the Munich and Lyons hubs may be served either by rail or by barge'.
- (56) Further, the TACA parties stated that 'the hub-and-spoke system does apply to the transportation of containers by barge to and from the Munich and Lyons hubs. The basic hub rates set out for the Munich and Lyons hubs at Annex 5 to the notification of 10 January are equally applicable to barge moves'.
- (57) On 12 March 1997, the Commission sent the TACA parties a further request for information (also made pursuant to the provisions of Article 16 of Regulation (EEC) No 4056/86 and Article 19 of Regulation (EEC) No 1017/68) requesting further details of Munich/Lyons barge movements. In reply, the TACA parties on 26 March 1997 wrote to the Commission stating that there is no barge service operating between northern European ports and either the Lyons for Munich hubs.
- (58) In a letter to the Commission dated 14 April 1997, the TACA parties stated that unless express agreement is made to the contrary, where a hub location is established by the TACA parties, a single set of rates will apply to and from the hub location, and those rates will be equally applicable to transport by rail and by barge and will not generally specify the actual mode to be used. Thus, the fact that the rates apply equally to rail and to barge does not
- (54) In their application for individual exemption with respect to the hub-and-spoke system, the TACA parties argued that the arrangements notified to the Commission contribute to improving transport services and thus fulfil one of the necessary criteria for the granting of an individual exemption in respect of the notified arrangements. They stated that 'under the hub-and-spoke system, the trunk leg of a container move will be made either by rail or by inland waterway'. The use of the TACA's

<sup>(24)</sup> Application for exemption, paragraph 4(10).

necessarily mean that both modes of transport are geographically relevant to the particular hub. The TACA parties also explained that sections of the inland waterways connecting the Munich and Lyons hubs to northern European ports are not navigable by container barge.

- (59) Finally, the rates established for the trunk leg between the Benelux ports and the Frankfurt/Mainz hub apply only to a barge move.

### III. THE RELEVANT MARKET

- (60) It was claimed in the application from the TACA members to the Commission that the parties face actual external competition from:

- (a) other operators of containerised liner services on the direct trades;
- (b) operators of containerised liner services on alternative routes;
- (c) other operators of liner services;
- (d) non-liner operators;
- (e) air transport operators.

- (61) In its judgement of 14 November 1996 in Case C-333/94 P *Tetra Pak International v. Commission*<sup>(25)</sup>, the Court of Justice stated that the stability of demand for a certain product is the appropriate basis for defining a relevant market and that the fact that different products are, to a marginal extent, interchangeable does not preclude the conclusion that those products belong to separate product markets.

#### A. Relevant product market – maritime transport

- (62) The Commission takes the view that air transport forms a separate market from containerised liner shipping for the reason, *inter alia*, that it has not been shown that a substantial proportion of the goods, carried by

container could easily be switched to air transport<sup>(26)</sup>. On the North Atlantic, air transport for cargo is up to 20 times more expensive than maritime transport and up to nine times faster. These figures do not include the additional delays and consequent costs of port congestion, particularly when it comes to unloading larger vessels which can amount to a further eight days at both ends<sup>(27)</sup>.

- (63) In the reply to the Statement of Objections the TACA parties no longer maintained their claim that air transport services were substitutable for maritime transport services.

- (64) The Commission also takes the view that, for the vast majority of categories of goods and users of containerised liner shipping, the other forms of maritime transport, including conventional (break-bulk) liner transport, do not offer a reasonable alternative to containerised transport services on the routes falling within the relevant geographic market in this case and that these services constitute one or more markets in their own right.

- (65) It is clear that many bulk commodities can be containerised and that before the advent of containerisation all goods travelled in bulk consignments of some description or another. In this case, in order to determine the competitive conditions in the relevant market, it is necessary to consider the effect of substitutability from carriage in container to carriage in bulk: substitution from bulk to container is irrelevant.

- (66) Almost all cargo can be containerised and, over time, it is likely that the degree of containerisation in most maritime markets involving Member States will be very high. In mature markets, such as the northern

<sup>(25)</sup> [1996] ECR I-5951, paragraphs 13, 14 and 15.

<sup>(26)</sup> Goods are transported on container vessels in sealed boxes, the most common types of which are 20-foot equivalent units (teus) and 40-foot equivalent units (feus).

<sup>(27)</sup> See *The Journal of Commerce, Shipping Review & Outlook*, 6 January 1997 at page 73C. Transit times on the North Atlantic are typically two to three weeks for a scheduled liner service.

Europe/USA or the northern Europe/Far East markets, the process of change towards containerisation is more or less complete and few, if any, non-containerised cargoes are left which are capable of being containerised.

bulk to container, possibly on a route-by-route basis, the differences in the nature of the service being provided mean that once that transformation period is over, a shipper is highly unlikely to revert to bulk shipping<sup>(29)</sup>.

(67) Furthermore, once a type of cargo regularly becomes containerised it is unlikely ever to be transported again as non-containerised cargo. The reasons for this are that shippers become accustomed to shipping in smaller but more frequent quantities and become accustomed to the fact that once cargo has been loaded into a container, it is easier to ship onwards from the port of delivery to the ultimate consignee using multimodal transport.

(71) In this context, it is not important that certain commodities may still travel by either means: the essential question for determining demand substitutability is whether the choice of mode is made on the basis of the characteristics of the mode. Thus, the fact that some steel products may travel by bulk and others by container does not show that the two modes are substitutable, since it does not take into account the diverse nature (and value) of steel products nor the delivery requirements of customers. The same is true for the other products for which the TACA parties claim substitutability between bulk and containers.

(68) Thus, as the degree of containerisation increases, shippers of non-containerised cargoes turn towards containerised services but once those shippers have become accustomed to shipping in containers they do not revert to non-containerised shipping. Such examples of one-way substitutability are not uncommon.

(69) Drewry<sup>(28)</sup> makes a cautious estimate that the containerised share of the world's general cargo trade has risen from 20,7 % in 1980, to 35,1 % in 1990, to 41,6 % in 1994. Drewry forecasts that by the year 2000, this percentage will rise to 53,8 %. The transformation from bulk shipping to containerisation reflects not only a change in the nature of the goods being shipped (essentially from raw materials to manufactured commodities), but also the inherent characteristics of containerised liner shipping.

(72) The single specific example given by TACA parties ([Business secrets omitted]) is an interesting one since, as discussed at recitals (210) to (213), it demonstrates the ability of the TACA parties to price-discriminate so as to attract marginal products away from bulk carriers without affecting freight rates generally. There is no evidence that bulk carriers are likewise able to discriminate as between customers.

(70) These characteristics include the following. Smaller, more frequent, shipments as is typically the case with container shipping lead to reduced inventory costs. Containerised goods are less likely to suffer from damage and pilferage. Containerised goods are easier to ship multimodally. For these reasons, once a commodity has made the transformation from

(73) So far as reefer (that is, refrigerated) services are concerned, the TACA parties argue that reefer containers are substitutable for bulk reefer services. Even to the extent that this may

<sup>(28)</sup> Drewry, *Global Container Markets*, London 1996, pp. 38 to 48.

<sup>(29)</sup> Such one-way substitutability is not restricted to shipping: for example, although soft drinks are not a substitute for bottled waters, it is not necessarily the case that bottled waters are not a substitute for soft drinks, see Commission Decision 92/553/EEC (IV/M.190 – Nestlé/Perrier) (OJ L 356, 5.12.1992, p. I.)

be the case<sup>(30)</sup>, for the reasons given above this does not mean that bulk reefer services are substitutable for reefer container services. Apart from the advantages offered by liner container services such as smaller volumes and speed of transfer to other modes of transport, a wider variety of products can travel in reefer containers than can travel as bulk reefer cargoes. Such products include furs and leathers, pharmaceuticals, electronic goods and, because of the steady temperatures and the ability to control ripening, soft fruits.

(74) On this basis, while it is possible that in exceptional circumstances some substitution may occur between break-bulk and container transport, it has not been demonstrated that there is any lasting changeover from container towards bulk for the vast majority of cases.

(75) On the supply side, the TACA parties have argued that break and neo-break carriers could readily convert their vessels so as to enter the relevant market and for this reason should be regarded as potential competitors. Further, they have argued that there are a significant number of very large liner operators intending to enter the transatlantic trades. These questions of potential competition (and the evidence which the TACA parties have put forward to support their case, the Dynamar Report) are considered at recitals (278) to (282).

#### **B. The relevant geographic market – maritime transport**

(76) Similarly, while northern European ports are for some shippers substitutable for some Mediterranean ports, very few, if any, shippers find that Mediterranean ports are substitutable for northern European ports.

(77) First, notwithstanding the TACA parties' claims that all ports in the Mediterranean are substitutable for northern European ports falling within the scope of the TACA, there is no realistic possibility and no evidence has been provided that Mediterranean ports east of latitude 20° or south of longitude 36° (which includes parts or all of Greece, Turkey, Lebanon, Israel, Cyprus, Egypt, Libya, Tunisia, Algeria and Morocco) could, with the possible exception of Algeciras in Spain, be used by shippers in northern Europe as a substitute for northern European ports (or for that matter, vice versa).

(78) Secondly, the evidence of substitution of ports in France, Spain, Italy and Croatia does not lead to the conclusion that ports in those countries are substitutable to a sufficient degree, if at all, for the conclusion to be drawn that they are in the same market as northern European ports. The TACA parties have provided the following evidence of substitution by shippers of Mediterranean ports for northern European ports:

'[Business secrets omitted] diverted a significant proportion of its volume to Mediterranean ports in 1994/1995. Whilst TACA lines continue to carry some of the shipper's total volume, (business secrets omitted) continues to ship approximately (business secrets omitted) teus per annum via the Mediterranean'.

'(Business secrets omitted) also moves an estimated (business secrets omitted) teu of cargo via the Mediterranean ports, both with SEAC carriers and with independent lines. Some of that cargo was previously carried via northern Europe. It is understood that cargo originating from (business secrets omitted)'s production plant on (business secrets omitted) continues to move through both northern European and Mediterranean ports'.

'(Business secrets omitted) has switched approximately (business secrets omitted) teu of cargo from TACA services to Mediterranean services operated by Evergreen'.

<sup>(30)</sup> According to Mats Jansson, President of Unicoil and Cool Carriers, 'The reefer container capacity deployed is still limited and the negative impact so far on the demand for specialised reefers is small.' (Fairplay, 3 July 1997).

- (79) On the basis of this evidence ( the alleged substitutability of some 8 000 to 10 000 teu), the TACA parties consider that some 48 000 teu should be included in the overall market in which the TACA operates. According to the TACA parties, the effect of this would be to increase the total market by 2 %. Since they do not include in the TACA market share, cargo carried by TACA parties on trades falling outside the geographic scope of the TACA, this would decrease the TACA parties' share of the relevant market by approximately 1 %.
- (80) The Commission does not consider that the evidence put forward by the TACA parties outweighs the evidence that ports in the Mediterranean are not substitutable for northern European ports. First, the inadequacy of Mediterranean ports for shipments to North America is demonstrated by the fact that the TACA parties which are also VSA parties operate two to three round trip rail shuttles a week between Milan and Rotterdam: the TACA parties have provided no evidence that any shipper has sent material quantities of cargo to Mediterranean ports from northern Europe with North America as the ultimate destination.
- (81) Secondly, there is no evidence that the specific cargoes in question could have been carried via northern European ports. Thirdly, of the three examples given by the TACA parties, it would appear that in two of the three cases the shipments in question were made using the Mediterranean service of one of the TACA parties.
- (82) In this context, it is relevant to note that Mediterranean ports do not appear to be substitutable for northern European ports even for Europe/Far East services, where the geographic advantages of Mediterranean ports are significantly greater than for trans-atlantic services. Thus, Drewry considers:
- in anything like the foreseeable future, given the infrastructural limitations of the southern ports and the European rail system' <sup>(31)</sup>.
- (83) Finally, the effect of marginal competition from other means of transport for certain categories of goods can be limited. This situation arises because liner shipping companies are able to identify shippers of such goods and, because of the differentiated price structure in liner shipping, offer lower prices to such shippers without affecting prices generally (see recitals (203) et seq.).
- C. Conclusions as to relevant maritime transport market**
- (84) For the reasons given above, the Commission considers that the market for sea-transport services to which the TACA relates is that for containerised liner shipping between northern Europe and the United States using the sea routes between ports in northern Europe and ports in the United States and Canada <sup>(32)</sup>.
- D. Shares of the relevant maritime transport market**
- (85) Figures provided by the TACA parties for their market shares are set out in Tables 2 and 3. These figures include some bulk and break-bulk commodities going through the Canadian gateway in the product market and Iceland and Puerto Rico in the geographic market, none of which fall within the scope of the TACA: the consequence of this is that the figures given below underestimate the TACA's market share, although probably not to a significant degree. The effect of potential competition is considered at recitals (276) to (306).

'By turning in the Mediterranean, Europe-Far East ships could save at least two weeks on their average nine-week round voyage time (a 22 % increase in vessel productivity), but this seems unlikely

<sup>(31)</sup> Drewry, Global container markets, p. 76.

<sup>(32)</sup> This market is described in greater detail at recitals (25) to (70) of the TAA Decision: the TAA Decision is referred to by the TACA parties at recital (1)(4) of the application for exemption of the EIEIA.



Table 2

Market shares for containerised cargo 1994 to 1996  
(Northern Europe/USA including via Canadian gateway)

	1994 teu	1994 (%)	1995 teu	1995 (%)	1996 teu	1996 (%)
TACA						
Direct NE/USA	1 317 785		1 358 983		1 342 684	
Via gateway	57 455		90 607		86 406	
Total TACA	1 375 240	60,65	1 449 590	61,55	1 429 090	59,83
Non-TACA						
Direct NE/USA	574 776	25,35	643 675	27,34	638 194	26,72
Via gateway	317 339	14,00	261 536	11,11	321 067	13,45
Total	2 267 355	100	2 354 801	100	2 388 351	100

Source: PIERS/TACA.

- (86) These figures can be broken down into four distinct segments based on the coast on which the North American port of entry is located: these are the US east, gulf and west coasts and Canadian east coast ports for goods shipped to the American mid-west (the Canadian Gateway).

Table 3

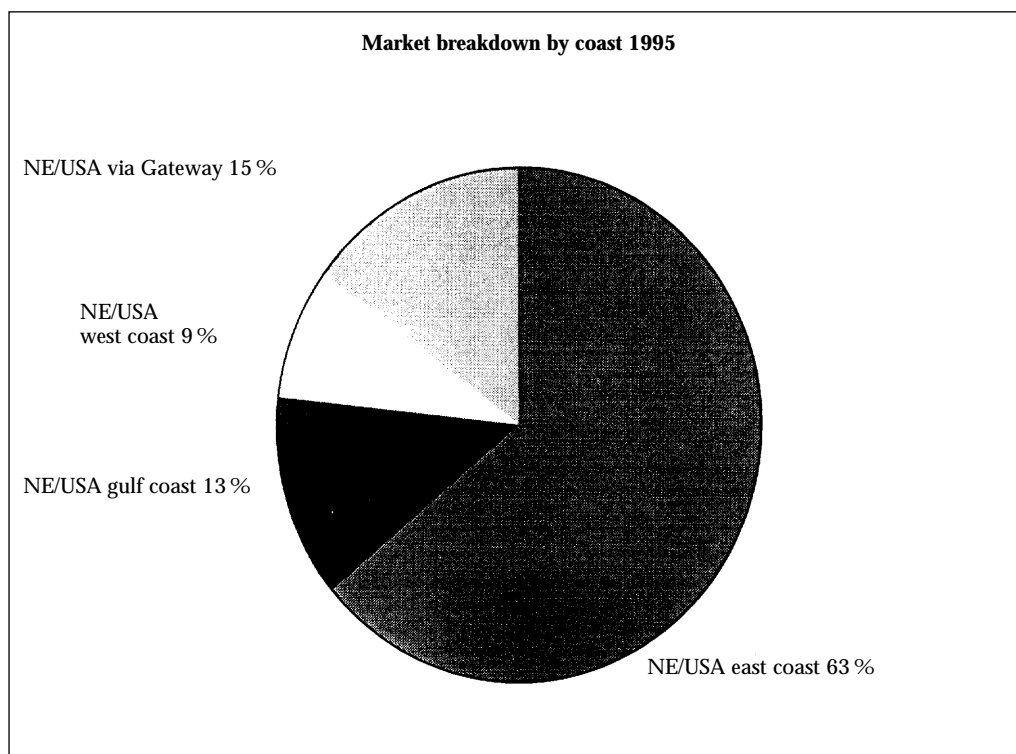
Market share by segment 1994 to 1996

		(%)		
		1994	1995	1996
NE-USA	TACA	71	69	69
East coast	Evergreen	13	14	13
	Lykes	5	5	5
	Others	12	12	12
NE-USA	TACA	59	56	61
Gulf coast	Evergreen	0	0	3
	Lykes	18	19	17
	Others	23	24	18
NE-USA	TACA	72	68	68
West coast	Evergreen	14	15	15
	Lykes	0	0	0
	Others	14	17	17
NE-USA	TACA	15	26	21
Gateway	Evergreen	0	0	0
	Lykes	0	0	0
	Others	85	74	79

Source: PIERS.

- (87) The relative importance of each of these segments is apparent from the diagram below.

*Diagram*



- (88) The following conclusions may be drawn from Tables 2 and 3 and from the diagram each of the three years 1994, 1995 and 1996, the TACA parties enjoyed market shares of some 60 %. In each year they also enjoyed market shares in excess of 55 % on each of the market segments for direct trade between northern Europe and the USA. In each year they enjoyed approximately 70 % of the northern Europe/US east coast segment, the market segment which is over four times larger than the next largest segment.
- (89) According to Drewry<sup>(33)</sup>, demand for maritime transport services between northern European ports and ports in the USA, Canada and Mexico grew by more than 7 % between 1993 and 1994 and by nearly 6 % between 1994 and 1995. On 1 October 1997, the Journal of Commerce stated that the trade was 'growing between 6 % and 9 % per year'.
- (90) On 13 October 1997, the TACA parties, published their 1998 business plan: the plan included a forecast growth in 1998 of 'approximately 8 % to 9 % westbound and 3 % to 4 % eastbound'. The plan added, 'The 1997 growth in the market has absorbed the capacity introduced by new trade entrants, both in terms of American direct services and cross-border via Canada. The continued growth in 1998 will thus translate into real growth for TACA carriers'.
- (91) The land transport services that are of relevance to this Decision are the inland transport services undertaken within the territory of the Community which shippers acquire together with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America. These services do not form part of the market for

#### E. The relevant inland transport market

<sup>(33)</sup> Drewry, 'Global container markets', p. 88.

maritime transport services described above but form part of a distinct market.

#### V. THE TACA TARIFF

(92) These land transport services can be supplied in one of two ways: merchant haulage or carrier haulage. Where supplied by carrier haulage, they are supplied by one of the liner shipping companies present in the market for sea transport services described above. In 1995 the TACA parties provided carrier haulage services within the territory of the Community for some 48 % of the cargo they carried between northern Europe and the United States.

#### IV. LINER SHIPPING CONFERENCES

(93) In general terms, liner shipping conferences are associations of shipowners served by a secretariat. The shipowners act together to set common or uniform freight rates and to make a common policy on the discounts or rebates which may be offered to certain shippers. Depending on the trade, they may share the cargo between themselves in various ways, coordinate sailing timetables, pool revenues and agree measures to combat competition from non-conference competitors. They deal with applications for membership<sup>(34)</sup>.

(94) Unlike liner shipping consortia, conferences do not bring about the joint operation of a liner shipping service. The question of operational issues, other than scheduling, falls outside the scope of conference activity. It is not uncommon to find one or more consortia operating within a liner conference.

(95) Conference secretariats organise the meeting of the members of the conference and monitor trade conditions. They do the latter by collating statistics of trade volumes and prices which are supplied to the secretariat by the members of the conference. In the case of the TACA, the TACA secretariat has played an especially prominent role, becoming directly involved, *inter alia*, in service contract negotiations and in policing compliance by the TACA parties with the TACA's rules.

<sup>(34)</sup> In the US trades, conferences may be joined without the consent of the existing members and are accordingly termed 'open' conferences.

(96) As with many conference tariffs, the TACA tariff is a five part tariff showing separate rates for each of the following services:

(a) inland transport to the port,

(b) cargo handling in the port (transfer from the mode of inland transport to the vessel),

(c) sea transport (maritime transport from one port to another),

(d) cargo handling in the port of destination (transfer from the vessel to the mode of inland transport),

(e) inland transport from the port of destination to the place of final destination.

(97) The first and fifth of these services are invoiced to the shipper in local currency. The second, third and fourth are invoiced in US dollars.

(98) A rate is also shown for: container service charges; forwarding and customs clearance charges (UK/Ireland); CFS/breakbulk service charges; terminal handling charges; CFS/pier cargo charges, stuffing/stripping charges; optional delivery/discharge – additional charges; diversion of cargo – administration fees; port drayage – (cotton in containers); advance charges – collection fees; temporary insulation kit – removal fees, liner bag or flexitank/flexibag removal fees, demurrage charges; stop-off charges – consolidated cargo; pick-up charges – consolidated charges; and wharfage and handling charges.

(99) The TACA tariff is based on the TAA tariff which was introduced in 1993. The TAA tariff replaced the tariffs previously used by conferences in the northern Europe/USA trades. The westbound tariff which was replaced by the TAA tariff has been described by the TAA

secretariat as follows: published in six volumes, has close to 2 500 pages, covers approximately 10 000 tariff positions, stacks one-quarter of a metre in height and weighs over 12 kg<sup>(35)</sup>. According to the TACA parties the current TACA tariff runs to many thousands of pages: consequently, when the Commission requested a copy, the TACA parties preferred to supply it in electronic form.

operate under uniform rates. These rates make up the conference tariff which is published and available to all shippers. The conference tariff sets out a number of different rates: standard rates, time/volume rates, loyalty contract rates. Conference members sometimes also offer secret discounts from the conference tariff in order to gain market share at the expense of other conference members.

#### VI. THE PROVISION OF INLAND TRANSPORT SERVICES BY THE TACA PARTIES

- (100) The extension of liner shipping companies' activities to inland transport was discussed at recitals (12) to (29) of Commission Decision 94/985/EC<sup>(36)</sup> (IV/33.218 – Far Eastern freight conference: hereinafter 'the FEFC Decision'). Those comments are equally applicable to the TACA parties and, indeed, 10 out of 15 of the TACA parties are also members of the FEFC.
- (101) Thus, apart from the collective fixing of prices and conditions for carrier haulage, no inland transport activities are directly or indirectly organised through the medium of the TACA. The member lines of the TACA negotiate individually the terms and conditions on which they buy in inland transport. Until now, only some member lines of the TACA have invested in and own inland transport infrastructure (such as depots) or equipment (such as tractors), the most notable being P&O's inland depots in the UK and the various carrier-owned road haulage companies (such as Nedlloyd and Maersk).
- (102) As was explained above, the TACA parties have established, and applied for exemption for, two arrangements which distinguish their situation from that described in the FEFC Decision: the European Inland Equipment Inland Equipment Interchange Agreement and the hub-and-spoke system.
- (104) Under American law, the right of members of an exempted conference to take independent action is mandatory with regard to tariff rates: this means that any member of a conference has the right to depart from the conference tariff in respect of a particular class of goods, provided that the other members of the conference are notified.
- (105) Tariff arrangements include the carriage of cargo not only at standard tariff rates but also loyalty arrangements and time/volume arrangements where the goods will also travel at tariff rates, but rates which are lower than standard tariff rates. Under tariff arrangements certain terms of the relationship are determined by the tariff.

#### VII. SERVICE CONTRACTS

##### A. The difference between tariffs and contracts

- (103) The essential feature of conference agreements is that the members of the conference agree to
- (106) Carriers operating under tariff arrangements are expected to hold themselves out to the public as common carriers. In brief, a common carrier is one who plies between fixed places, does not differentiate between those who demand to use his services, and accepts an obligation to carry any goods brought to him, if suitable and if he has space. Few liner shipping companies have legal obligations to act as common carriers, but there is nevertheless an expectation that they

<sup>(35)</sup> Letter from TAA to the European Shippers' Councils dated 13 October 1992.

<sup>(36)</sup> OJ L 378, 31.12.1994, p. 17.

will behave as such<sup>(37)</sup>. American law requires members of liner conference to act as common carriers if they are to benefit from antitrust immunity under American law.

(110) Section 3(21) of the American Shipping Act (1984) defines a 'service contract' as:

(107) There is a major distinction to be drawn between tariff arrangements and contractual arrangements. Contractual arrangements do not depend on the terms set out in the tariff and the parties are free to negotiate the terms they consider appropriate.

'... a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level – such as, assured space, transit time, port rotation, or similar service features; ...'

(108) The main difference is that in the case of the tariff arrangements, the price is not an individually negotiated price but that set out in the tariff. In the case of contract carriage (for example, a service contract) the price is not one which appears in the tariff. The TACA parties acknowledged this distinction in a letter to the Commission dated 10 August 1995 in which it is stated that the TACA parties 'use the term "tariff" to refer to the document in which the conference rates are published'.

(111) Service contracts were introduced following the prohibition of collective 'loyalty contracts' by the American Shipping Act<sup>(38)</sup>. At the time of enactment of the 1984 Act, the tariffs of some 33 conferences serving American trades contained loyalty contract rates. Conference or collective loyalty contracts were considered excessively anti-competitive by the USA because they could discriminate against small shippers. It was also considered that service contracts would serve the long-term interests of American export trade and would be one of the two counterbalances (the other being independent action) to ensure that antitrust immunity for conferences did not lead to an excessive reduction in price competition between liner shipping companies.

#### B. Service contracts under American law

(109) The American Shipping Act (1984) specifically authorised for the first time a form of contract carriage for common carriers for use in American trades: service contracts. While their use was not unknown in American trades prior to 1984, their development had been impeded by legal uncertainty as to whether they were unlawfully discriminatory under American law.

(112) Under US law, service contracts may be entered into by shippers either with individual carriers or with conferences. They must be filed with

<sup>(37)</sup> See Unctad, The liner conference system. TD/B/C4/62 1970, paragraph 10. The distinction between common carriage and contract carriage predates liner shipping conferences. An example of the distinction may be found in the UK Carriers Act 1830 (11° Geo. IV. & 1° Gul. IV), an Act of Parliament limiting the liability of common carriers, which provides that, 'Provided always, and be it further enacted, That nothing in this Act contained shall extend or be construed to annual or in anywise affect any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandises'.

<sup>(38)</sup> Section 3(14) of the American Shipping Act 1984 defines a 'loyalty contract' as '... a contract with an ocean common carrier or conference, other than a service contract or contract based on time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference'.

the FMC on a confidential basis. A concise statement of the essential terms<sup>(39)</sup> of service contracts must also be filed: this is published by the FMC and the same terms must be made available, 'to all shippers similarly situated'.

### C. Loyalty arrangements

(113) The carriage of cargo under the tariff system does not preclude an additional contract between the shipper and shipowner relating to loyalty arrangements. Such a contract is, for the reasons explained above, of a wholly different nature from a purely contractual relationship such as a service contract. The definition of a service contract used by the American Shipping Act (see recital (110)) does not extend to contracts for a percentage or portion of a shipper's cargo.

(114) Unlike service contracts, loyalty arrangements are specifically referred to in Regulation (EEC) No 4056/86, and Article 5(2) of that Regulation attaches to the group exemption a number of detailed obligations relating to loyalty arrangements. The 10th recital of Regulation (EEC) No 4056/86 provides as follows:

'... whereas, furthermore, loyalty arrangements should be permitted only in accordance with rules which do not restrict unilaterally the freedom of users and consequently competition in the shipping industry, without prejudice, however, to the right of a conference to impose penalties on users who seek by improper means to evade the obligation of loyalty required in exchange for the rebates, reduced freight rates or commission granted to them by the conference'.

(115) The provisions of Regulation (EEC) No 4056/86 relating to loyalty arrangements should

<sup>(39)</sup> The essential terms of a service contract include: (a) the origin and destination port ranges or geographic areas; (b) the commodity or commodities involved; (c) the minimum volume; (d) the line-haul rate; (e) the duration; (f) the service commitments; and (g) the liquidated damages for non-performance, if any.

be considered in the light of the Unctad Code<sup>(40)</sup>. Council Regulation (EEC) No 954/79<sup>(41)</sup> permitted but did not oblige Member States to ratify the Code, which eventually came into effect on 6 October 1983 but which has never been ratified by the United States. The Unctad Code, in particular Chapter III of the Code (Relations with shippers), clearly recognises no form of contract between shippers and conferences other than loyalty contracts, which are specifically dealt with in Article 7 of the Code.

(116) There are three types of loyalty arrangement: the deferred rebate system, the loyalty contract system and the dual-rate contract.

(117) Under the deferred-rebate system, a shipper who utilises exclusively the vessels of the member lines of the conference for the carriage of cargoes between the ports covered by the conference is initially charged at the full freight rate, but is entitled to receive a deferred rebate of a certain percentage of his total freight payments. The rebate is computed for a designated period (shipment period), usually three to six months, but is paid after a period (deferment period) of the same length following the shipment period, on the condition that the shipper has given his exclusive support to the conference lines during both the shipment period and the deferment period. The reward for loyalty in the past is thus made conditional on continuing loyalty in the future. The rebate is not a legal right which the shipper has, since there is no contract covering its payment.

(118) Under the loyalty contract system, the carrier offer an immediate discount to those shippers who sign a contract to the effect that they agree

<sup>(40)</sup> United Nations Conference of Plenipotentiaries on a Code of Conduct for Liner Conferences, Final Act and Annexes, UN, Geneva, Doc TD/Code/11/Rev. 1, 9 May 1974. The third recital of Regulation (EEC) No 4056/86 provides as follows: '... whereas the Regulation applying the rules of competition to maritime transport foreseen in the last recital of Regulation (EEC) 954/79 should take account of the adoption of the Code; whereas as far as conferences subject to the Code of Conduct are concerned, the Regulation should supplement the Code or make it more precise'.

<sup>(41)</sup> OJ L 121, 17.5.1979, p. 1.

to give their entire support to the conference carriers. An example of this is the Far Eastern Freight Conference's (FEFC) General cargo contract: in return for a 9,5 % discount on conference tariff rates, shippers who sign the General cargo contract agree to 'give the [conference] carriers their entire support', to 'ensure that all contracts for the carriage of conference cargo ... are made with one or more of the [conference] carriers' and to 'refrain from participating directly or indirectly in any arrangements relating to the carriage of conference cargo by any vessel not operated by one of the [conference] carriers'. Conference cargo is defined as cargo falling within the geographic scope of the conference and excludes a small number of commodities usually shipped in bulk.

- (119) The third form of loyalty arrangement is the dual-rate contract. Under this contract, the full conference tariff rate is charged to shippers who do not sign an exclusive patronage contract with the conference lines, and a lower rate to shippers who do sign such a contract.

#### D. Time/volume rates

- (120) Time/volume rates are part of the conference tariff: they are lower than standard tariff rates, depending on the volume of cargo offered over a specified period of time. Thus separate rates are shown for different volumes of a particular commodity undertaken to be shipped<sup>(42)</sup>. Time/volume rates have no additional service element. Time/volume rates, like loyalty rates,

are, in effect, discounts on standard rates and are designed to protect the overall market share of the conference by tying shippers to conference carriers.

- (121) Under American law the possibility of independent action is mandatory on time/volume rates, since they are tariff rates: this means that any member of a conference has the right to depart from the conference tariff in respect of a particular class of goods, provided that the other members of the conference are informed.

#### E. Service contracts in practice

- (122) In the transatlantic trades, some 50 % to 60 % of cargo probably travels under service contracts<sup>(43)</sup>, although most consolidated cargo<sup>(44)</sup> travels under conference time/volume rates (which form part of the conference tariff). The high proportion of service contracts on the transatlantic trades is due to the American prohibition of loyalty contracts, a prohibition which does not exist under other systems of competition law.

- (123) In the transpacific trades westwards from the USA to the Far East, there have been, until recently, very few service contracts as a result of

<sup>(42)</sup> A rate published in a tariff which is conditional on receipt of a specified aggregate volume of cargo or aggregate freight revenue over a specified period of time.

<sup>(43)</sup> According to a presentation made by TACA to selected shippers on 6 July 1995, in the first quarter of 1995 some 59,5 % of all TACA carryings moved pursuant to service contracts and 40,5 % at tariff rates. According to 'Contracts between shippers and shipping conferences', a study carried out on behalf of the Commission Directorate-General for Transport by Brinkman-ship Ltd in February 1996, 'TACA has signed some 450 contracts (westbound) for 1996, representing close to 65 % of the annual carryings of the conference'.

<sup>(44)</sup> I.e. parcels consolidated by freight forwarders into shipments of 20 or 40-foot loads.

conference opposition to their conclusion and, where they existed, they were for very large quantities<sup>(45)</sup>. In the opposite direction, there are apparently several hundred service contracts. In the northern Europe/Far East trades, where loyalty agreements are not prohibited, there are no service contracts of the type found in the American trades. Arrangements are either made with the FEFC, on the basis of a loyalty agreement, or are individual arrangements, on the basis of a discount for volume, and without the involvement of the FEFC secretariat. It is possible to negotiate all-in rates (prices which include surcharges) on these trades.

- (124) As can be determined from the number of filings with the FMC, the popularity of service contracts grew tremendously following their introduction in 1984, reaching a pinnacle in January 1986. Shippers entered into service contracts in order to obtain a lower price than the standard tariff rates. Carriers offered them because they were the next best thing to the prohibited loyalty contracts, their main attraction being the chance to tie shippers to a particular carrier or conference, although they do also assist shipping lines to plan forward.

- (125) By 1986 many service contracts required carriers to provide few, if any, extra services and they were used merely to obtain a lower rate than the standard conference tariff, *ad hoc* discounting from the conference tariff being

prohibited under the American Shipping Act. It is reported that some service contracts covered as little volume as 3 teu and some were for as brief a period as seven days.

- (126) To counteract their negative impact on revenues, conferences serving the transpacific trades began to prohibit individual service contracts from around the beginning of 1986<sup>(46)</sup>. Furthermore, since independent action on service contracts is not mandatory under American law, these conferences also began to prohibit the taking of independent action on joint-service contracts. Conferences on the transatlantic routes had never openly permitted individual service contracts until their introduction by the TACA parties in 1996.

#### F. TACA service contracts

- (127) The Commission has examined some 350 TACA 1995 joint-service contracts. Almost none of those contracts contain any individually negotiated terms relating to service. They merely set a tariff rate lower than the standard tariff rate, depending on volume. The TACA parties have disputed the Commission's finding in the Statement of Objections that very few of the 1995 service contracts contain individually negotiated services, claiming that 98 1995 service contracts contained one or more of 48 different types of additional service.

- (128) In the Commission's view, only 16 of the 48 different clauses identified by the TACA parties could be classified as relating to service as opposed to price. Of those 16 clauses, 12 appear in one contract each and concern in

<sup>(45)</sup> According to Albert A. Pierce Jr., Executive Director of the Transpacific Westbound Rate Agreement (as reported in *American Shipper* in December 1994), in October 1994 the TWRA was in the course of negotiating its third-ever service contract and had offered a 2 % discount from tariff rates for a minimum-volume commitment of 5 000 feu. The October 1995 edition of *American Shipper* reported that this one-year contract took some eight months to negotiate and the minimum volume eventually agreed is 9 100 feu for which space is guaranteed. The February 1996 edition of *American Shipper* reported that in the first week of 1996 a further 20 contracts had been signed. It is understood that the number of such service contracts has further increased in 1997.

<sup>(46)</sup> The prohibition of individual service contracts by the Transpacific Westbound Rate Agreement (TWRA) and the Asia-North America Eastbound Rate Agreement (ANERA) with effect from 1 July 1986 resulted in the immediate departure of Evergreen from both agreements. See 'Service contracts: a case study of unfulfilled promises', N. Shashikumar, *Marit. Pol. Mgmt.*, 1986, Vol. 16, No 1, 13-26.



total a mere seven shippers: four appeared only in the (business secrets omitted) contract, two in the (business secrets omitted) contract and two with (business secrets omitted). ([Business secrets omitted] each had a single clause of that type). Of the other four types of clause, two concern merchant haulage, one cash-on delivery payment and one in-transit storage.

service-contract provisions and the subsequent wider-ranging use of service contracts, few carriers or conferences have availed themselves of the time/volume rate provisions'.

(129) The mandatory right of independent action on time/volume rates under American law (a measure intended to promote competition) probably explains why shipping lines on the transatlantic routes have preferred to offer service contracts rather than time/volume rates<sup>(47)</sup>. The attitude of the TACA parties towards independent action is apparent from a TACA briefing paper dated 15 February 1996, where it is described as 'a tool of last resort'.

(130) In its 1989 report on the American Shipping Act, the Federal Maritime Commission commented:

'The 1984 Act expressly authorises time/volume rates, defining them as rates that "... may vary with the volume of cargo offered over a specified period of time".... However, with the promulgation of

(131) The absence of independent action on service contracts and the TACA rules on the terms of service contracts, including the rules requiring disclosure to the other TACA parties, mean that less price competition is generated between the parties to the TACA than would be the case if the lines offered genuine time/volume rates rather than time/volume rates disguised as service contracts.

(132) Until the introduction of individual service contracts, all service contracts between a shipper and the TACA parties were negotiated by the TACA secretariat for and on behalf of the TACA members. Service contracts negotiated by the TACA secretariat are then put to the voting procedure of the TACA. A TACA party which does not wish to participate in that service contract may take 'unilateral action' on that service contract. The scope of the 'unilateral action' is limited in a number of important ways which are likely to prove disincentives to the taking of 'unilateral action'.

(133) First, the unilateral action must be agreed with the shipper and provided to the TACA secretariat for filing (with the Federal Maritime Commission) no later than 15 days following the filing of the original service contract. This 'window of opportunity' is designed to limit significantly the possibility for shippers to negotiate with lines which do not wish to participate in TACA service contracts. It also means that shippers will be unable to take advantage of changing market conditions.

(134) The second important limitation on the scope of the 'unilateral action' on service contracts is that such action can only be in respect of cargo which is additional to the minimum agreed to be carried under the service contract.

<sup>(47)</sup> See 'The Effectiveness of collusion under antitrust immunity - The case of liner shipping conferences', Paul S. Clyde and James D. Reitzes, Bureau of Economics Staff Report, Federal Trade Commission, December 1995, 'unlike independent action on regular tariff rates where the "discount" must be offered to all shippers of that commodity on that route, [service] contracts could be written in a manner which effectively allowed the conference carrier to offer a "selective" discount to that shipper (or a small group of "similarly-situated" shippers). Due to these circumstances, permitting independent action on service contracts could have increased the attractiveness of cheating and inhibited the ability of the conference to detect and punish cheating'.

Furthermore, the TACA party engaging in 'unilateral action' will not then be allowed to participate in the service contract.

parcelled out for carriage by a number of other carriers. This limitation may be exacerbated because the TACA parties are likely to be in a position to anticipate the likely total annual requirements of individual shippers as a result of past commercial relations.

- (135) The consequences of this are twofold. Shippers will normally seek a service contract for as great a volume as they think they are reasonably likely to require, since this enables them to get a bigger discount from the tariff rate<sup>(48)</sup>. Since 'unilateral action' can only be in respect of volumes above the minimum quantity commitment, a shipper knows that if it negotiates a low minimum quantity commitment it will get a smaller discount from the tariff rate but it will be uncertain whether it will be able to obtain a lower rate for the rest of its needs by virtue of 'unilateral action'. Shippers are therefore unlikely to find 'unilateral action' sufficiently advantageous for it to have any significant effect in increasing competition between the TACA parties.
- (136) The second consequence of this limitation is that it makes 'unilateral action' unattractive to carriers since they would be unable to carry any part of the minimum quantity commitment and would be obliged to carry goods only at the rate agreed under the 'unilateral action'. Furthermore the 'unilateral action' must be effective for the duration of the service contract. 'Unilateral action' is accordingly an inflexible system so far as the carriers are concerned and is unlikely to stimulate competition to any significant degree between the TACA parties.
- (137) The third important limitation is that the quantities permitted to be carried under 'unilateral action' are too small to make 'unilateral action' widely useful. The quantity to be carried under the service contract will have to be smaller than overall requirements and the rest of a shipper's requirements will have to
- (138) The fourth important limitation arises from the fact that the 'unilateral action' takes place within the context of the TACA service contract and cannot therefore be for a longer period than the TACA service contract.
- (139) On 17 November 1995, the TACA parties informed the Commission that as at 10 November 1995, 'no unilateral action has been taken with respect to TACA service contracts in 1995'<sup>(49)</sup>.
- (140) It is also important to note that under the TAA, those parties which were not members of the Contract Committee<sup>(50)</sup> were free to enter into individual service contracts at rates directly negotiated between a shipper and the individual line. Under the TACA as notified in July 1994, this possibility was removed and all TACA parties became bound by the restrictions contained in the TACA relating to service contracts.
- (141) As was indicated at recital (32), on 9 March 1995 the TACA parties informed the Commission that they had amended the TACA so as to allow individual TACA parties to enter into 1996 service contracts without having received the approval of not less than five other TACA parties, provided that those contracts complied with the provisions of Article 14(2) of the TACA.
- (142) In the reply to the Statement of Objections, the TACA parties stated that as at 28 August 1996 some 60 individual service contracts had been entered into with TACA parties. Such contracts were not put to the vote of the TACA parties although their terms were disclosed to the other TACA parties.

<sup>(48)</sup> Under service contracts, the discounts from tariff class rates are generally determined by reference to bands of minimum quantity commitments, for example 500 to 749 teu may attract a discount of, say, USD 40 per teu.

<sup>(49)</sup> See LWD letter to the Commission dated 17 November 1995.

<sup>(50)</sup> Cho Yang, MSC, DSR/Senator, POL, OOCL.

- (143) These 60 contracts accounted for some 3,2 % of the TACA parties' carryings on the direct USA/northern Europe trades in the first two quarters of 1996. Some 75 % of the volumes carried under these contracts was carried by six carriers<sup>(51)</sup>, all of them being traditionally non-conference members and none of them a member of the TAA's Contract Committee.
- (144) This means that the former members of the TAA's Contract Committee carried between them less than 1 % (0,8 %) of the TAA's total carryings on the direct trades pursuant to individual service contracts, a figure which should be compared to the figure of 59,4 % of carryings carried pursuant to TACA service contracts.
- (145) This shippers' representatives have argued that prior to the TAA and the TACA, service contracts on the transatlantic were negotiated individually and included a wide variety of different services. They were then submitted to the conference secretariat for information/approval and filing with the FMC. There was no direct contact between the secretariat and the shipper.
- (146) Since the TAA and TACA came into operation, the possibility of negotiating service contracts which include different services has, apparently, disappeared. The role of the TAA/TACA secretariat has been much enhanced and, according to the shippers, is the main obstacle to individually negotiated contracts. The Commission has been told that sales representatives of the lines claim they are not allowed under the terms of the TAA/TACA to offer anything other than a standard service contract, namely a volume-related contract without additional services.
- (147) Although conferences on the transatlantic have never openly permitted individual service contracts, the shippers' representatives have told the Commission that before the TAA there were unfilled individual service contracts, as well as conference service contracts of which not all the terms were filed. The TAA/TACA rules on service contracts have apparently put an end to the use of such terms. Examples of such unfilled terms were as follows:
- (a) cash refunds to separate accounts,
  - (b) classification of cargo into a lower-rated category,
  - (c) no invoicing for services such as inland haulage,
  - (d) no charge for special equipment,
  - (e) lower rates with the same line on a different trade,
  - (f) non-enforcement of liquidated damages clauses for under-performance of a service contract.
- (148) In a TACA briefing paper dated 15 February 1996, it is stated that 'single factor intermodal rates' and 'rates inclusive of CSC, THC, CAF, etc.' are 'cornerstone principles of TAA/TACA'. This is borne out by the observation that service contracts with Neusara and Usanera (TAA/TACA's predecessor) could be negotiated on an all-in basis<sup>(52)</sup>.
- (149) In addition to imposing rules for the negotiation of service contracts, TACA has imposed a number of binding 'guidelines' (Article 14(2)) concerning the contents of service contracts and the circumstances under which they may be concluded. The restrictions placed on the contents of service contracts include restrictions as to duration, bans on contingency clauses and multiple contracts, obligations as to non-confidentiality and agreement as to the level of liquidated damages for non-performance of the contract.

<sup>(51)</sup> Cho Yang, DSR/Senator, Hanjin, Hyundai, POL, Tecomar/TMM.

<sup>(52)</sup> See for example SC92-017.

(150) It is apparent from a review of TACA's 1995 service contracts that a very large number of service contracts with no-vessel operating common carriers (NVOCCs) have been entered into only by those TACA parties<sup>(53)</sup> which were formerly unstructured members of the TAA<sup>(54)</sup> (see footnote 84). These lines were the former independent, non-conference lines operating on the transatlantic routes.

TAA. The reduction varies between USD 50 and USD 100 per teu although in at least one case it is as much as USD 150. These dual-rate structures are also found in TACA's 1996 and 1997 service contracts.

(153) The TACA parties have explained the dual-rate service contract pricing structures as follows:

(151) The TACA parties have explained that the former structured members intentionally do not compete against the former unstructured members for this cargo<sup>(55)</sup>. This should be seen in the light of the fact that, according to 'Contracts between shippers and shipping conferences', the study carried out on behalf of the Commission Directorate-General for Transport by Brinkman-ship Ltd in February 1996, 'on the north Atlantic some 23 % of all cargo is said to be booked by NVOCCs'.

'In the light of the Commission's TAA Decision, TACA 1995 service-contract offers have been made to prospective shipper parties at uniform rates i.e. rates which are equally applicable to all participating lines. This is to say that the TACA parties, acting on legal advice, agreed that, in order to comply with the TAA Decision on this point, service contract offers should not include or reflect a dual-rate structure, i.e. a predetermined spread of rates. Thus, in service contract offers, as in the tariff, a rate for a particular commodity or class of commodities is applicable to all (participating) TACA parties, as is consistent with the TACA comprising a sole class of members.

(152) Finally it is also apparent from a review of TACA's 1995 service contracts that a significant number (approximately one-third) contain a dual-rate structure whereby the former 'unstructured' members of the TAA charge lower rates within the same service contract than the former 'structured' members of the

During the ensuing negotiation of a number of service contract offers, the prospective shipper party requested lower rates in respect of certain participating lines, in view of the shipper's perception of the different levels of service offered. Each such request was considered by the lines on a case-by-case basis. The final terms negotiated with each shipper were then submitted to the service contract voting procedures of the conference'<sup>(56)</sup>.

<sup>(53)</sup> Cho Yang, DSR/Senator, MSC, Hanjin, POL, Tecomar and TMM.

<sup>(54)</sup> See the TAA Decision recitals (135) and (136).

<sup>(55)</sup> See (second) Lovell White Durrant letter to the Commission dated 3 May 1995: 'In relation to full container load (FCL) cargo, however, some TACA parties have elected, as part of their overall corporate business policy, planning, marketing and investment strategy, not to maintain large sales forces and/or extensive agency networks to solicit cargo from the numerically great number of small and medium-sized proprietary shippers of FCL cargo. As a consequence, such carriers tend to utilise and depend to a greater extent on the broad NVOCC industry to solicit and aggregate significant volumes of FCL cargo. In distinction to such TACA parties, others have elected to maintain and bear the fixed costs of extensive internal sales forces, customer service functions and agency networks. These carriers tend to deal to a much greater extent directly with FCL proprietary shippers and therefore tend to view NVOCCs as competitive and rival carriers (since they too are competing for proprietary shipper FCL cargo)'.

(154) No evidence has been put forward to support this assertion that, in each case, the initiative for a dual-rate service contract came from the shipper party to the contract. In any event, it is clear that the dual-rate structure was agreed by

<sup>(56)</sup> See (second) letter of Lovell White Durrant to the Commission dated 3 May 1995.

the TACA members acting together as a whole. The application for exemption dated 5 July 1994 describes the mechanism for agreeing service contract rates at paragraph 4.2.2. However, neither here nor elsewhere in the notification is any mention made of the fact that the TACA parties considered that their agreement permitted them to enter into service contracts with a dual-rate structure. The highly significant fact did not come to light until after the Commission had formally requested copies of the TACA service contracts.

trades; (b) operators of containerised liner services on alternative routes; (c) other operators of liner services; (d) non-liner operators; (e) air transport operators, and (f) potential entrants and cross-entrants to the transatlantic trades' <sup>(58)</sup>.

#### A. Non-vessel operators

(155) As discussed at recital (296), the effect of the reservation of the NVOCC service contracts to the former non-structured TAA members and the systematic inclusion of dual-rate prices in service contracts for the benefit of the former non-structured TAA members is to lead to an extension of the membership of the TACA to a much wider number of shipping lines than would otherwise be the case.

(158) A distinction must be drawn between two different types of non-vessel operators (NVOs) on the north transatlantic trades. The first type of NVO is the type which, although it does not operate vessels on the trade in question (buying in its requirements from actual operators, usually on a long-term basis), operates vessels on other trades. This type included parties to the TACA such as Hanjin and Hyundai. The price at which these NVOs buy in maritime transport services from the TACA parties which actually operate vessels on the north Atlantic is not fixed by the TACA parties acting collectively but is fixed on a bilateral basis. The level of such prices is regarded by the TACA parties as a business secret and confidential to the parties to the bilateral arrangement.

#### VIII. NON-VESSEL OPERATING INTERMEDIARIES

(156) Shippers acquire maritime transport services in one of three ways. First, they may approach carriers direct. Secondly, they may use the services of a non-vessel operating common carrier. Third, they may use the services of a freight forwarder. The TACA parties consider that, 'the provision of multimodal transport services by the TACA parties is substitutable with the provision of such services by non-vessel operating intermediaries, namely freight forwarders and non-vessel operating common carriers' <sup>(57)</sup>.

(159) The second type of NVO on the north transatlantic trade is the type which does not operate vessels anywhere. Examples of this kind of NVO include the Kühne & Nagel Group, Danzas, Schenker International and Panalpina Welttransport. In addition to undertaking the forwarding of goods these NVOs also provide other forwarder services such as documentation, customs clearance and warehousing. Such NVOs obtain their maritime transport services from the TACA parties in the same way as other shippers, either at tariff rates or (more usually) on the basis of a TACA service contract.

(157) This is a new argument, not reflected in the application for exemption where the TACA parties defined the relevant market as follows:

'The applicants face competition for the transportation of containerisable cargo between Europe and the USA in both the westbound and eastbound directions (sectors) from: (a) other operators of containerised liner services on the direct

(160) Clearly, neither type of NVO competes with the actual carrier in terms of the quality of the maritime transport service provided. So far as competition on price is concerned, the first type of NVO (namely the type which operates vessels on other trades) is able to compete on

<sup>(57)</sup> See reply to the Statement of Objections, paragraph 44.

<sup>(58)</sup> See application for exemption paragraph 2(5).

price except to the extent that he has voluntarily restricted that freedom by becoming a party to an agreement such as the TACA and agreeing not to compete on price.

- (161) The second type of NVO (namely the type which does not operate vessels anywhere) does not compete with the TACA parties on price at all. While such an NVO may have a degree of buying power and may therefore be able to obtain lower service contract prices (but not tariff rates) than other shippers, those prices are fixed by the TACA parties.

#### B. Freight forwarders

- (162) Freight forwarders carry on the business of arranging for the carriage of goods for other people. They generally act in one of two ways *vis-à-vis* liner shipping companies. First, they may act as shippers themselves, undertaking to the consignors or consignees of the goods to ensure delivery of the goods to the agreed destination. The goods in question may be less than a container load (LCL) or many container loads: in either case the freight forwarder deals with the shipping line as principal and not as agent. In such cases, the freight forwarder is rewarded by the margin he earns between what he pays the carrier for transporting the container and the price he obtains from the consignor or consignee (together with his payment for any other services rendered). Freight forwarders who act in this way may even hold themselves out as non-vessel operating common carriers (NVOCC) and publish a tariff.

- (163) Alternatively, the freight forwarder may act as agent for a shipper. In this case his main task will be to arrange for a carrier to transport the goods and to negotiate the terms and conditions on which the transport takes place. He may also undertake other services such as the preparation of documentation and customs clearance. Crucially, when acting in this capacity the freight forwarder acts as agent for the shipper and not as principal. Freight forwarders who act as intermediaries in arranging for the provision of shipping services to shippers from shipping lines customarily receive a commission of around 2,5 to 50 % of the cost of those services (excluding ancillary

charges) from a shipping line in addition to payment from their shipper clients.

- (164) Under Article 5(1)(c)(3) of the TACA, the TACA parties agree the amounts, levels or rates of brokerage and freight forwarder remuneration including the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers. The TACA parties have claimed that the practice of conference members of fixing the levels of commission paid to freight forwarders acting as agents for shippers is a long-standing one and that within parts of the Community the practice dates back to the beginning of this century. The TACA parties have stated that it is not the practice for any ocean carriers serving the United Kingdom and Irish export trades to pay any commission or compensation to freight forwarders providing services in the United Kingdom and Ireland<sup>(59)</sup>.

#### C. Arguments put to the Commission by NVOs

- (165) Freight forwarders, through their pan-European trade association Clecat, have stated that they are customers of the TACA parties for sea transport services and not their competitors. This is acknowledged by the TACA parties, in their description<sup>(60)</sup> of NVOs as 'large, powerful and well-informed buyers of ocean transport capacity'.
- (166) Separately from the arguments put to the Commission by Clecat, a trade association called Freight Forward Europe (FFE) also submitted arguments to the Commission. The members of FFE are Europe's nine largest freight forwarders, all of which are also members of Clecat.
- (167) On 10 July 1996, FFE submitted a letter to the Commission setting out its members' position on the Transatlantic Conference Agreement, stating that they were in favour of conference agreements between shipping lines and supporting TACA's arguments concerning inland price-fixing. The TACA parties relied on this letter in the reply to the Statement of Objections<sup>(61)</sup> sent to the Commission on 6 September 1996 and included it as an Annex to that reply.

<sup>(59)</sup> See reply to the statement of objections, paragraph 332.

<sup>(60)</sup> See reply to the statement of objections, paragraph 49.

<sup>(61)</sup> See reply to the statement of objections, paragraph 305.

(168) On 1 August 1996, the TACA parties put into effect 'a temporary incentive plan for non-vessel operating common carriers in the westbound trade from northern Europe to the USA'. Under the plan TACA reduced its NVO rates by USD 75 per teu and USD 125 per feu.

(169) On 9 October 1996, in reply to a formal request for information, the TACA supplied the details of the contacts and meetings with FFE, including those described below.

(170) On 12 October 1995, the TACA secretariat wrote to the TACA parties concerning a meeting which had taken place between TACA and the members of FFE on 6 October 1995, in the following terms: 'The FFE was particularly pleased that they are deemed to be customers in their business relationship with TACA'. This relationship is also reflected in a letter dated 9 October 1995 sent by Charles F. McCann, President of Cho Yang (America) Inc., to the freight forwarders which attended the meeting on 6 October 1995, in which it is stated that, '[Cho Yang's] corporate policy is focused on the vital partnership with you and other global forwarder/consolidator operators.... We will diligently work to protect your interest as they are also Cho Yang's'.

(171) On 21 June 1996 P&O circulated an internal memorandum concerning a meeting which had taken place between TACA and the members of FFE on 20 June 1996:

'FFE will contribute to the cause of "stabilisation". They do not want carriers to subsidise inland transportation from the ocean revenue. FFE will fire the bullets but TACA has to manufacture the bullets. Therefore, agreed that J. Pheasant [European special counsel to the TACA parties] will assist in developing a "working paper" which is well-reasoned and cites the need for smaller shippers for stability with FFE'.

(172) On 1 July 1996, FFE wrote to John Pheasant: 'Dear John, In view of our meeting on July 3 at 8 am at your offices, please find a draft position as basis for our discussion. Best regards, Kurt Vandenberghe', attaching a draft version of the letter eventually sent to the Commission on 10

July 1996. A reading of the final version of the FFE letter sent to the Commission and the draft sent to Mr Pheasant reveals substantial differences. Unsurprisingly, these differences involve the introduction of a number of the key arguments put forward by the TACA parties, none of which is accepted by the Commission.

'conferences are not incompatible with lower freight rates',

'despite the fact that the transatlantic trade has always been a conference environment, rates have continued to fall over time',

'conferences do not inhibit innovation or investment in the development of new services',

'if service contracts were invisible, large shippers would get disproportionate benefits at the expense of small shippers...',

'it is important for conferences to determine common rates for service contracts',

'if there were free competition on through rates or on inland rates, shipping lines would cross-subsidise their inland rates by reducing ocean rates to destructive levels'.

(173) In October 1996, as a result of disagreement among its members as regards this support for the TACA parties, FFE wrote to the Commission to withdraw the letter.

#### IX. COMPETITION BETWEEN THE TACA PARTIES

(174) The first point concerning internal competition within the TACA relates to American law. Under the American Shipping Act 1984, conferences exempted from American antitrust laws are required to file their tariffs publicly with the Federal Maritime Commission and are required to adhere to those filed rates.

- (175) Carriers are not allowed to grant any special discount or excuse a shipper from any charge for any reason, regardless of the commercial desirability or apparent necessity in any individual case<sup>(62)</sup>. One consequence (and even purpose) of the obligation to adhere to filed tariffs is that members of a conference exempted under American law cannot discriminate in favour of large shippers. Thus, the difference in purchasing power between large and small shippers is substantially reduced.
- (176) Each breach of this requirement may be sanctioned by civil penalties of up to USD 25 000. Thus, policing against cheating of a substantial part of the TACA's activities is undertaken by an American regulatory authority. The policing activities of the Federal Maritime Commission are undertaken by its Bureau of Enforcement which employs seven lawyers and eight investigators to perform this task.
- (177) Adherence to the TACA is also ensured by the extensive enforcement provisions described at recitals (21) and (22). Policing has taken the form of the payment of substantial guarantees, fines for exceeding quotas as well as the appointment of an independent body to act as 'the Enforcement Authority' which has 'total unfettered access ... to all documents which may be related to a carrier's activities in the Trade'.
- (178) The independent body so appointed is called 'The Adherence Group bv'. The tasks entrusted to this body include the task of explaining the TACA's complex rules to the TACA parties. An example of this is found in a letter from The Adherence Group bv to Hanjin dated 28 April 1995 in which it is stated that 'there is NO possibility [under TACA's rules] to apply an S.C. [service contract] rate together with an inland tariff-IA [independent action]'.
- (179) The TACA parties have also adopted measures which are intended to present the TACA parties as a single united body and so diminish pressure for price reductions from customers. Of particular importance in this respect has been the role of the TACA secretariat and the publication of annual business plans (see Annex III). The TACA secretariat has extensive administrative and financial functions. It is authorised to act as agent for the TACA parties by entering into transport contracts on their behalf. It has the right to attend service contract negotiations between shippers and individual TACA parties.
- (180) The spirit of cooperation within TACA is evidenced by a letter from POL to Hanjin dated 28 December 1995 concerning service contracts with NVOCCs in which it is stated that:
- '... all NVOCC issues are very delicate and sensitive. This can be handled properly only with the full harmony within TACA, collectively, without any individualism, as any independence may totally destroy this part of the market, so carefully built by the group throughout the years. ... We therefore kindly ask you to settle this problem with POL in the spirit of avoiding mutual competition within TACA...' (emphasis added).
- A. Other restrictive arrangements affecting the transatlantic trade**
- (181) In addition to the TACA, it is necessary to consider pressures other than the TACA which are likely to reduce competitive pressure.
- (182) A significant number of TACA parties do not operate their own vessels on the northern Europe/USA trades: P&O, Nedlloyd, OOCL, NYK, NOL, POL, Hanjin, Hyundai. These shipping lines accordingly use space on vessels operated by other TACA parties. Furthermore, even those TACA parties which do operate vessels on the northern Europe/USA trades also use space on the vessels of other TACA parties. None of the TACA parties uses space on vessels operated by shipping lines which are not party to the TACA.
- (183) The TACA parties were asked to provide the Commission with details of all other agreements, whether operative or contemplated, which relate to the transatlantic trade and

<sup>(62)</sup> Section 18 Report on the Shipping Act of 1984, Federal Maritime Commission, September 1989, p. 544.



which involve TACA parties, whether under TACA auspices (in any sense) or not. In response, the TACA parties supplied to the Commission the information which is reproduced in Annex IV. In supplying this information, the TACA parties excluded details of agreements involving TACA parties falling outside the geographic scope of the TACA<sup>(63)</sup>.

- (184) The agreements appear to be exclusively space charter and sailing arrangement agreements. Pursuant to these agreements, the parties to the TACA engage in cooperative arrangements for the sharing of space on each other's vessels.
- (185) It is apparent from the information contained in Annex IV that the shipping lines operating on the transatlantic have concentrated into three groupings. These are:
- (a) P&O, Nedlloyd, Sea-Land, Maersk, OOCL (the VSA and related agreements);
  - (b) ACL, Hapag-Lloyd, MSC, TMM, Tecomar, Hyundai, NYK, NOL, POL (the ACL/Hapag Lloyd et al. agreements);
  - (c) Cho Yang, DSR/Senator, Hanjin (the Hanjin/Tricon agreement).
- (186) The first aspect of these arrangements that is relevant is that they do not concern the TACA as such but individual groupings of shipping lines acting independently of the TACA and its secretariat. The second aspect is that the first and third groupings operate on a much more closely integrated basis than the second.

(187) The VSA is a liner shipping consortium established in March 1988 by Sea-Land, P&O and Nedlloyd which operates on the northern Europe/USA and Mediterranean/USA trades. The VSA parties jointly operate nine vessels, all of which are owned and crewed by Sea-Land. The VSA parties are collectively party to the further agreements with OOCL and Maersk. Under these arrangements, OOCL obtains in each direction 1 450 teu slots per week from the VSA parties and 400 teu slots per week from Maersk. The VSA parties and Maersk provide each other with 180 teu slots per week<sup>(64)</sup>. For the purposes of the VSA, Sea-Land made considerable investments in the acquisition of vessels and P&O and Nedlloyd contributed to financing those investments. Furthermore, P&O, Nedlloyd and OOCL agreed to withdraw their existing vessels and to use Sea-Land's vessels.

(188) Under the ACL/Hapag Lloyd et al. agreements five liner shipping services (A-Service, PAX Service, GUMEX Service, North Atlantic Service and South Atlantic Service) are currently provided between northern Europe and the USA. One of these is provided by ACL, two by MSC, one by Hapag Lloyd, NOL and NYK and one by Hapag Lloyd and TMM/Tecomar. Table 4 sets out details of which lines operate which services and which lines charter space on those services.

<sup>(63)</sup> The effect of this is that the TACA parties excluded relevant agreements affecting conditions on the Europe/Canadian trades and the Mediterranean/American trades.

<sup>(64)</sup> A detailed description of the VSA and related agreements was published in OJ C 185, 18.6.1997, p. 4. In the context of the application for individual exemption of the VSA, the VSA parties have undertaken to the Commission not to exercise in the geographic area covered by the EC Treaty the provisions relating to inland and maritime rate-making, discussion and agreement on the terms relating to freight forwarder compensation and discussion and agreement on common essential terms in service contracts.

Table 4

**Vessel sharing and slot chartering arrangements**  
**ACL, Hapag Lloyd, TMM/Tecomar, MSC, NOL, NYK, Hyundai, POL**

	A-Service	PAX Service	GUMEX Service	NAS Service	SAS Service
ACL	Operator	Charterer	Charterer	Charterer	Charterer
Hapag Lloyd	Charterer	Operator	Operator		
TMM/Tec			Operator		
MSC				Operator	Operator
NOL		Operator			
NYK		Operator			
Hyundai				Charterer	Charterer
POL	Charterer			Charterer	Charterer

(189) Under the Tricon Agreement, DSR/Senator and Cho Yang jointly provide international liner shipping services on three trades from and to the Community, namely:

(a) the northern Europe/USA trade (North Atlantic trade);

(b) the northern Europe/Far East trade;

(c) the Asia/Mediterranean/America trade (AMA trade).

(190) The northern Europe/USA/Far East Service is operated on a round-the-world basis with one string of vessels operating eastbound and one string westbound. At present, DSR/Senator and Cho Yang operate 11 vessels eastbound and 11 vessels westbound on their round-the-world service and 13 vessels in total on their AMA service. DSR/Senator and Cho Yang have cooperated with Hanjin in the North Atlantic trade since 1 January 1995, pursuant to the Hanjin/Tricon Agreement. By this agreement, Hanjin charters slots on the Tricon North Atlantic service. On 25 February 1997, Hanjin acquired a majority shareholding in DSR/Senator.

(191) In addition to the agreements described above on the northern Europe/USA trades, some of the TACA parties are also party to agreements on the northern Europe/Canadian trades and on the Mediterranean/USA trades. In particular, both OOCL and DSR/Senator are party to arrangements with Canada Maritime (as to which see recitals (265) to (273) relating to services operated between ports in Europe and ports in Canada. Hapag Lloyd charters space on the Canada Maritime/OOCL service operating between Montreal and northern Europe.

(192) The arrangements entered into by these groupings do not contain binding rate-making provisions; however, they do contribute to coordination and discipline between their parties. For example, in 1995, the parties to the VSA and related agreements took a mere 92 independent actions between them on the northern Europe/USA trades. On the transpacific trades, where the VSA does not apply, in 1995 the VSA parties (other than P&O which was not then operating transpacific services) took 4 880 independent actions between them in the same year. The USA's Federal Maritime Commission has publicly stated that no significant independent rate action took place on the northern Europe/USA trades in 1994.

- (193) thus the effect of these agreements has been to restrict intra-TACA competition, particularly by their achievement of curtailment of independent action. Furthermore, in this case, the combination of the two kinds of restrictive agreements (conferences and consortia) between the parties (including the VSA agreement to maintain common essential terms) is likely to restrict non-price competition between the TACA parties.
- (194) This arises from the extensive use of space on other TACA parties' vessels which means that each TACA party has a severely reduced incentive and ability to compete in terms of speed of crossing and safety of cargo. In fact, the 'product' on offer from each carrier becomes indistinguishable from the others. This effect is reinforced by the fact that seven of the TACA parties do not operate their own vessels on the northern Europe/USA trades. The identity of the owner of the vessel on which his goods travel is evident to a shipper because the vessel name<sup>(65)</sup> appears not only on each carrier's shipping schedule but also on the bill of lading.
- (195) Two conclusions may be drawn from this analysis. The first is that the benefits or drawbacks which are due to vessel-sharing and slot-exchange agreements do not depend on the TACA but on agreements between individual shipping lines. Any benefits which are brought about cannot be attributed to the TACA. However, even if they could be so attributed, the restrictions on competition which the TACA entails are not indispensable to the achievement of the objectives for which the vessel-sharing and slot-exchange agreements have been entered into.
- (196) Second, whether or not each individual set of arrangements may qualify for exemption, their overall impact on the restrictions on competition which result from the TACA itself must be taken into account in considering whether the TACA itself can qualify for individual exemption. In particular, the impact on competition as between the parties to the TACA is important.
- (197) Concern about the effect of these kinds of agreements (often known as 'VSAs' or 'vessel-sharing agreements') has been expressed by regulatory authorities other than the Commission. In particular, Karen Gregory, an Industry Economist with the USA's Federal Maritime Commission has stated on affidavit as follows:
- 'While VSAs may be a means to manage capacity, service schedules, and frequency, they also affect competition among carriers. Coordination of services and investments requires a certain amount of cooperation. The coordination inherent in VSAs promotes solidarity between carriers which in turn diminishes intra-conference competition on pricing ... . In an article discussing a newly formed VSA in the transpacific trade, a Mitsui OSK Lines official commented that "There are still a lot of IA's [independent actions] but we hope this kind of agreement will help".'<sup>(66)</sup>
- (198) The Commission understands that the comment of the representative of Mitsui OSK Line was intended to suggest that consortia such as vessel-sharing agreements have the effect of reducing the number of independent actions entered into by their members.

## B. Evidence of internal competition

### (a) *Price evidence*

- (199) the TACA parties claim that restrictions on internal competition have been significantly reduced in comparison with the TAA. They maintain that independent action, service contracts, unilateral action on service contracts, time/volume rates and independent action on time/volume rates are all evidence of internal or external competition. They also claim to compete on other elements, in particular in relation to service.

<sup>(65)</sup> The owner of a liner vessel is usually readily identifiable from the name of the vessel because of the practice of adopting names including the name of the owner or other means of identifying the owner: e.g. Atlantic Conveyor (ACL), Neptune Jade (NOL), MSC Pamela (MSC), etc.

<sup>(66)</sup> Affidavit of Karen V. Gregory, Fact finding investigation No 21 — Activities of the transatlantic agreement and its members, dated 20 October 1994.

- (200) The TACA parties argue that the fact that some goods travel at service contract prices and that some goods travel at discounts from tariff rates are proof that 'there is significant internal price competition between the TACA parties'<sup>(67)</sup>. The TACA parties claim that 'an absence of competitive pressures within the conference would mean that the TACA parties would have no incentive to carry cargo at anything other than TACA class tariff rates'<sup>(68)</sup>.
- (201) It is unclear what economic argument the TACA parties are here putting forward. In any event, the Commission does not accept that the fact that different shippers are charged different prices is evidence of competition. The mere fact that there are prices other than laid down in the tariff is no more evidence of the existence of competition than it is of the absence of competition.
- (202) Second, the fact that certain customers are either unwilling or unable to pay a cartel's target price is not evidence of internal competition but may be evidence that the target price is set too high to serve to maximise profits. In those circumstances, a cartel unable to discriminate as between customers would lower the cartel price to a level at which it was profit maximising. However, as will be seen from the discussion below, the TACA parties are able to discriminate as between customers.
- shippers pay different prices and that those differences do not always reflect cost differences. Further pricing mechanisms, such as discounts from tariff rates and service contract prices, are no more than an elaboration of an already elaborate pricing system.
- (205) The fundamental requirement for the TACA's system of discriminatory pricing is that different shippers have different price elasticities of demand: the TACA parties aim to charge what each different shipper will bear. Each price is set so that its percentage deviation from marginal cost is inversely proportional to the item's price elasticity of demand.
- (206) Price discrimination is profitable because it allows a firm to enhance revenues without increasing costs. There are three major categories of price discrimination: first, second and third degree. Under first degree price discrimination, a customer pays a specific price for a specific unit or service and a different price for subsequent units or services.
- (207) Second-degree price discrimination involves setting prices on the basis of the quantity purchased. This form of discrimination is practised by the TACA parties in the form of time/volume rates and service contracts.

#### *Price discrimination*

- (203) The first point to observe is that the purpose of the TACA's pricing strategy is to ensure profit maximisation: this is the basic objective of every pricing strategy and is achieved by capturing consumer surplus and converting it into additional profit for the firm. The establishment of the tariff is a means to this end and not the end in itself.
- (204) To better understand this point, it is necessary to understand that the tariff is the embodiment of a pricing policy based on discrimination as between customers. That is to say that different
- (208) The third form of price discrimination, third degree price discrimination, is qualitatively different from the first two types. It results when a firm separates its customers into several classes and sets a different prices for each customer class. The TACA maritime tariff establishes 2 080 different classes of customer. These classes are divided on the basis described in the following paragraphs.
- (209) Each commodity shipped with the TACA is given a headcode. Thus, for example, dairy products are found in the commodity index with headcode 0400. Likewise, fabrics have a headcode of 6000 and firearms 9300. The basic pricing mechanism of TACA is to place each of

<sup>(67)</sup> See reply to the statement of objections, paragraph 223.

<sup>(68)</sup> See reply to the statement of objections, paragraph 131.

these commodities into one of 26 classes for each of which there is a basic price established by the TACA parties.

(210) This third form of price discrimination also allows the TACA parties to discriminate between shippers by adjusting the headcode attributed to the goods of a particular shipper. For example, the standard headcode for bibulous paper is 4803: the tariff class for the shipment of such goods from USA gulf to continent is 14. Similarly, the standard headcode for kraft linerboard is 4808 and the class for the same route is also 14. However, in service contract 96-EC3 ([business secrets omitted]), the headcodes for bibulous paper and kraft linerboard are both given as 4804 for which the relevant class for a voyage from USA gulf to continent is 8. In terms of 1998 tariff rates, the difference in price resulting from adjusting the headcode in such a way amounts to a price per feu of USD 1 535 instead of USD 1 985, a difference of nearly 25 %.

(211) Evidence of the reason for which such adjustments are made is contained in a memorandum from the TACA secretariat to the TACA parties dated 12 October 1995, 'It was also pointed out that TLI (tariff line item) class adjustments in the tariff had been used *selectively* in previous years to *maintain a balanced trading climate*' (emphasis added).

(212) The third form of price discrimination is also readily recognisable in the independent actions sometimes undertaken by TACA parties which are limited in time (say, 30 days), volume and port coverage. They are in fact one-off pricing strategies aimed at capturing specific parcels of goods from a specific shipper and represent the equivalent of a spot market purchase. The purpose of such discrimination may be to prevent the goods travelling with a non-conference carrier or, in certain trades, as non-containerised cargo.

(213) However, the class into which the commodity is placed (and thus the basic price payable) is not standard. First, a commodity may be placed in

different classes depending on whether it is being shipped eastbound or westbound. Second, the class into which the commodity is placed differs according to its origin and destination. Commodities shipped from Europe are divided into five categories: Continent, UK, Denmark, Sweden/Norway/Finland, Poland. Goods shipped from the USA are divided into 16 categories: north USA to continent, south USA to continent, gulf USA to continent, Pacific USA to continent, and so on.

#### *Independent action*

(214) To the extent that independent action may be regarded as evidence of competition, there are a number of comments to be made.

(215) First, independent action may be exercised for very short periods. In such cases the independent action resembles a spot market price where the customer is unable to rely on the carrier's having capacity available to ship his goods and where he is therefore offered a lower price. This is another form of price discrimination and could be compared to the stand-by prices offered by most airlines.

(216) Secondly, there is evidence that short-term independent actions may be used as a stop-gap measure while service contract negotiations are taking place<sup>(69)</sup>.

(217) Thirdly, it is clear that many of the independent actions undertaken by the TACA parties are not in response to internal competition but are legitimate responses to external competition. For example, five lines exercised independent action in 1996 with respect to westbound travelling peanuts. Peanuts are typical of the kind of product that needs to travel in bulk or in ventilated or moisture-controlled containers in the case of peanuts, this is due to the deadly

<sup>(69)</sup> For example on 29 December 1994, Hanjin wrote to the TACA secretariat in the following terms: 'This [IA] is being taken until S/C is concluded'.

toxins they produce under certain circumstances. Since such containers have only recently become available, peanuts appear to be one of the kind of product described above (see recitals (66) to (71)) which are in the process of becoming a product carried in containers but in respect of which there is still some residual competition from bulk carriers.

- (218) A similar product to peanuts in terms of the need for ventilation and the transformation from carriage in bulk to containerised transport is coffee. In 1996, 14 TACA parties exercised joint independent action with respect to the westbound carriage of green decaffeinated coffee from continental Europe.

- (219) There are also other products where the widespread exercise of independent action by the TACA parties suggests that those actions were intended to meet external as opposed to internal competition. For example, in 1996 eight TACA parties exercised independent action with respect to paper carried westbound from the UK and nine with respect to crispbread carried westbound from the continent and Sweden.

- (220) Finally, in order to put the extent of independent action practised by the TACA parties into perspective, Table 5 gives comparative figures for independent actions undertaken by those TACA parties which are also members of the Asia North America Eastbound Rate Agreement and the Transpacific Westbound Rate Agreement.

Table 5

## Comparison of independent actions between transatlantic and transpacific

	Transatlantic			Transpacific		
	1994	1995	1996	1994	1995	1996
Sea-Land	14	17	61	684	1 177	1 429
Maersk	7	9	45	1 460	1 702	1 536
Nedlloyd <sup>(1)</sup>	5	13	44	0	189	502
P&O <sup>(2)</sup>	7	19	66	0	0	145
OOCL	13	34	78	1 080	1 812	3 514
Hapag Lloyd	10	25	64	575	671	14 990
NOL	6	19	10	891	541	1 340
NYK	1	0	8	1 091	827	1 372

<sup>(1)</sup> Nedlloyd joined ANERA & TWRA in 1995.

<sup>(2)</sup> P&O joined ANERA in April 1996.

- (221) As these figures show, even allowing for the fact that the transpacific trade is larger than the transatlantic trade, the number of independent actions exercised on the northern Europe trade by those TACA parties which are also members of transpacific conferences is comparatively insignificant.

- (222) In the reply to the Statement of Objections, the TACA parties argued that 'In any event, an analysis of the significance of independent rate action within a conference should take account not only of the number of individual-rate actions, but also of the total volume of cargo lifted at those rates...'. This statement flatly

contradicts the views of the TACA secretariat stated in a briefing paper dated 15 February 1996 that 'the problem is not so much the number of IA/ISC and teu coverage, but rather the commodity coverage, structure and targeted market segments'. The TACA parties have put forward no arguments on the basis of commodity coverage, structure or targeted market segment.

(b) *Other evidence of internal competition*

*The prevalence of service contracts*

(223) The TACA parties have claimed that the fact that many of their customers have entered into service contracts is evidence of internal competition, since service contracts contain a price which is lower than the regular tariff rate for the same goods (although it may not be too dissimilar from the tariff time/volume rate for those goods).

(224) In contrast to the possibilities which exist in relation to independent action and individual service contracts, it is clear that there is no internal competition as to price between those TACA parties which are party to a joint service contract. Moreover, from the carrier's point of view, there are considerable benefits from entering into service contracts with shippers which offset the fact that the service contract price is lower than the tariff rate. First, service contracts are usually for one or two years. Given the prevalence of service contracts on the transatlantic trades (some 60 % of all TACA's carryings are made under service contracts), this relatively long-term arrangement helps the lines to plan their capacity requirements and guarantees them a stable revenue flow.

(225) The second principal benefit of service contracts, from the carrier's point of view, is that, although not as effective a barrier to entry as a loyalty (or exclusive) arrangement, they act as a highly effective device for deterring entry<sup>(70)</sup>.

<sup>(70)</sup> See Unctad interim report on restrictive business practices, New York 1971 and 'Excluding capacity constrained entrants through exclusive dealing: theory and an application to ocean shipping', Jong-Say Yong, The journal of industrial economics, June 1996.

(226) The conditions for this effect are easily met in the case of service contracts. First, there is a capacity asymmetry between the incumbent and the potential new entrants together with a minimum scale of production. Second, TACA service contracts contain a liquidated damages clauses for underperformance of the contract by the shipper. The level of the liquidated damages has been set by the TACA parties at USD 250 per teu which is an amount greater than the shipper can expect to gain by breaking the contract and switching to the new entrant.

(227) Thus, liquidated damages clauses for underperformance are the equivalent to customer switching costs, the effect of which is universally recognised as an barrier to entry. For shippers acquiring services under the tariff, there are no equivalent switching costs, although there may be some search costs.

(228) Accordingly, it is apparent that far from being evidence of effective internal competition, the existence of service contracts is perfectly consistent with the profit maximising behaviour of an undertaking with market power.

(229) Evidence of the value to a new entrant of being a party to service contracts may be found in a letter from Hanjin to TACA written on 19 August 1994 in anticipation of entering the transatlantic trade: *'In preparation for our commercial activity, we would request access to all relevant documents and statistics by TACA (including tariff, service contracts, portcall, lifting and performance) ...'*.

(230) The minutes of a meeting of the TACA senior executives (TACA PWSC meeting No 95/8) report the the executive director advised that 'Hyundai had sought inclusion in 1995 service contracts, in which three or more members currently participate eastbound, three or more members currently participate westbound, and three or more members currently participate in

joint eastbound/westbound service contracts, at the rate levels applicable to the majority of members in such contracts. In this regard, he confirmed that steps were in hand to so notify service contract shipper parties of such inclusion effective coincidentally with Hyundai's first transatlantic sailings'.

#### *Switching between carriers*

- (231) Table 26 of the reply of the Statement of Objections is described as being a 'comparison of the share of individual shippers'. It purports to be evidence of competition as between the TACA parties in relation to cargo to be carried under a TACA service contract. In particular, it purports to show that even where an individual shipper has a TACA service contract, it does not use the same carrier or carriers each year but 'allocate(s) ist cargoes between the participating carriers in accordance with ist commercial judgment based on an evaluation of the competitive offerings of the various carriers' <sup>(71)</sup>.
- (232) Under a TACA service contract, there is no question of competition on price once the contract has been entered into: the price has already been agreed. What remains is the possibility of competition on service quality, the main elements of which are, for a maritime transport operation, the reliability of the service and the convenience of the schedule. Where a carrier is party to an agreement such as the VSA, such forms of competition are excluded because the parties to such an agreement share vessels and operate to a joint schedule.
- (233) Therefore, to demonstrate the existence of internal competition it would be necessary to show that individual shippers moved their cargoes between different groupings of carriers and not simply within groupings. Annex V shows that *even on the basis of the shippers selected by the TACA parties* the shares enjoyed by the groupings of carriers have remained largely stable and that, except in few cases, the switching that has taken place has not been between groupings.

#### *Fluctuations in market shares*

- (234) The TACA parties' reply to the Statement of Objections, paragraph 222 claims that 'It is clear from Table 37 that there have been significant movements in the respective market shares of the TACA parties. These movements unequivocally indicate competition between the TACA parties'.
- (235) However, the figures provided by the TACA parties in Table 37 ('% increase/decrease: highest to lowest point during period') do not give a fair picture of the movement in shares a between the TACA parties.
- (236) For example, the TACA parties claim that the share of NOL varied by 33,3 % during the reference period. To put this figure in context, it should be noted that NOL carried 935 containers in 1994, 1 169 in 1995 and 217 in the first quarter of 1996. Given that the combined carryings of the TACA parties on the direct trades were over 1,3 million in each of 1994 and 1995, it is insignificant that NOL carried 234 more containers in 1995 than in 1994. It is certainly not unequivocal evidence of competition between the TACA parties.
- (237) Furthermore, the evidence of movements by quarter fails to take into account the fact that, liner shipping being a demand-driven service industry, each line will be susceptible to fluctuations in the demands of its individual client base which result from seasonal and other variations in the demand for that shipper's products. Thus, a particular shipper which has a preference for a particular carrier may have a much greater demand for liner shipping services in certain quarters. Examples of such variations in demand are for drink products in the summer and consumer goods in the run-up to Christmas.
- (238) A true picture is obtained by looking at the overall annual fluctuations in shares a against the other TACA parties. This information is set out in Table 6.

<sup>(71)</sup> See reply to the statement of objections, paragraph 155.



Table 6

## Individual shares of TACA liftings on direct trades 1994 to 1996

(%)

Carrier	1994	1995	1996
ACL	7	6	6
DSR/Cho Yang	11	10	10
Hanjin	0	1	1
Hapag Lloyd	13	13	12
Maersk	12	12	12
MSC	7	8	8
Nedlloyd	6	6	7
NOL	0	0	0
NYK	2	1	1
OOCL	7	7	8
P&O	11	10	10
POL	6	6	5
Sea-Land	17	17	18
TMM	1	1	1
Tecomar	1	0	1

Source: Annex 5 of the reply to the statement of objections and PIERS.

Note: Hyundai and its carryings are excluded as it was not present on the transatlantic trade in 1994.

(239) The attitude to fluctuations in market share may be seen from a TACA briefing paper dated 15 February 1996 in which the TACA chairman is recommended by the TACA secretariat to 'Encourage and persuade all carriers to collectively find a way to enable Hanjin to build up a market share consistent with its slot capacity in the trade, which does not have a negative knock-on effect'. In any event it can be seen from Table 6 that the relative shares of the TACA parties have remained remarkably stable.

#### Competition on quality

(240) In the TAA reply (of 17 March 1994) to the Article 85 issues of the Statement of Objections dated 10 December 1993, the TAA parties stated that:

'3.10. Each TAA party operates as a separate commercial entity with a separate marketing organisation and distinct reputation in the marketplace.

3.11. Annex 6 sets out examples from the shipping press of advertisements for each of the TAA parties. These advertisements demonstrate that each TAA party presents itself on the market as a separate marketing organisation and that the TAA parties compete against each other and against others also on quality, namely with regard to the nature and range of the services offered to shippers, including the

frequency and reliability of service, ports served, transit times, intermodal transportation, specialist equipment, maintenance and condition of containers, documentation, customer support, etc.'.

- (241) These claims have disappeared from the reply to the TACA Statement of Objections (see Chapter 6, 'Non-price competition'). Instead the TACA parties seek to confuse two different issues. The first is whether the TACA parties compete against each other in respect of the quality of the services they provide at tariff rates. The second is whether TACA service contracts contain any individually negotiated service elements.
- (242) As discussed in recital (127), few TACA service contracts contain individually tailored provisions relating to the type of service offered. Under tariff arrangements, there are no individually tailored provisions relating to the type of service offered. This is not to say that the TACA parties do not attempt to differentiate their products by use of advertising in journals or by providing electronic schedule information over the Internet.

#### X. EXTERNAL COMPETITION

- (243) The TACA parties consider that they face actual external competition from other operators of

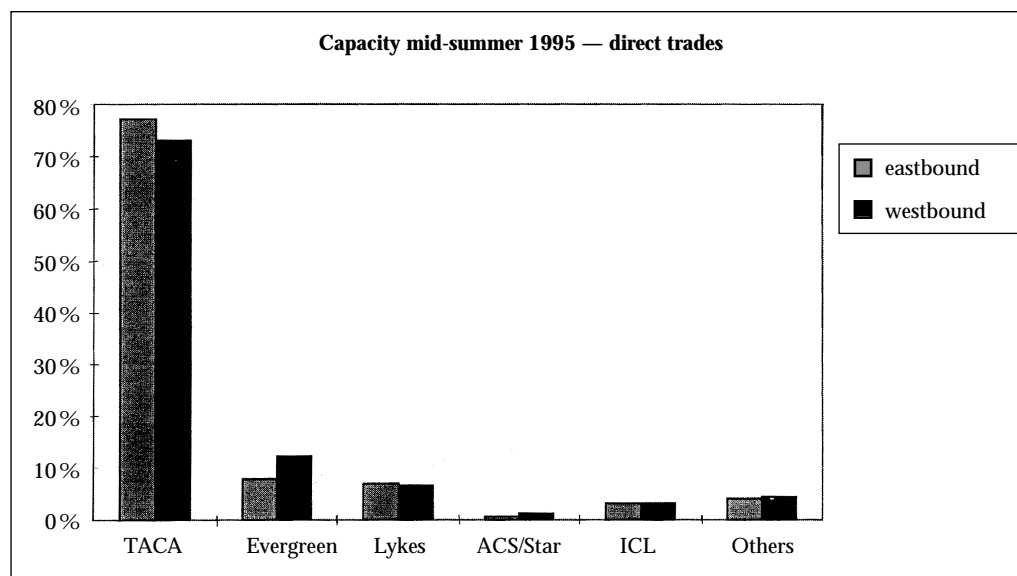
containerised liner services on the direct trades and operators of containerised liner services on alternative routes. The issues of competition of bulk and reefer shipping and air transport have been considered in recitals (66) to (75).

#### A. Other operators of Containerised Liner Services on the Direct Trades

- (244) The TACA parties claim that they face five main competitors on the direct transatlantic trades: Evergreen (10,2 %), Lykes (5,7 %), Atlantic Cargo Service (3,2 %), Independent Container Line (2,7 %) and Carol Line (1,0 %) (1995 market shares in brackets). The Commission describes the competitive position of each of these carriers below. In addition to these sources of competition, in 1998 a number of new operators have entered the transatlantic trade (Mitsui OSK and APL), although without introducing any new capacity. However, as a general point, it is necessary first to examine whether each of these carriers has sufficient capacity to win significant market share from the TACA parties.

- (245) Thus Table 7 provides a comparison of capacity on the direct northern Europe/USA trades as at mid-summer 1995<sup>(72)</sup>.

Table 7



<sup>(72)</sup> Drewry, *Global container markets*, page 85.

- (246) The importance of capacity constraints on direct competitors to the TACA lies in the fact that in order to wrest significant volumes away from the TACA parties it would be necessary to introduce new capacity. Further discussion of the costs of introducing new capacity are considered at paragraphs (288) to (299).

### *Evergreen*

- (247) Table 8 sets out Evergreen's share of the direct northern Europe/USA trades for 1993, 1994, 1995 and the first quarter of 1996. These figures give an overall share of direct trade in 1995 of 11 % eastbound and 14 % westbound.

Table 8

Evergreen: share of direct trade 1993 to 1996

(%)

	1993	1994	1995	1996
NE to US EC	15	12	14	13
NE to US GC	0	0	1	2
NE to US WC	21	12	16	15
US EC to NE	12	14	14	14
US GC to NE	0	0	2	4
US WC to NE	13	16	15	15

Source: PIERs.

- (248) For the three years 1993 to 1995 the TACA parties had over 70 % of the available capacity on the direct northern Europe/USA trades (76 %, 74 %, 75 %) <sup>(73)</sup>. Over the same period, Evergreen has had a share of capacity of 8 % eastbound and 12 % westbound: the difference being due to the fact that Evergreen operates its round the world service using vessels of different sizes depending on the direction in which they are travelling.

market means that, in the absence of significant overcapacity, independent lines such as Evergreen, are more likely to follow the price rises of the market leader than to attempt to gain market share at the market leader's expense. In Evergreen's case this is demonstrated by the fact that Evergreen has announced identical price rises to TACA for 1996 <sup>(74)</sup>.

- (249) In any event, the inability to store capacity and the time lag in bringing new capacity to the

<sup>(74)</sup> On 1 December 1995, Evergreen announced price increases for its transatlantic eastbound to Europe trades of USD 110 per teu and USD 140 per feu to take effect from 1 January 1996. Compare this with the TACA 1996 business plan at Annex III.

<sup>(73)</sup> Source: Lloyds Shipping Economist.

(250) The fact that Evergreen, the largest of the independent lines, was a party to the Eurocorde Discussion Agreement (EDA) and is a member of the Southern Europe America Conference (SEAC) suggests that the mutual interests arising from these networks limit the true extent of this competition. Evergreen is currently a party to the Transpacific Stabilisation Agreement and was a party to the Europe Asia Trades Agreement until it was discontinued in September 1997. The Transpacific Stabilisation Agreement and the Europe Asia Trades Agreement were both capacity non-utilisation agreements.

(251) Furthermore, the competitive pressure from Evergreen is limited by the fact that given current high capacity-utilisation levels in the transatlantic trade, Evergreen could only compete to win market share by introducing new vessels.

#### *Lykes*

(252) The second significant non-TACA operator is Lykes. Lykes filed for bankruptcy protection under American law on 11 October 1995. This situation was reportedly brought about owing to a combination of poor management and the fact that its revenues were in dollars and its loan commitments in yen. This latter seems to have proved harmful given the major change in relative values between the two currencies. These circumstances seem highly likely to inhibit the range of commercial freedom of Lykes on the relevant market. Lykes has recently been bought by Canada Maritime.

#### *Atlantic Cargo Service*

(253) Atlantic Cargo Service (Atlanticargo) operates a weekly service between northern Europe and the USA gulf coast. Unlike the other direct competitors of the TACA parties, Atlanticargo operates vessels which carry mainly bulk products but which also carry a limited number of containers. The ability of operators of such vessels to compete with the operators of fully containerised vessels is discussed in recitals (300) to (306).

#### *Independent Container Line*

(254) Independent Container Line (ICL) currently operates four vessels, all of which are operated on a fixed-day weekly service between Antwerp and the USA ports of Chester and Richmond. This service was upgraded from a nine-day service using three vessels in April 1995 thereby increasing ICL's annualised total capacity from some 80 000 teu to some 110 000 teu.

(255) ICL's market share was 2,5 % in 1994 and 2,7 % in 1995. According to Drewry, it had 2,6 % of available capacity in 1994 and 3,1 % in 1995. On the basis of available capacity, its maximum potential market share in 1995 would have been 4,3 % even assuming that none of its capacity was unusable through the carriage of empty containers.

(256) In order to increase market share beyond this relatively low level, ICL would need to introduce new capacity. Given the need to offer shippers a fixed-day weekly service, this would require the introduction of four similarly sized vessels. As ICL possesses no other vessels than the ones currently operated on the Antwerp to Chester and Richmond service, these would have to be bought or chartered in. The first year fixed costs of establishing such a new service would be in the region of USD 20 to 30 million.

(257) Furthermore, there is reason to believe that the trade between Antwerp and the ports of Chester and Richmond would not be sufficient to sustain a further string of vessels. Both USA ports are considered to be niche ports and ICL currently accounts for a high proportion of their containerised trade.

(258) Thus, it seems reasonable to expect that, given its lack of currently available capacity and the difficulty of increasing capacity incrementally, coupled with the need to operate to new ports, ICL is unlikely to adopt an aggressive pricing strategy *vis-à-vis* the TACA parties.

*Carol Line*

(259) The TACA parties claim<sup>(75)</sup> that Carol Line is one of the main non-TACA operators on the direct transatlantic trades. According to Piers, in 1995 Carol Line carried 2,8 % of containerised cargo from northern Europe to the USA east coast and was not present on any other northern Europe/USA trade (including the USA east coast to northern Europe trade).

(260) The TACA parties fail to mention that Carol Line is in fact a consortium which has been called the 'New Caribbean Service' since 1993 and which operates between northern Europe and the Caribbean, Central and South American east coast ports. One of its ports of call is Ponce in Puerto Rico: Puerto Rico is a self-governing commonwealth in association with the United States whose Head of State is the President of the USA<sup>(76)</sup>.

(261) The TACA parties also fail to mention that two of the TACA parties, Hapag Lloyd and P&ONedlloyd have a 43 % share in the activities of the 'New Caribbean Service'. The 'New Caribbean Service' members are also members of the two price-fixing arrangements operating in the geographical areas falling within the scope of the 'New Caribbean Service'. These are the Association of West Indies Transatlantic Steam Ship Lines (WITASS) and the New Caribbean Service Rate Agreement (NCSRA). The purpose of the NCSRA is to comply with the requirement of the American Shipping Act 1984 that in order to qualify for antitrust exemption, price-fixing agreements in the liner shipping sector must be restricted to goods entering or leaving the USA through USA ports.

<sup>(75)</sup> See reply to the statement of objections, paragraph 31.

<sup>(76)</sup> The reason for which figures for Puerto Rico are included with those of the USA east coast may be related to the fact that Puerto Rico is included with the Seventh District Circuit of the United States Federal Court along with Massachusetts.

(262) Thus, in so far as Puerto Rico may be considered as falling within the relevant market<sup>(77)</sup>, the Commission does not consider that Carol Line (or more accurately the 'New Caribbean Service') can be said to be exercising any significant competitive pressure on the TACA parties. This arises from the fact that its two biggest members are both members of TACA and the fact that the 'New Caribbean Service' is itself subject to two price-fixing agreements.

*Cosco/K Line/Yangming*

(263) Cosco entered the USA northern Europe trade on 16 February 1997 under consortium arrangements with K Line and Yangming, both of which were also new entrants to the trade. Under the arrangements, Cosco provides two vessels and the other lines one each which are operated on a fixed-day weekly basis. Under the arrangements, Cosco controls 900 teu per week in each direction and the other two lines 450 teu each<sup>(78)</sup>.

(264) On the basis of the capacity on the trade in mid-1995, this new capacity would have given Cosco 2,8 % share of eastbound capacity and 2,7 % of westbound capacity on the direct trades and 2,3 % and 2,2 % respectively on the trades including Canadian trades. The other lines would each have had exactly half this capacity.

**B. Operators of containerised liner services on alternative routes***Canada*

(265) Cargo originating in or destined for the mid-west may travel to and from northern

<sup>(77)</sup> The Commission did not argue in the administrative proceedings leading to the adoption of this Decision that Puerto Rico does not form part of the relevant geographic market in this case since it was not until the stage of the reply to the statement of objections that the TACA parties appeared to put forward this claim. In the present case, this question does not seem to raise any significant issues although it is possible that in another case dealing with, for example liner shipping services in the Caribbean, it would be necessary to examine in detail whether or not Puerto Rico falls within the same geographic market as the Continental USA States.

<sup>(78)</sup> See Economic analysis of China Ocean Shipping Co. 1994-1997, Bureau of Economics and Agreement Analysis, Federal Maritime Commission, June 1997.

Europe either by USA ports or Canadian ports (principally Montreal and Halifax), the latter being known as the Canadian Gateway. Canadian Gateway cargo falls neither within the scope of American antitrust exemptions nor Canadian antitrust exemptions (although under Community law it receives the same treatment as direct cargo). Carriers are not therefore lawfully permitted to fix either maritime or inland prices for the carriage of such cargo, which, accordingly falls outside the scope of the Canadian Conferences.

(266) For certain shippers, the Canadian Gateway may be substitutable for USA east coast ports. However, the effect of potential competition through the Canadian Gateway is limited by the fact that OOCL, Hapag Lloyd, ACL and POL (all TACA parties) are members of the Canadian conferences. The only non-TACA members are CAST and CanMar (which form part of the same group of companies) and CanMar is in a joint venture with OOCL on that trade<sup>(79)</sup>. Hapag Lloyd charts space from OOCL and CanMar on its (SLCS) service.

(267) Maersk, another TACA party, also operates through the Canadian Gateway but is not a member of the Canadian conferences. In September 1997, Maersk and Sea-Land commenced a dedicated northern Europe/Canada service using three relatively small chartered vessels.

(268) Competitive conditions on the northern Europe/Canada trades have been a matter of concern to the Canadian competition authorities. The following is an extract from the Notice of Application dated 19 December 1996 before the Canadian Competition Tribunal concerning the acquisition of Cast by Canadian Pacific:

<sup>(79)</sup> See Commission press release IP/96/400 of 8 May 1996 announcing the Commission's decision not to oppose exemption of the St Lawrence coordinated service (SLCS), a consortium agreement relating to a joint service operated by CanMar and OOCL between Montreal and ports in northern Europe.

### *'Conclusion*

129. The Director [of Investigation and Research of the Canadian Competition Bureau] submits that the merger [between CP and Cast] will prevent or lessen, or is likely to prevent or lessen competition substantially in the market comprised of non-refrigerated containerised transportation services between Ontario and Quebec and northern Continental Europe and the United Kingdom. Due to reduced service characteristics and switching costs, bulk and break-bulk shipping services are not acceptable substitutes to containerised transportation services.

130. The Director submits that the merger confers market power to Canada Maritime by providing it with a market share of approximately 63 % in a market that was already highly concentrated and with respect to which there are significant barriers to entry. The market share of the SLCS increases to approximately 85 % as a result of the merger. The existence of the SLCS enhances Canada Maritime's ability to exercise the market power conferred on it as a result of the merger'.

(269) The services of Hapag Lloyd, ACL and POL are not separate services since they call at Halifax as their first or last port of call when serving the USA east coast ports. Thus, the same slots are used both for direct shipments and shipments via the Gateway. The Commission considers that it is unrealistic to believe that one line will compete against itself to sell the same slot depending on the inland route of the cargo. Although some competition may exist, that competition is likely to be diminished because some of the TACA parties also have a significant influence on competitive conditions on the trades between northern Europe and Canada.

(270) Even if the services were distinct, this would not demonstrate that those services compete with each other under normal market conditions. The fact that an individual line may

charge a different price for a cargo going from, say, Birmingham to Chicago depending on whether or not the cargo goes through the Canadian Gateway does not prove the existence of competition between the services, since the carrier may well have other reasons for having different price levels. It is a question of the cross-price elasticity between the two services and not the level of price. The TACA parties have provided no evidence of the degree of cross-price elasticity between the two routes.

- (271) Evidence of the influence of the TACA over the activities of the Canadian conferences is evidenced in the extracts of correspondence (emphasis added) from the Canadian conference secretariat to members of the Joint Inland Committee of the Canadian Conferences. This correspondence also demonstrates that the members of the Canadian conferences have detailed knowledge of the pricing practices of the TACA parties. The references to 'an adjacent trade' are undoubtedly references to the TACA.

'19/5/93 Further to our fax yesterday a line has asked to add DIC/DOC to the agenda for the meeting on 25 May [1993] as follows — Quote Re: application of DIC/DOC — Coatbridge suggest to discuss the application of surcharges/additional in connection with DIC/DOC ex Coatbridge on next inland committee meeting. HL [Hapag Lloyd] proposal is to apply surcharges/additional on the original grids only and to exempt DIC/DOC from any additional which would be in line with TAA procedures. PLS add to agenda for further discussion.

7/6/93 By a 4:1 majority the inland committee have agreed that in line with an adjacent trade the 10 % hazardous surcharge should apply only on the base rate, and not the all in rate including DIC/DOC of CD 120/20' and CD 175/40'.

9/5/94 The joint inland committee have agreed in line with an adjacent trade that all references to barge terminals should be deleted from the tariff and that where more than one rate is shown for a given postal code the lowest rate available should be tariffed.

7/11/95 Further to our faxes of 31 October and 3 November we have now obtained revised rates as set out in the second draft of page 23-6 attached. These have been checked with the lines in an adjacent trade, and now conform to their tariff.

26/2/96 Whilst in principle the inland committee follow the rates in another trade, in this case, three lines felt that to do so would result in substantial losses for their lines.

26/2/96 Understand that in an adjacent trade agreement has been reached to increase the current [French road] rates by 2 % across the board, subject to final agreement on an implementation date. We would therefore propose that our rates take the same increase, subject to the agreement of the inland committee, and subsequently of the owners.

29/2/96 We refer to our e-mail of 26, and the proposal to increase the rates by 2 % was declined by owners yesterday. This followed similar action in an adjacent trade'.

- (272) Finally, it should be noted that in October 1995, the Continental Canadian Westbound

Freight Conference and the Canadian North Atlantic Westbound Freight Conference<sup>(80)</sup> announced identical price rises for 1996 to those announced by the TACA parties (see Annex III).

- (273) For all the above reasons, the Commission considers that the market share of the TACA parties for services provided through the Canadian Gateway should be aggregated with the market share of the TACA parties for direct services and not treated as a distinct competitor.

#### *Mediterranean*

- (274) For the reasons discussed above in recitals (76) to (83), the Commission does not consider Mediterranean services to fall within the relevant market.

#### XI. CONCLUSIONS ON THE STATE OF ACTUAL COMPETITION ON THE TRANSATLANTIC ROUTES

- (275) The evidence that the market share of the TACA parties have remained stable during 1994, 1995 and 1996, despite regular, albeit modest, price increases, suggests that actual external competition is limited. This cannot be explained by a claim that rates are still low since there have been new entrants to the transatlantic trade, in particular as members of the TAA/TACA. Furthermore, the relative stability of the aggregate market share of the TACA parties, despite the increase in the numbers of the parties to the TACA, is explained by the fact that, with the exception of TMM and Tecomar, the new TACA parties are new entrants to the trade and so did not have an existing clientele. It is also explained by the fact that those new entrants have entered the market without actually introducing any capacity.

<sup>(80)</sup> Members: ACL, Canada Maritime/Cast, Hapag Lloyd, OOCL and POL. These tariffs do not include Canadian Gateway cargo. The following price increases were announced with effect from 1 January 1996, 'All freight rates in [their] tariffs will be increased by USD 110 per teu and USD 160 per feu container in respect of general cargo, and the tariff premium for specialised equipment (open top and flat rack containers) will be increased to USD 400 per teu and USD 500 per feu'.

#### XII. POTENTIAL COMPETITION: OTHER OPERATORS OF LINER SERVICES

- (276) The TACA parties have argued that potential competition is a major factor in the transatlantic trade. The sources of such competition are said to be carriers already operating on the transatlantic trade, who are able without significant expense or technical difficulty to increase the number of containers they carry, and the cross-entry by container operators not present on the transatlantic trade.
- (277) Before discussing each of these in turn, it is necessary to consider as a preliminary issue the experts' report put forward as evidence by the TACA parties.

##### A. Dynamar report

- (278) In view of the reliance placed by the TACA parties on a report attached to the reply to the Statement of Objections, on 18 September 1997 the Commission addressed a formal request for information in the following terms:

'A report prepared by Dynamar dated 30 August 1996 is attached to the reply as Annex 10. Please provide full details of all instructions given to Dynamar by or on behalf of the TACA parties concerning the preparation of this report. In so far as such instructions are to be found in correspondence or other documents concerning the preparation of, previous reports by Dynamar, please also provide copies of these documents'.

- (279) In response the TACA parties claimed legal professional privilege in respect of 'instructions given to an expert witness by or on behalf of a party to administrative or judicial proceedings'. This claim was repeated at the oral hearing held on 6 May 1996.
- (280) In the Commission's view, it is not established that under Community law legal professional privilege attaches to reports prepared other than under a client/attorney relationship. Even if such reports were protected under the doctrine of privilege, the Commission would not accept that instructions given to the expert witness



should be treated as privileged where a report prepared by that expert is relied on by a defendant party.

they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned;’.

- (281) In this context, the Commission notes that its own practice in this respect has been recently clarified:

*‘Special note concerning studies*

It should be stressed that studies commissioned in connection with proceedings or for a specific file, whether used directly or indirectly in the proceedings, must be made accessible irrespective of their intrinsic value. Access must be given not only to the results of a study (reports, statistics, etc.) but also to the Commission’s correspondence with the contractor, the tender specifications and the methodology of the study. However, correspondence relating to the financial aspects of a study and concerning the contractor’s references remain confidential in the interests of the latter<sup>(81)</sup>.

- (282) In the view of the Commission, the purpose of making available this additional information is to enable all parties to assess the reliability of conclusions drawn by an expert and, in the absence of such additional information, it is difficult to assess the probative value of any report. In the present case, the TACA parties have not sought to explain their refusal to supply the information requested and, in those circumstances, one reasonable inference is that the conclusions of the report were coloured by the instructions given to the expert.

## B. Mobility of fleets

- (283) Regulation (EEC) No 4056/86 places particular emphasis on potential competition as a means of controlling the market power of liner conferences:

‘whereas the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences to constant competition which

- (284) It is generally accepted (see recital (365)) that on a major trade lane such as the North Atlantic, it is a tremendous competitive disadvantage for a carrier not to be able to offer a weekly, preferably fixed-day weekly, service.

- (285) Weekly services have become an essential part of the supply chain from manufacturer to ultimate consumer. Longer intervals between services can lead to increased costs for shippers, in particular because of the need to hold increased stocks at both ends of the supply chain. This can be even more expensive in the case of perishable goods. Thus, not only is the supply chain slowed down, leading to delays in payment for goods manufactured, but there are also storage costs and the fact that goods may lose value as a result of delayed delivery.

- (286) The reason why a fixed-day weekly service is preferred to a 10, 12 or even four-day service, is that it enables shippers to plan ahead more easily without the need to check whether there will be a vessel available when necessary. This phenomenon is well-known to providers and consumers of regular transport services. Thus passengers, especially business passengers, expect airlines to provide a daily or even hourly service: train and ferry passengers expect to have services which are not only regular but predictable in the sense that the timetable is relatively simple to comprehend and remember.

## C. Cost of increasing capacity

- (287) Generally, the special features of transatlantic trade substantially reduce the likelihood of potential competition. Transatlantic trade is a high-volume trade and needs regular, high-capacity services. Lines need enough large, modern vessels, and must operate a weekly

<sup>(81)</sup> Commission notice on the internal rules of procedure for processing requests for access to the file in case pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ C 23, 23.1.1997, p. 3).

service, calling at a sufficient numbers of ports. It is estimated that the cost savings per slot are 30 % to 40 % for a 4 000 teu ship as against a 2 500 teu ship.

- (288) To operate a fixed-day weekly service calling at three or four ports in northern Europe and the same in the United States requires a string of five vessels of similar speed and capacity together with a complement of containers of three times the capacity of the string. The cost of introducing such a service would be in the region of USD 500 million plus the related on-shore costs of management and administration.

#### D. Container ship cross entry

- (289) The Commission's general observations on the mobility of fleets, and the contestability of liner shipping markets, are set out at recitals (350) to (357). Nevertheless, it is possible to demonstrate that in the case of the TACA, potential competition in the form of mobility of fleets is unlikely to be effective.

- (290) This situation arises from two facts: first, almost all of the major liner shipping companies are already present on the transatlantic trade (the ones that are not are discussed below) and secondly entry by smaller shipowners is unlikely.

'The days when ambitious and opportunistic entrepreneurs regularly set up small transatlantic operations, usually with chartered tonnage of less than 1 000 teu, have long since gone-such enterprise having been killed off by the remorseless and unforgiving economics of the market<sup>(82)</sup>'.

- (291) Furthermore, a chronology of TACA party membership shows that, until the introduction of the Cosco/KLine/Yangming service in 1997 (see recital (263)), every significant potential competitor that has entered the transatlantic

trade since the inception of the TAA has done so by joining the TAA/TACA<sup>(83)</sup>.

*Version I (28.8.1992) – 11 lines*

ACL

Hapag Lloyd

P&O

Nedlloyd

Sea-Land

Maersk

MSC

OOCL

POL

DSR/Senator

Cho Yang

*Version II (12.3.1993) – 12 lines*

NYK

*Version III (31.3.1993) – 13 lines*

NOL

*Version IV (7.4.1993) – 15 lines*

TMM

Tecomar

*Version V (26.8.1994) – 16 lines*

Hanjin

*Version VI (31.8.1995) – 17 lines*

Hyundai

- (292) On 30 January 1996, Olav Rakkenes, the Chairman of the TACA (who is also Chairman of ACL) wrote to Hanjin as follows:

<sup>(83)</sup> TMM and Tecomar had been present on the transatlantic trade but had not been conference members and, in any event, their carryings of full containers in, for example, the second quarter of 1995 represent less than 1 % and 2 % respectively of all TACA carryings.

<sup>(82)</sup> Drewry, *Global container markets*, p. 87.

‘As I have said to every line concerned trying to enter the market, please come and talk to me and we will do everything we can to help you succeed with that goal’.

relation to dual-rate tariffs and the elimination of competition, this has substantially the same effects as those described in the TAA decision, recitals (341), (342), and (343)<sup>(84)</sup>.

(293) It is especially significant that not one of the four Asian carriers which entered the trade between 1992 and 1996 (NYK, NOL, Hanjin and Hyundai) did so as an independent carrier operating in competition with the TACA parties. Furthermore, various arrangements with TACA parties have allowed each of these carriers to enter and obtain a foothold in the market without facing the competition normally to be expected in such circumstances. This indicates that entry to the transatlantic trades can be relatively easily done with the agreement of the TACA parties.

(294) In particular, Hanjin and Hyundai have been able to enter the market on a slot charter basis without having had to make any investment in vessels for the trade. The TAA/TACA had argued that these carriers were significant potential competitors to the TAA/TACA: in fact, the TAA has been able to ensure that they did not enter the transatlantic trade as independent lines but as parties to the TACA.

(295) This is not intended to suggest that entry to a particular trade on the basis of slot charter arrangements without putting actual tonnage in place is necessarily anti-competitive. The question here is whether any benefits of such cooperation are accompanied by changes in the competitive structure of the market such as the elimination of potential competition.

(296) This ability to absorb potential competitors has come about in part by the practice of the TACA offering shippers service contracts which contain a dual-rate price structure and by the fact that the majority of the TACA parties do not compete to participate in service contracts with NVOCCs (see recitals (150) and (151)). In

(297) There are two significant liner carriers which have recently entered the transatlantic trade but which have not become party to the TACA: American President Lines Ltd (APL) and Mitsui OSK Lines Ltd (Mitsui). Both are, however, linked with TACA carriers in other trades.

(298) APL and Mitsui are already in partnership on the transpacific trades with OOCL<sup>(85)</sup>. APL is a members of the TransPacific Westbound Rate Agreement, the TransPacific Conference of Japan, the Asia North America Eastbound Rate

<sup>(84)</sup> See footnote 7. Commission Decision 94/980/EC on the transatlantic agreement of 19 October 1994, OJ L 376, 21.12.1994, p. 1, recitals (341) to (343).

‘(341) The real purpose of the introduction of differentiated rates in a case such as that of the TAA is to bring independents inside the agreement: if they were not allowed to quote prices lower than those of the old conference members, these independents would continue as outsiders competing against the conference, especially in terms of price. The advantage to the old conference members is that this limits the activities of outsiders and thus the competition they offer. Such a system substantially reduces effective competition from outsiders, whose existence is the main safeguard for the block exemption given to liner conferences.

(342) This objective reveals the true nature of the TAA; it emerges clearly from various points already made here. Reference should be had to recital 117 et seq., which describes the recent history of the trade, the document summarising the conclusions of a meeting of all members of the TAA held in Geneva on 13 January 1992 (see footnote 70); and the speech by the President of Senator Lines, a member of the TAA, delivered shortly before the agreement entered into force.

(343) This type of agreement seeks to disguise as a conference what is really an agreement with outsiders, independents wishing to maintain price flexibility. This is not a genuine liner conference, but an agreement between a conference (i.e. the rate and contract committee members or “structured members”) and outsiders (i.e. the “unstructured members”: see recitals 133, to 144). Such agreements do not benefit from the block exemption granted to conventional conferences.’

<sup>(85)</sup> FMC Agreement 203-011468. APL/MOL/OOCL Asia-Pacific Alliance Agreement (‘A-Pac’).

Agreement and the Transpacific Stabilisation Agreement. Both APL and Mitsui OSK are members of the Far Eastern Freight Conference, a conference operating on the northern Europe/Far East trades to which the following TACA parties are also party: DSR, Hapag Lloyd, Maersk, NOL, NYK, OOCL, P&ONedlloyd and Sea-Land.

- (299) Finally, as discussed at recitals (355) and (356), the cost of withdrawing from transatlantic trade, with resultant damage to reputation and to competitive positions elsewhere, and lower prospects of returning to the trade, reduces the incentive to enter.

#### E. Competition from non-container vessels

- (300) The TACA parties have argued that they face potential competition from operators of non-container vessels which could adapt those vessels in order to carry containers or increase the numbers of containers carried. Their conclusion is that non-container operators on the relevant market are able immediately to increase their carrying capacity by some 200 000 teu, which is equivalent to about 15 % of the capacity of the TACA parties. In support of this claim, the TACA parties rely solely on the Dynamar report, the probative value of which is discussed in recitals (278) to (282).

- (301) In principle, any vessel can carry containers and the market share figures for the TACA parties given in recitals (85) and (86) include containers carried on non-fully containerised vessels. The effect of potential competition from operators of non-fully containerised vessels could only be material if both of the following two conditions were fulfilled. It would have to be shown, first, that suppliers of such services could economically compete with the TACA parties on even terms and, secondly, that customers regarded carriage on a non-fully containerised vessel as being functionally interchangeable with carriage on a fully containerised vessel.

- (302) In considering whether the first of these cumulative tests is fulfilled, it is essential to

note that the characteristics and performance of non-fully containerised vessels are significantly different from those of fully containerised vessels:

'It is crystal clear, and almost implicit in the terminology, that cellular containership capacity is more efficient and more productive than non-cellular space when it comes to carrying unitised (i.e. containerised) cargo, and hence of greater significance as far as the supply/demand balance is concerned. Each slot on a cellular vessel will provide more container carrying capacity in any given year than a slot on a non-cellular vessel, since the cellular ship:

— spends less time in port,

— usually possesses a much higher sea-speed,

— operates on regular liner schedules<sup>(86)</sup>.

While ro-ros may achieve 80 % or more of the productivity of a cellular vessel, a semi-containership or a con-bulker will be considerably less efficient on the grounds of both speed and cargo-handling time in port. An overall estimate of the relative productivity ratios for cellular and non-cellular capacity might reasonably be 2:1'<sup>(87)</sup>.

- (303) Apart from the performance characteristics which militate against supply-side conversion, there are a number of technical characteristics. The first of these is the additional expenditure required to carry containers on vessels which were not specifically built as container vessels. Such costs are both one-off in the sense that chains and fittings have to be purchased (according to Dynamar at a cost of some ECU 150 per slot) and variable in the sense that the cost of labour is higher for stowing containers on non-container vessels than on container

<sup>(86)</sup> Drewry, *Global container markets*, p. 69.

<sup>(87)</sup> Drewry, *Global container markets*, p. 71.

vessels. Account needs also to be taken of the additional port costs involved in carrying containers on such vessels due to slower stowing times and consequentially longer periods spent in port.

(304) The second reason for which the potential capacity of non-fully containerised vessels is less than the TACA parties assert is the fact that the operators of such vessels do not possess the same fleets of containers as do operators of fully containerised vessels. Typically, each of the TACA parties has three containers for every vessel slot it operates. Many operators of breakbulk services will own no containers at all. The significance of this is especially important given that 'the global box inventory has seldom, and certainly not for the last 10 years or more been sufficient to permit all the nominal containership capacity of the non-cellular fleet to be used'<sup>(88)</sup>. This situation is compounded by the fact that the operators of non-fully containerised vessels do not generally possess the same land-side facilities as do operators of fully-containerised vessels.

(305) So far as the customers are concerned, the Commission does not accept that the vast majority of customers of the TACA parties would regard carriage on a bulk or neo-bulk vessel as being substitutable for carriage on a fully-containerised vessel. This fact is demonstrated in the following extract from an advertisement for ACL in January 1997:

'If your present carrier tells you that your shipment will be securely slowed on deck, don't believe it. *Cargo can really take a beating on its journey across the North Atlantic ... ACL's containerised cargo is also safely secured in uniquely-designed cell guides, unlike those carriers whose containers are only lashed down in place*'.

<sup>(88)</sup> Drewry, *Global container markets*, p. 70.

(306) Other differences so far as customers are concerned are the absence of scheduled weekly sailings and the fact that in many cases non-fully containerised vessels use different port terminals or berths to the ones used by fully containerised vessels, with consequential inefficiencies for multimodal transport operations.

### XIII. PRICE MOVEMENTS

#### A. Average revenues and prices

(307) In the reply to the Statement of Objections, the TACA parties claimed, contrary to evidence put forward by the European Shippers' Associations and referred to in the Statement of Objections, 'that, for many shippers, 1996 service contract rates are lower than 1994 rates'. The TACA parties also claimed in the Reply to the Statement of Objections 'that TACA class tariff rates were reduced in August 1996'.

(308) In order to assess these claims and to put them into perspective, the Commission has examined average revenues per teu earned by the TACA parties (both as a whole and individually) as well as the price movements contained in a number of service contracts. All the figures given below are actual figures which have not been adjusted for inflation.

(309) Before considering that evidence, there are a number of general points to be made concerning price movements for liner shipping services supplied by the TACA parties. The first such point is that, owing largely to the complexities of the TACA's discriminatory pricing structure, it is very difficult to track prices for individual commodities. This means that in looking at average revenues, no account is taken of the fact that the mix of cargo is of fundamental importance to the end result.

(310) Secondly, average revenues do not take into account the fact that the TACA parties have significantly different degrees of capacity utilisation. This means that average revenues at a given level could be highly profitable for one line but not for another.

- (311) Thirdly, it is important to bear in mind that trading conditions in the three main world trades have been markedly different in recent years. Both transpacific and northern Europe/Far East trades have seen substantial pressure on rates. The *Journal of Commerce* stated on 18 October 1996 that:

‘The Atlantic is the only major trade lane that has not endured a serious price war this year. While prices on the Pacific and Europe-Asia trade lanes have dropped significantly over the last year, Atlantic freight rates have remained fairly stable’.

- (312) According to Drewry<sup>(89)</sup>

‘The transatlantic was the poor relation of the arterial trades in the early 1990s, deprived of high growth by its greater maturity and its inability to access the magical “Asian x-factor”. In 1992 reported collective carrier losses on the route were USD 400 million (an estimated – 22 % return on sales), but since then the concerted efforts of carriers within TAA/TACA have seen a radical improvement and in 1996 the trade is forecast to generate an aggregate surplus of USD 350 million for a very healthy 10,1 % margin (+ 9,1 % in 1995) which will make it the most profitable of the east-west markets. The TAA and TACA may have occasioned much bad publicity for carriers, not to mention considerable legal costs, but given the scale of the market recovery, it could doubtless be considered as a price worth paying. The profitability outlook for the balance of the decade seems eminently satisfactory for carriers (regulatory uncertainties aside), with little sign of any likely rate or volume instability’.

- (313) Fourthly, it is significant that between March 1993 and August 1995, four of the most powerful liner shipping companies in the world (NYK, NOL, Hanjin and Hyundai) entered the

northern Europe/USA trades without appearing to have had any adverse impact on prices.

- (314) Finally before considering actual price increases, it is necessary to recall that on 9 March 1995, the TACA parties agreed with the American Federal Maritime Commission to reduce tariff and service contract rates for the remainder of 1995 to levels prevailing as at 31 December 1994. This roll-back of rates means that the overall price increase for services provided by the TACA parties in the context of the TAA and TACA is lower than it would have been in the absence of regulatory intervention by the USA authorities.

- (315) The cost to the TACA lines of the roll-back of rates was estimated by the FMC as being in the region of USD 60 to 70 million. So far as individual shippers are concerned, the TACA parties have stated in the reply of the Statement of Objections that the roll-back meant the cancellation from the date of the settlement (and hence not with effect for the 10 weeks of 1995) of increases of the following order:

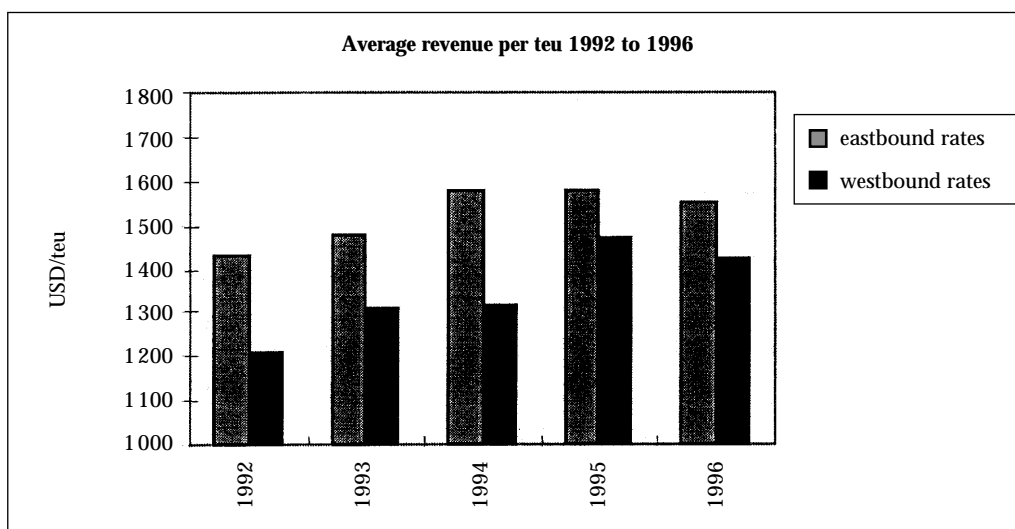
		(%)
From France	Iron and steel	23
	Non-hazardous chemicals	7
	Paper	17
From Germany	Automobile spare parts	12
	Automobile electrical equipment	12
	Computers, parts	13
	Electrical, medical equipment	10
	Machinery parts	11
From Netherlands	Dairy produce	14
From Denmark	Meat	7
	Dairy produce (dry container)	11
	Dairy produce (reefer containers)	3
	Biscuits	11
	Furniture	11

<sup>(89)</sup> Drewry, *Gobal container markets*, p. 8.

From UK	Non-hazardous chemicals	(%) 6
	Beverages	4
From Belgium	Non-hazardous chemicals	10
	Hazardous chemicals	9

(316) The TACA parties refused to supply the Commission with port-port prices on the grounds that this was difficult to do. Accordingly, Table 9 sets average revenue per teu figures for the TACA parties as a whole for the period 1992 to 1996.

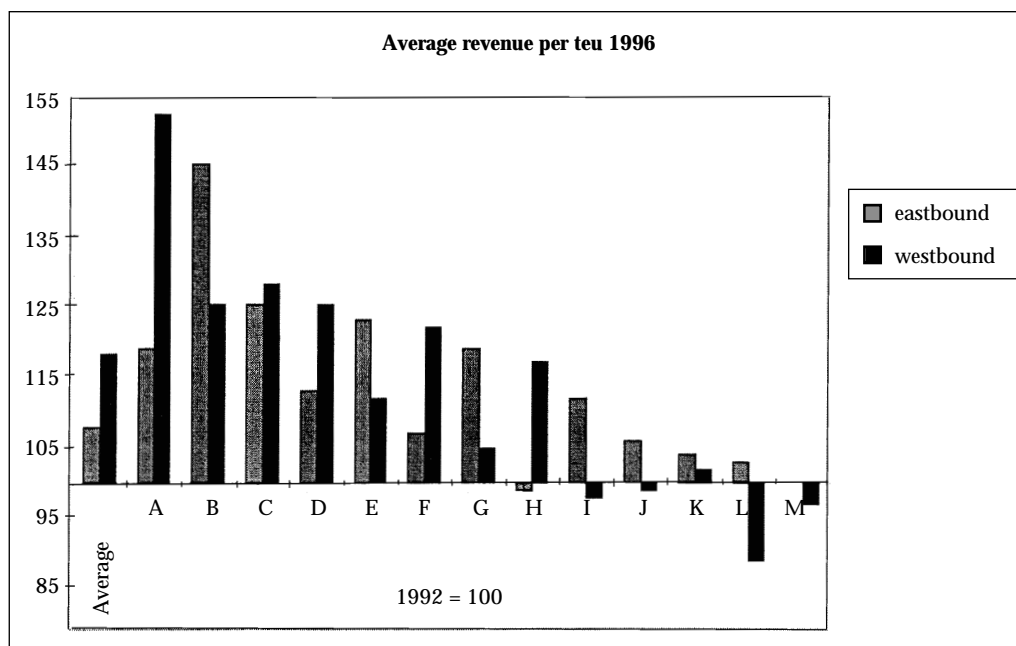
Table 9



(317) From Table 9 it can be seen that average revenues per eastbound teu increased by approximately 7 % in 1994 over 1993 average revenues. In 1995 average revenues per westbound teu increased by approximately 11 % over 1994 revenues and would have increased by an even greater amount had not the TACA parties been forced by the Federal Maritime Commission to roll back their 1995 rates to 1994 levels. Notwithstanding these price increases, the TACA parties increased the total volume of their carryings in the relevant market by 5,4 % in 1995 as compared with 1994.

(318) Taken as an average, the TACA parties increased their revenues per teu (that is, the average price paid by shippers for the maritime transport of 1 teu) between 1992 and 1996 by 8 % eastbound and 18 % westbound. This average figure, however, masks the fact that during this period, as can be seen from Table 10, many of the TACA parties were able substantially to outperform the average.

Table 10



- (319) Table 10 should be viewed in combination with Table 6 (Fluctuations in market shares), since it demonstrates that a number of TACA parties have been able to increase average revenues per teu substantially without suffering any loss in market share. Equally, a number of the TACA parties have experienced decreases in the average revenues per teu without seeming to have benefited in terms of increased market share.

#### B. Statistical analysis of price movements in the maritime and Community inland legs of TAA/TACA service contracts, 1992 to 1997

##### *Methodology*

- (320) A list of 1996 service contracts quoting prices for Community inland legs was completed. Using this list, a survey was done of the other years' contracts in order to select a group of contracts on which to base the analysis. For a set of contracts between any given shipper and the liner conferences to be chosen, there had to be at least one 1992 contract and one 1996 contract which fulfilled the required criteria, or in lesser priority a 1993 contract and a 1996 contract. All the available 1992 contracts with an appropriate 1996 partner contract have been surveyed, and approximately 40 % of the available 1993 contracts with an appropriate

1996 partner contract have been surveyed. The cut-off point in the survey of the 1993 contracts was determined by the chronological order in which they appeared in relation to the list of the 1996 contracts; that is to say that the survey terminated approximately 40 % of the way down the list of appropriate contracts.

- (321) The criteria which the contracts had to fulfil in order to be surveyed were as follows: separate non-tariff westbound maritime and Community inland rates had to be quoted for at least one identical commodity or group of commodities for at least one identical routing in every year's contract. Westbound rates only were analysed in order to focus the survey on the effect of TACA parties' activities on European exporters. Where there were more than two Community inland routings which appeared in all the contracts between the relevant shipper and the conference, two routings were selected at random, and the currencies in which the rates were quoted were left the same as long as the same currencies in which the rates were quoted were left the same as long as the same currency was used each year for each routing. Currencies were not converted, so as to avoid the distortive effects of currency exchange fluctuations. All the commodities and routings which appeared in both 1992/1993 and 1996 were surveyed for



all relevant container types/sizes, meaning that in large contracts (such as [business secrets omitted]) there could be up to 144 different prices per year recorded, and a total of up to 576 prices recorded in total for the contract over the full period surveyed.

- (322) Excluded from the prices were all ancillary charges unless otherwise noted, including arbitraries, currency adjustment factors, interim fuel participation, container service charges, terminal handling charges, etc.
- (323) At a late stage of the survey, the 1997 service contracts were submitted to the Commission. All appropriate prices which match the criteria set down above have been added to the figures for the final contracts used.

#### Analysis

- (324) The clearest conclusion to be drawn from the survey is that the price increases from 1993 to 1996 in the maritime legs of the journey are 10,4 percentage points greater than increases for the Community inland legs. As Table 11 shows, there was an overall 15,5 % increase from 1993 to 1996 in the maritime legs, compared with a 5,1 % increase in the Community inland legs. Without the large increase in the inland rates paid by (business secrets omitted) (24,3 %), these increase would be even smaller (2,1 %). The period of 1993 to 1996 offers the widest number of contracts, commodities and routings to be surveyed, and so these can be seen as the most representative statistics to be drawn in the survey. While there was some rate reduction in the inland leg for this period, there were only rate increases in the maritime leg, the very smallest of which were about 7 %. Table 11 is based on the information set out in Annex VI.

Table 11

#### Overall price movements in service contracts 1992 to 1997

(%)

Period	1993/4 to 1995 maritime	1993/4-1995 EC inland	1992-1996 maritime	1992-1996 EC inland	1993-1996 maritime	1993-1996 EC inland	1992-1997 maritime	1992-1997 EC inland	1993-1997 maritime	1993-1997 EC inland
Overall	10,9	2,5	33,1	58,2	15,5	5,1	29,9	22,8	8	- 4,0

- (325) This conclusion supports the Commission's view that the maritime service offered by the TACA parties is the area of their activities where they exercise the most market dominance and are the least subject to competitive pressure. Conversely, inland haulage is a market where the TACA parties are subject to more competitive pressure.
- (326) The 1992 to 1996 contract period surveyed offered a much narrower range of contracts to analyse, only three being available. Of those three, two were pre-TAA contracts, namely contracts from the Neusara conference, and the increases in both the maritime and the inland legs between these 1992 contracts and the contracts in the TAA/TACA period reflect the large rate rises that TAA/TACA parties have

been able to demand. The (business secrets omitted) contracts show a 133,6 % increase in the rates for inland legs from 1992 to 1996, with a 36 % increase for the same period for the (business secrets omitted) contract. The (business secrets omitted) contract also shows a 64,2 % increase in the maritime rate for the same period. The other 1992 contract, which was entered into *after* the creation of the TAA, shows far more modest rate increases from 1992 to 1996, through here the inland rates increased more than the maritime rates (2 % maritime to 5 % inland).

- (327) Where the narrow range of figures added to the picture by the 1997 contracts is taken into

account, the situation changes somewhat. As far as inland legs are concerned, there are either decreases in the overall rates from 1993 to 1997 or no change. The exception is the (business secrets omitted) contract, where there is a modest increase of 4 % from 1996 to 1997, making the 1992 to 1997 rates increase for this contract 40 %. Overall, however, the inland leg rates from 1993 to 1997 showed a decrease of 4 %. Conversely, if the period selected is 1992 to 1997, then there are marked increases overall, due to the jump from pre-TAA to post-TAA. The maritime legs show an overall increase of 8 % from 1993 to 1997, although in four contracts there were drops in the overall 1993 to 1997 rates when 1997 prices were included.

- (328) The following conclusions can be drawn. There were substantial price rises from 1993 to 1996 in maritime rates on westbound journeys. The rises in EC inland leg rates for the same period and journeys were 10 percentage points lower, suggesting less market power on the inland routes. Where 1992 prices from pre-TAA contracts are included, the increases for both maritime and inland journeys are much greater, suggesting that the creation of TAA/TACA has allowed the parties to exact substantial rate rises on both maritime and inland routes. Where 1997 prices are included, overall maritime rate rises are smaller than for 1993 to 1996, and inland leg rates actually decrease overall. Similarly, 1992 to 1997 rises are smaller than 1992 to 1996 rises. This suggests a more careful approach to rate rises being adopted by the TACA parties in the 1997 contract period.

#### XIV. THE NOTION OF STABILITY

- (329) A liner shipping conference brings stability to the trades if affects by fixing a uniform tariff which serves as a reference point for the market. Prices set in this way are likely to remain unchanged for a longer period of time than if they are set by individual lines. This

reduction in the price fluctuations which would be expected in a normally competitive market may benefit shippers by reducing uncertainty as to future trading conditions<sup>(90)</sup>.

- (330) The rate stability envisaged by Regulation (EEC) No 4056/86 has the consequential effect of assuring shippers of reliable services. Liner services are, by their nature, regular in the sense of an evenly-spread timetable. Reliable services are those which are of a reasonable quality, such that the shipper's goods come to no harm, and at the same price irrespective of which day and which line is chosen to carry the cargo. Reliability in the supply of transport services is the maintenance over time of a scheduled service, providing shippers with the guarantee of a service suited to their needs.
- (331) For these reasons, the customers of the members of liner shipping conferences are considered to obtain a fair share of the benefits arising from the restrictions on competition brought about by liner shipping conferences. Therefore, provided that they remain subject to effective competition, agreement between the members of a liner shipping conference as to the rates they charge benefits from group exemption.
- (332) However, a thesis frequently put forward by liner shipping companies operating on the main world trades (including the TACA parties in their application for exemption and elsewhere) is that the liner shipping market is so different from all other markets for goods and services that it must be exempt from the normal rules of competition which apply to those other markets. The TACA parties would like the notion of stability to amount to the assurance that any particular shipping line on any particular trade should be guaranteed sufficient return on its capital not to tempt its owners to invest that capital elsewhere.

<sup>(90)</sup> See 1981 Commission memorandum (COM(81) 423 final: Proposal for a Council Regulation (EEC) laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ C 282, 5.11.1981, p. 4).

(333) Their main argument is that since the liner shipping industry has considerable fixed but avoidable costs, the existence of reserve capacity gives rise to short-run price competition at levels close to marginal cost, resulting in the withdrawal of capacity as operators either move their vessels to more profitable trades or go bankrupt. In theory<sup>(91)</sup>, this could lead to a shortage of capacity which would cause a large increase in prices drawing in new capacity and operators into the market. Capacity would then increase until an adequate level of reserve capacity were reached (a level necessary for the provision of reliable services) and the cycle would begin again.

(334) These potentially large fluctuations in price and available capacity are a form of market failure: the market is inherently unstable. In order to break out of that cycle, strict price discipline is necessary, preventing lines from offering services at levels which the advocates of this thesis regard as too low (that is to say, 'destructive price competition'). That, in their view, is recognised by Regulation (EEC) No 4056/86, which grants exemption for certain price-fixing activities of liner conferences.

(335) Moreover, simple price-fixing is not sufficient; additional measures such as capacity non-utilisation agreements are necessary in order to limit the volume of goods which each line is allowed to transport, so as to eliminate the temptation for lines to transport additional goods at a price close to marginal cost. Such measures, they say, do not give conferences the power to raise prices as much as they wish since supra-competitive prices would draw hitherto potential competitors into the market.

(336) Those who argue that there is a lack of equilibrium leading to an inherently unstable

market go even further. They argue that joint price-fixing must be extended to the inland sector where lines offer multimodal transport services, since otherwise lines could, by charging less than the cost to them of inland transport, in effect charge rates lower than those in the conference maritime tariff. By implication, the measures to restrict competition have to be extended to any service provided by even a single member of the conference lest the members of the conference are tempted to undermine their agreement to fix maritime prices by competing in other ways.

(337) This analysis is an instance of the arguments made in many competition cases by cartel members seeking to draw a distinction between 'fair' and 'destructive' competition<sup>(92)</sup>. In fact, most of the factors relied on in support of the thesis that there is no equilibrium in the liner shipping market are not peculiar to liner shipping. The existence of reserve capacity is common to most capital-intensive industries, where there are large sunk costs but where marginal variable costs of production are low. In certain circumstances, there is an incentive to lower prices in order to increase turnover, by means of an increase in volume.

(338) The arguments of those who put forward the thesis of inherent instability are based on two very controversial theories which Pirrong<sup>(93)</sup>, Sjoström and Davies<sup>(94)</sup> in particular have sought to apply to sea transport: the core theory and the theory of contestable markets. The hypotheses necessary for the application of these theoretical models (the presence of fixed but avoidable costs, the impossibility of adjusting capacity in accordance with demand and suicidal conduct of shipowners in setting

<sup>(91)</sup> No examples have ever been put forward by the TACA parties (or any other shipping line) of shortages of capacity arising from the withdrawal of vessels from a trade.

<sup>(92)</sup> See for example the judgement of the Court of First Instance in Case T-29/92 SPO v. Commission [1995] ECR II-289, point 294, where the Court of First Instance considered that no distinction could be made between normal and destructive competition. Appeal rejected as manifestly inadmissible by Order of the Court of 25 March 1996 (Case C-137/95 P, [1996] ECR I-1611).

<sup>(93)</sup> Dr Pirrong, 'Core theory and liner shipping markets' (*Journal of law and economics* 1992, footnote on p. 11).

<sup>(94)</sup> 'Competition, contestability and the liner shipping industry', p. 310.

their own prices) appear unrealistic to most commentators. It is thus hardly surprising that the work of the economists who apply these heterodox theoretical models has not been accepted by most analysts of sea transport<sup>(95)</sup>.

#### A. The core theory and the theory of contestable markets

- (339) According to the core theory, the maintenance of adequate reserve capacity in order to provide regular and reliable service in spite of demand fluctuations can lead shipowners to forget the *raison d'être* of this reserve capacity (which ought to remain unused unless there is an exceptional increase in demand at constant prices, for example seasonal demand), so that they decide to lower their prices in order to fill their reserve capacity by attracting additional customers. Such a commercial strategy aims at maximising the use of ships.
- (340) The decision to lower rates leads other shipowners to enter into a price war which leads to very low price levels, close to marginal variable cost, since shipowners are not able quickly to adapt capacity to demand. It is in this way that the cycle of excessive swings in prices and service quality described above begins, and this constitutes the inherent instability of the industry.
- (341) Without going into the question whether the core theory is anything more than a theory without application, it is clear in any event that the hypotheses which underlie the core theory are not applicable to the liner shipping industry.
- (342) First, the concept of reserve capacity corresponds to the problem of the indivisibility of factors of production in regular transport services<sup>(96)</sup>. Thus, from the point of view of the individual shipping line, the capacity costs of ships are common costs to all cargo carried and

cannot be allocated to individual consignments. They are therefore not included in the calculation of what a particular freight rate should be, and the charging floor becomes the direct handling costs. The view that capacity costs cannot be allocated is made more complicated by price discrimination between commodities, with the result that the rate paid for one commodity may be five times as much as another for the same service.

- (343) However, as Jansson and Schneerson point out, there is a general problem of part-load transport markets, both for passengers and freight where, if part-loads are relatively small (for example a single container on a cargo liner), a problem of indivisibility may arise, leading to the conclusion that the capacity cost should not be included in the marginal cost. To the extent that this has ever been a problem, it is clear that the means of minimising its negative effect on profitability now exist and are well understood by the liner shipping industry. The definition of reasonable prices at the margin is generally achieved by the use of the principles of yield management which are well known in the fixing of air fares. Today, the main shipping lines use these principles of marginal pricing in order to avoid any pollution of their normal rates by sales at the margin<sup>(97)</sup>.

<sup>(95)</sup> See for example, Jankowski in 'The development of liner shipping conferences', *International Journal of Transport Economics* 1989; Jansson and Schneerson in their book *Liner shipping economics*, 1987; the analysis of the Federal Trade Commission, 'An analysis of the maritime industry and the effects of the 1984 Shipping Act', November 1989; the analysis of the American Department of Justice, 'Analysis of the impact of the Shipping Act of 1984', March 1990; the lecture given by Professor S. Gilman at Tarporley in February 1994.

<sup>(96)</sup> See for example Jansson and Schneerson, Chapter 10.2 'Common costs and indivisibility'.

<sup>(97)</sup> See the Article 'Sea-Land's computer wars' in *Containerisation international*, August 1995 and the article 'Market share isn't everything' in *American Shipper*, July 1995; see also the Drewry report 1991, pp. 104 to 106. For example, the article in *American Shipper* states in relation to Atlantic Container Line: 'the company developed a contribution model which works off equipment flows. The model serves as a cargo-acceptance guideline. As a result sales staff are much more aware these days of the overall value of a business prospect'. See also the 'liner industry: structural changes and future outlook' Industrial Bank of Japan Quarterly Survey (1995, IV). There has been a fundamental shift from the profit-management system by ship or route to management by cargo unit. The profit for each cargo unit yields the net contribution of each container per voyage. The introduction of unit management has resulted in one container having the same meaning that one ship had in the past (p. 43).

- (344) The 1991 Drewry Report<sup>(98)</sup> pointed out that prices at the level of marginal variable cost would be in the vicinity of USD 20 to 400 per feu container (depending on whether equipment was owned or leased), which is well below any rate recorded at the time. The analysis in the Drewry report shows the absurdity of the idea put forward by proponents of the destructive competition theory that certain occasional rates on marginal shipments (at a level approaching marginal variable cost) will contaminate all rates. Shipping lines, like other businesses, realise the impossibility of making a profit on their operations by offering rates which on average are lower than average total cost.
- (345) Secondly, the hypothesis of capacity fluctuation is essential to the application of the core there. However, it is inconsistent with the existence of large sunk investments on the part of shipping lines. Investments in, for example, container ships for each service, port and terminal facilities, and the sales and administrative structures necessary to build up a satisfactory customer base cannot be made without loss if a line suddenly decides to withdraw from a route. Since withdrawal from a route normally takes place at a time of difficulty, the line must expect to sell its assets at very low second-hand prices.
- (346) The collapse of US Line in 1986 is a signal example of sunk costs in ships. It has been estimated that about 40 % to 50 % of the residual value of investments was not recovered in that case<sup>(99)</sup>. The investments are so large that lines have no interest in withdrawing from a market as soon as prices start to slide. Consequently, potential competitors must also expect a vigorous reaction from lines already on the market in the event of any change in the competitive structure of the trade. Accordingly, the existence of significant sunk costs limits the risk of hit and run entry predicated by the core theory.
- (347) Thirdly, the core theory suggests that the withdrawal of capacity results in a diminution of service quality (frequency and capacity), then a price rise which draws new competitors into the market. This hypothesis reflects the view that the services and capacities operated by lines on the market are rigidly defined, with no flexibility for adaptation to demand. This hypothesis corresponds to an incorrect view of the stability of services, according to which the stability of transport means the protection of all existing services and requires protection against all competition, which is considered destructive. Such a hypothesis does not correspond to the circumstances of the main liner routes.
- (348) For the above reasons, the Commission does not accept that the core theory is applicable to the study of the liner shipping industry. Moreover, in addition to the fact that the core theory does not provide a satisfactory theoretical framework, it should be observed that the specialists of that theory are not able to propose specific solutions. Dr Pirrong<sup>(100)</sup> states 'Other forms of institutions may also rectify empty core problems. These include monopoly, long term contracts and vertical integration.' As pointed out at recital (122), some 60 % of TACA's business is done pursuant to service contracts fixed for periods of up to two years.
- (349) Accordingly, a commercial strategy based on a differentiation of service quality according to client and on the conclusion of individual service contracts makes it possible to resolve any problem of 'inherent instability' in the industry. Since these commercial strategies are well-known to shipping lines, it must be concluded that the core theory, even if it were applicable, provides no justification for cartels.
- (350) Shipowners also rely on the theory of contestable markets in order to argue that the existence of potential competition guarantees efficient services at competitive prices. The threat of the sudden entry of ompetitors

<sup>(98)</sup> Pp. 105 and 106.

<sup>(99)</sup> See in particular Gilman, Tarporley 1994.

<sup>(100)</sup> See footnote 93.

subjects the lines present on the market to certain constraints of efficiency. The applicability of this theory to liner shipping is, however, disputed by many economists<sup>(101)</sup>.

specialists and by shipowners themselves<sup>(102)</sup>. The observations of Dr Davies concerning entry to and exit from the Europe-Canada trade also support the idea of flexibility in redeployment of ships rather than any real contestability of the market

(351) In addition to the existence of significant sunk costs which limit profitable entry to the market, it should be observed that a condition of the applicability of the theory of the contestable market is that there should be no entry or withdrawal, the threat of potential competition being sufficient. According to the contestability theory, it is only if potential competition does not exert any real competitive pressure that high prices or supply-side inefficiencies may arise and attract new entrants hoping to profit from these inefficiencies.

(352) Jankowski has pointed out that a large number of instances of entry and exit from the market, most of which are unprofitable and result in failure, suggest a lack of contestability of the market. In his 1986 study Dr Davies argued that liner trade between Europe and Canada was contestable precisely because of the number of entries observed; he did not, however, investigate the profitability of these movements. The conclusions of Dr Davies concerning the contestability of the market are therefore questionable.

(353) It should be added that most if not all of the instances of entry and withdrawal observed by Dr Davies concerned the redeployment of ships by lines present on neighbouring trades. No analysis of these redeployments was done in order to determine whether these were in fact hit and run entries.

(354) The concept of mobility and flexibility in the positioning of ships is accepted by most

‘All the above analyses of entry and exit have been made on the basis of services creation or extinction, not of companies. The movement of vessels by a firm from one trade to another must give rise to the exit and entry of a service – something which in itself will influence the competitive environment in each trade – but it may not alter the number of companies involved in the wider market environment (Table 4) shows the turnover of companies supplying the liner services on Canadian trades, but again the same problems arise: a company that is new to Canada may not be new to the rest of the world, and an exit from Canada may imply not a death but a movement to a non-Canadian route. Indeed, of the 49 exits listed in Table 4, only six were caused by the complete bankruptcy of the company involved: the remainder were brought about by a service movement or, in the case of the further six by take-over or merger (Abbott et al, 1984). Similarly, almost all the 60 firms which were new to the Canadian trades over the period were not newly established but existing foreign corporations that were redeploying their tonnage, presumably in response to perceived profit opportunities’<sup>(103)</sup>.

(355) Professor Gilman has also criticised the idea of contestability and the idea of inherent instability on the main world routes in the following terms (Tarporley, February 1994):

‘However, one does not actually need empirical evidence relating to losses in individual cases to criticize the idea of low

<sup>(101)</sup> See for example Jankowski, ‘Notes and Comments: Competition, Contestability and the Liner Shipping Industry’, *Journal of transport economics and policy*, May 1989, or from the same author ‘The Development of Liner Shipping Conferences’, *International journal of transport economics*, October 1989, and Professor S. Gilman, Tarporley, February 1994.

<sup>(102)</sup> See, *inter alia*, Federal Trade Commission Report, November 1989, p. 20; Jansson and Schneerson, Chapter 10.2; and the article Sea-Land’s Computer War’s, *Containerisation international*, August 1995.

<sup>(103)</sup> See footnote 94.

sunk costs. The basic argument comes down to a question of industry structure as this control relationships between markets. The mainstream trades consist of three large markets, the Atlantic, the Pacific and the Europe/Far East route. The availability of capacity for entry, and the level of sunk costs related to exit, from any one of these, will clearly depend on conditions on the other two. If the three routes were in anything like equilibrium, the capacity simply would not be available for the instant and total replacement of the incumbents in any one market. As ships began to move out of the other two, rates would go up, - the extent depending upon demand elasticities - and the process would quickly come to a stop. So even in the complete absence of barriers to entry and exit, the market could not be contested to the extent of total replacement.

Very large scale entry via newbuildings would also be quite impossible. To replace all of the ships on the Europe Far East route for example would cost in excess of USD 10 billion. And from the decision to build to the full capacity coming on stream would take up to five years on an optimistic view. Ship prices would also escalate, (which would mean that the potential new entrants could not obtain their ships at the price paid by the incumbents) and the attempt to build on this scale would set in train a major disequilibrium in the world shipping industry.

Concentration in global ownership of large containerships also affect the possibility of entry. The world fleet is dominated by some twenty very large carriers, many of whom operate on two, or even all three, of the mainstream routes, so they basically count as incumbents. The trend over the last two

decades has been towards concentration and this is expected by many to continue during the next ten years. New entry into this big league is likely to be quite limited, and the pool of potential new entrants is very small indeed.

Turning to exit, opportunities even for limited re-deployment of vessels would depend on market conditions in the sector targeted. If one of the three mainstream routes were over-tonnaged and the other two were strong, there would be opportunities to re-deploy some vessels. However, if all routes were suffering the effects of world recession then opportunities would rather be limited. The point here is that, to the extent that markets are affected by a common set of influences, there will be relatively easy exit (for a moderate number of vessels) when market conditions are strong, and much more difficult exit when markets are weak. Thus relative ease of exit is most likely to be available when it is least likely to be of value. Very large scale re-deployment would be impossible, and the surplus capacity involved would have to go into lay up.

It is clear from the above analysis that there are a number of implicit assumptions about the structure and performance of a set of related markets, behind the idea of a single market within the set in which the fixed costs are not sunk. The first is that this single market is small relative to the size of the industry as a whole, the second that the global set of markets is operating profitably, and the third that the ownership structure is diverse enough to provide a pool of potential new entrants. It is only in these circumstances that capacity sufficient to replace that of incumbents could quickly and easily be found and could equally be easily re-absorbed should the incumbents retaliate. For individual liner markets, like the mainstream sectors, which fare large relative to global industry size, one can not very easily envisage a low level of sunk costs

except for modest incursions. To come back to current realities, incursions, of moderate scale in a market in which there is no ease of exit can result in ferocious competition, particularly as transport capacity is a perishable commodity.

Physical mobility of assets is directly related to economic mobility in some cases, including that of the transport industries. But it does not guarantee a low level of sunk costs. In other cases output is transportable, and the assets can quite happily stay in one place. A manufacturing company in a single location, but with a diversified strategy which enables it to cover a range of world markets, might well be able to switch its output (and therefore the deployment of much of its fixed capital) between markets, with ease, without moving it an inch.'

(356) Even this analysis of the contestability understates the distinction between the mobility of vessels and the contestability of markets. This is because maritime companies offering multimodal transport services need to make on-shore investments in such areas as management and marketing. Such assets are considerably less mobile than vessels, if at all. In any event the sunk costs of relocating or terminating management and marketing functions can be considerable.

(357) The economic analysis of liner transport is thus a complex area of study. The present discussion leads to the conclusion that arrangements between shipping lines on rates (conferences) or capacity (consortia), or in cartels which are even more restrictive of competition, in particular those which combine rate fixing with capacity management, cannot be analysed solely and simplistically on the basis of the core theory or the contestable market theory.

#### B. The question of destructive competition

(358) Economic evidence submitted by the former TAA parties in the application to annul the

TAA decision includes an annex in which Professor Yarrow summarises the different concepts of 'destructive competition' which appear in the instability theories (Annex 16 to the reply). Professor Yarrow distinguishes between two types of destructive competition: type A, which can exist in industries with certain characteristics, including marginal costs well below average costs, excess or unused capacity, and the presence of sunk costs; and type B, which can exist in a situation where there is no competitive equilibrium, such as that described by the core or contestable market theories.

(359) The foregoing discussion has shown that the conditions required for type B destructive competition are not met, *inter alia*, because of the presence of sunk costs and the absence of profitable hit and run entries. As for type A destructive competition, Professor Yarrow accepts that it does not require particular measures as regards the application of the rules of competition, in part because:

'Most economists with a specialism in competition policy, myself included, would not, however, regard such an outcome as itself a sufficient argument for exemption of price agreements from the general provisions of competition law. A central reason for this is that, while firms may suffer protracted accounting losses, customers benefit from low prices. Moreover, given that fixed costs are sunk, consumers benefit more than firms suffer: it is economically efficient for prices to be lower than average costs in circumstances of excess capacity.'

(360) Consequently, it is impossible to distinguish that situation of 'destructive competition' from normal competition. Furthermore, the theories of inherent instability disregard certain characteristics which run counter to them. For example, the possibility of redeploying ships on the main world routes as described by Professor Gilman above allows supply to adapt itself to considerable fluctuations in demand in order to



avoid prolonged over-capacity and find a balance between supply and demand. Dr Reitzes summed up the situation in the 1989 Federal Trade Commission report as follows:

'Ocean liner markets fail to exhibit the high market-specific sunk costs (as opposed to firm-specific sunk investments) that are a key condition for destructive competition (there is also little evidence in support of the proposition that shipping markets are unsustainable natural monopolies vulnerable to inefficient small scale entry). None of the empirical studies of this industry have been performed at a sufficient level of sophistication to generate useful insights into this issue. For an illustration of how this issue might be approached (see Evans and Heckman (1984)). Ships are mobile assets that, in some circumstances, may be transferred from less profitable to more profitable geographic markets in response to fluctuations in demand. The FMC report notes that carriers in certain regional markets can easily alter their port call patterns in response to changing market conditions (FMC Report, page 165). Furthermore, carriers and shippers can negotiate long term contracts to minimize the risks associated with uncertain demand and supply conditions (while the theory of the core stresses avoidable costs rather than sunk costs, the difference does not appear important in this case). Because ships are mobile assets, and because long term contracting is available, ocean carriers have latitude in deciding where and whether to operate their ships. That latitude suggests that carriers will operate their ships on routes least burdened by excess capacity, making destructive competition unlikely.'

services more rigid, the interests of users, the efficiency of services and the stability of rates are endangered. E. Benathan and A. Walters stated the following conclusion in their first study on cooperation in the liner shipping industry:

'Pooling, as practised in the shipping industry for example, is generally regarded, however, as the most anti-competitive form of cartel organisation. Our findings are consistent with this view in so far as competitive pricing is concerned. Since it is more flexible than quotas regimes, revenue pooling should give greater stability to cartels. It allows a fuller and more continuous exploitation of profit opportunities by the cartel as a whole. Hence it may avoid the disruptive crises of the more rigid quota system. If, on the other hand, a cartel is to be permitted (as in the case of shipping cartels in most maritime countries) then pooling does permit a better allocation of traffic within the cartel. It allows the expansion of efficient low-cost firms in the cartel, and promotes the contraction of the inefficient ones. It should, therefore, be less inimical to technical progress in the liner trade than simple quota systems' <sup>(104)</sup>.

(361) The achievement of a balance between supply and demand through the operation of the market ensures that the interests of transport users will be taken into account in the determination of service levels and in maintaining rate stability. If however, cartel agreements make the supply of transport

(362) Consequently, where the adaptation of supply of services and rates to demand is prevented by cartel agreements, in particular stabilisation agreements involving a freeze on capacity use and the imposition of artificial rate discipline, the stability and efficiency of services, and thus the interests of users, are endangered. In such circumstances the offer of capacity to the market may be reduced artificially by a partial freeze of capacity use which may lead to large rate increases or at least to the maintenance of

<sup>(104)</sup> *Revenue pooling and cartel*, p. 173. See also *The economics of ocean freight rates*, Benathan & Walters, 1969, Praeger.

an artificial rate level which does not encourage the elimination of less efficient services and any excess capacities (that is to say, capacity in excess of a reasonable reserve which is necessary in order to provide a service which corresponds to users' needs).

- (363) In relation to 'stabilisation agreements' including a freeze on the use of part of capacity, the 1991 Drewry report made the following remarks (page 69):

'Sub-optimal utilisation need not, of itself, be synonymous with low profitability provided that rates are kept at reasonable levels and costs are contained. Indeed the structural inevitability of over-tonnaging in an open, competitive trade will almost certainly produce a 'demand gap ratio' of between 15 % and 35 %. Clearly, an acceptable level of profitability is more likely if that gap is nearer 15 % than 35 % but, given some form of trade organisation (whether it be a conference or a stabilisation agreement) to regulate capacity and/or rates, the market can be manipulated at any reasonable level of demand gap ratio.'

- (364) The main risk in restrictive cartel agreements is that competition between transporters will be limited to competition on service quality. The lines present on the trade will then be drawn into a race to operate more and more ships of larger and larger capacity (the Averch-Johnson effect). The problem of monopoly-induced waste is considered in Scherer and Ross<sup>(105)</sup>:

'Price-fixing agreements, tacit oligopolistic collusion, and monopoly pricing can also stimulate the wasteful accumulation of excess capacity. There are four main mechanisms.

First, offering ample reserve capacity provides another kind of non-price rivalry

advantage – for example, as travellers patronize airlines with the most flights and seats available at the last moment, or as industrial buyers favour suppliers who were able to meet their demands in unusually tight grey markets. Second, when cartel sales quotas are allocated in proportion to capacity, as they were under the US crude oil prorationing system until the early 1970s, investment in excess capacity to get a higher quota is encouraged. Third, excess capacity may be carried to strengthen the credibility of a monopolistic group's entry deterrent. And fourth, monopolistic pricing cushions the survival of capacity in secularly declining industries.

There is reason to believe that the relationship between monopoly power and certain of these propensities is nonlinear. Thus, ocean shipping cartels that perfected their monopoly through controls over entry, investment, and scheduling were less prone toward costly excess capacity or overtonnaging than the looser open cartels serving US routes.'

- (365) As an illustration of this phenomenon, the 1991 Drewry report described in the following manner the history of the trans-Atlantic trade in the 1980s (page 120):

'All the conference lines operate on a seven-day schedule in all of their various services, and this frequency is matched by all the leading independents, leaving only some of the smaller operators with lower quality schedules. In 1987 exactly half of the 46 separate services were operated at seven-day intervals, so there has been a major advance in the quality of service generally being provided. This suggests it is becoming increasingly difficult for less frequent services to secure acceptance in the market.'

<sup>(105)</sup> Scherer and Ross, *Industrial market structure and economic performance*, 1990, Houghton Mifflin, p. 674.

- (366) Such an increase in capacity, which is logically accompanied by a decline in rates, cannot continue without an increase in rates to make up for the increase in production costs. Supply moves further and further away from the point of equilibrium and users pay for this race towards service quality through rates which are higher than they wish. The cycle continues until the point where market forces cannot be resisted. A return to commercial reality on the trade then causes an abrupt adjustment in rates which may cause carriers to leave the market and affect the supply of capacity. That cycle is clearly a source of instability for the market. It is not however, a problem of inherent instability or empty core, but simply the consequence of the disturbance of normal market conditions as a result of the misuse of the market power held by the shipping lines' cartel<sup>(106)</sup>.
- (367) Furthermore, the solutions put forward in Regulation (EEC) No 4056/86 to bring about the stability recognised by that Regulation, that is to say rate stability, are not and were never intended to deal with any problems brought about by liner shipping operators as a result of uneconomic investment decisions.
- (370) The foregoing discussion of the inapplicability of the core and contestability theories to liner shipping tends to show the unlikelihood of any destabilisation of maritime tariffs by competition on inclusive multimodal tariffs. The risk of destabilising conference tariffs for maritime transport as a result of normal competition with respect to inland haulage is fully described in recitals (131) to (137) of the FEFC decision.
- (371) Moreover, this theoretical destabilisation by means of underpricing of inland transport is unlikely in Europe. Advocates of the thesis often take as their example the decline in multimodal rates between Europe and the US in 1983. However, a slide in door-to-door rates compared to conference maritime tariffs demands careful examination before any conclusion can be drawn.
- (372) First, a mere comparison of rates charged by some independent lines with tariffs fixed by a conference cannot replace a proper analysis of the market conditions at that time. One can argue that the conference rates may have been fixed at such high levels that they were of very little significance and were not even adhered to by the conference members. The price slide would then reflect a return to normal market conditions rather than inherent instability.

### C. Inland price-fixing in Europe

- (368) The TACA parties argued in their application for exemption that 'The ability of the lines to agree through intermodal rates contributes to the stabilising effect of the Agreement since the ocean and inland legs are complementary services and agreement on the ocean leg alone is incapable of having a sufficient stabilising effect'.
- (369) In the absence of instability and of any threat of destructive competition, there is clearly no need to extend price-fixing practices. In particular, no economic theory justified the extension of maritime price-fixing to inland price-fixing.
- (373) Moreover, one can argue that this period saw the entry of new competitors who, by undercutting, the conference rates, were building up market share to break into the market (US Line entered the Atlantic market in 1982). Therefore, the duration and the extent of the price cutting (not its depth) need to be considered. Certain cyclical fluctuations in demand coupled with the operation of excess capacities can also explain a sharp but brief decline in independent rates. A number of possible normal market conditions and specific carrier strategies could explain a decline in independent rates compared to conference tariffs without providing any evidence to support the inherent instability thesis.

<sup>(106)</sup> See also Jansson and Schneerson in *Liner shipping economics*, Chapter 10.2 and Annex A.

- (374) Secondly, 1978 to 1984 was a period of great change for the shipping industry in the US, with the deregulation of the US rail sector from the end of the 1970s to 1981, followed by the development of the rail transport of containers. The 1991 Drewry report sums up that development in the following terms (page 68):

‘The advent of double-stack train services in North America in 1984 radically shifted the emphasis from vessel capacity to rail-car capacity for a major portion of world container traffic. The mind and micro-bridge concepts were well established in the USA before the intervention of double-stack technology, with APL, for instance, having abandoned its all-water Asia to East Coast North America service as early as 1978, but the quantum leap in efficiency and service which double stack trains introduced to the container market totally transformed the economics of the intermodal and all-water alternatives. No other land-side development has occurred in the last ten years which has so fundamentally altered the relationship between slot supply and cargo volume for a large part of the world container traffic, although increasing transshipment has in itself generated a requirement for additional ship space to move the same cargo volume. At the same time, though, such moves to transshipment services usually result in the more intensive utilisation of the deep sea vessels, and so the two factors can reasonably be treated as self-cancelling.’

- (375) However, the situation is very different in Europe, for historical, geographical and institutional reasons. As the 1991 Drewry report says:

‘In Europe normal conference practice for intermodal traffic is to apply zone rates (from a fixed inland haulage tariff) to the port to port freight. Historically such rates have been set at just below full cost recovery to provide an incentive for customers to opt for carrier haulage, while minimising any subsidy. Because port options within Europe tend to be much less

dramatic than the west/east coast possibilities in North America, there is less scope for competition on inland haulage rates and so there is less likelihood of an independent carrier offering a materially different transport rate. By keeping inland transport additional separate from the ocean freight there is far more rate transparency than there is in the US trade environment where through rates obscure costs and thus do not act as a barrier to erosion in quite the same way.’ (page 95)

‘There has been much speculation about the possibilities for European landbridge operations, particularly the volume movement of North European cargo via Mediterranean gateway ports, but there are considerable institutional and physical barriers to any such developments, despite the French strategy to create a high speed rail network which could facilitate this process. The Alps are a distinctly unhelpful obstacle to volume north-south rail moves in Europe, while general European geography and demographics prevent US double stack economics from playing any role. Mediterranean ports – most particularly those in Italy – have also had an unfortunate history and acquired a relatively poor international reputation. Most seriously of all, though, the fragmented and nationalistic control of Europe's railways makes for considerable difficulties in integrating disparate and individual systems into a coherent whole on anything like the scale which would be needed if large volumes of Europe-Far East containers were to find themselves routes in this way’ (page 162) <sup>(107)</sup>.

- (376) The different characteristics of the railway industry and geography in Europe and the US thus indicate that any development of land

<sup>(107)</sup> See also Europe's great divide, *American shipper*, December 1995.

transport of containers in Europe comparable to that in the US is improbable.

- (377) For all these reasons, the sudden repetition of a slump in multimodal rates in relation to conference maritime tariffs, similar to that which occurred in 1983 (during which rates remained well above the level of marginal variable costs), is not credible.

#### LEGAL ASSESSMENT

##### XV. PRELIMINARY ASSESSMENT UNDER ARTICLE 85(1)

##### A. Restriction, prevention or distortion of competition

- (378) The parties to the TACA are liner shipping companies which are undertakings within the meaning of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement<sup>(108)</sup>.

- (379) The TACA comprises the following elements which have the object or effect of preventing, restricting or distorting competition within the meaning of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement:

- (a) the price agreement between the parties to the TACA relating to maritime transport;
- (b) the price agreement between the parties to the TACA relating to inland transport services supplied within the territory of the Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo ('carrier haulage services') between Northern Europe and the United States of America;
- (c) the agreement between the parties to the TACA as to the terms and conditions on and under which they may enter into service contracts with shippers; and
- (d) the agreement between the parties to the TACA relating to the fixing of maximum levels of freight forwarder compensation.

- (380) These agreements have as their object or effect the restriction of competition within the common market. In particular, they allow the members of the TACA to restrict competition between themselves with regard to tariffs, freight rates and general transport conditions. Such agreements fall within the scope of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement generally and, in particular within Article 85(1)(a) and Article 53(1)(a).

- (381) There is no need to wait to observe the concrete effects of an agreement once it appears that it has as its object the prevention restriction or distortion of competition<sup>(109)</sup>. It is not disputed by the TACA parties that the four agreements identified above are intended to restrict competition between them within the common market.

- (382) In this case, the restriction of competition between the parties to the TACA is likely to be appreciable because of the very large number of containers involved and the large market shares of the TACA parties (see recital (85) and (86)). The appreciability of the effect of the restrictions of competition intended to be brought about by the price-fixing agreement for carrier haulage services is indicated by the fact that in 1995 the TACA parties also provided carrier haulage services within the territory of the Community for some 48 % of the cargo they carried between Northern Europe and the United States.

- (383) The appreciability of the effect on competition must also be considered in the light of the fact that the TACA parties are between them members of some forty further liner shipping conferences serving ports in the Community, which also fix prices for maritime transport and carrier haulage services, including the Far Eastern Freight Conference, the Southern

<sup>(108)</sup> In accordance with Article 56 of the EEA Agreement, the Commission is the competent body in this case.

<sup>(109)</sup> Judgment of the Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig v. Commission* [1966] ECR 299, at p. 342. Commission Decision 84/405/EEC (IV/30.350, Zinc Producer Group) OJ L 220, 17.8.1984, p. 27 recital (71): 'In any case, for Article 85(1) to be applicable, it is sufficient for there to have been the intention to restrict competition; it is not necessary for the intention to have been carried out, in full or only in part, that is to say, for the restriction of competition to have been put into effect.'

Europe America Conference<sup>(110)</sup>, the Europe/Australia Conference, the Mediterranean-Canadian East Conference and the Continental Canadian Westbound Freight Conference and Canadian North Atlantic Westbound Freight Conference.

(384) It is unclear at this stage whether and, if so, to what extent the 'European Inland Equipment Interchange Agreement', affects competition to any appreciable degree. The applicability of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement to the European inland equipment interchange Agreement is therefore not addressed in this Decision.

(385) The appropriate procedural regulation for dealing with agreements which fall within the scope of Article 85(1) and which concern maritime transport services is Regulation (EEC) No 4056/86. The appropriate procedural regulation for dealing with agreements which fall within the scope of Article 85(1) and which concern inland transport services is Regulation (EEC) No 1017/68. Where an agreement concerns both maritime transport and inland transport, it must be dealt under both regulations. The appropriate procedural regulation for dealing with agreements which fall within the scope of Article 85(1) and which do not concern transport services is Regulation No 17.

#### B. Effect on trade between Member States – Article 85

(386) the test of effect on trade between Member States is met whenever it is possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that the agreement or concerted practice in question is capable of having an influence, direct or indirect, actual or potential, on the pattern of trade in goods or services between Member States<sup>(111)</sup>. Accordingly, it is sufficient to show that the conduct in question is capable of having such an effect. Since a potential effect is sufficient, future development of trade may

be taken into account in assessing the effect of the restrictive arrangements on trade between Member States<sup>(112)</sup>.

(387) In considering whether the restrictions of competition identified at paragraph 379 are capable of effecting trade between Member States, it must be emphasised that the relevant markets which are directly affected relate to the provision of transport and intermediary services and not the export of goods to third countries<sup>(113)</sup>.

(388) The Commission considers that the agreements between the parties to the TACA to fix prices for maritime transport and carrier haulage services, to impose conditions on the parties' freedom to enter into service contracts and to fix maximum levels of freight forwarder compensation are capable of appreciably affecting and are likely appreciably to have affected trade between Member States in the following ways.

(389) The TACA involves shipping lines operating in several Member States and restricts competition between such lines in respect of the price at which each of them offers transport services, some of which are carried out inland, some of which are provided pursuant to the terms of a service contract, and some of which are provided through a freight forwarder. The elimination or diminution of price competition with respect to transport services between these companies is likely to reduce significantly the advantages which would accrue to the more efficient or the more competitive of them.

(390) The elimination or diminution in price competition between the parties to the TACA affects the number of transport operations undertaken by each shipping line which would be expected in the absence of the agreement. This restriction of competition between shipowners operating in several Member States consequently influences and alters trade flows

<sup>(110)</sup> A number of the TACA parties (Sea-Land, Maersk and P&O Nedlloyd) have recently left the Southern Europe America Conference and formed the United States Southern Europe Conference.

<sup>(111)</sup> See judgement in Consten and Grundig; footnote 109, p. 341.

<sup>(112)</sup> See footnote 92; [1995] ECR II-289, paragraph 235.

<sup>(113)</sup> Judgment of the Court of First Instance of 8 October 1996 in Joined Cases T-24/93, T-25/93 and T-28/93, CEWAL, *Compagnie maritime belge transports SA and Others v. Commission* [1996] ECR II-1201, paragraph 205.

in transport services within the Community (that is to say across the internal frontiers of the Community), which would be different in the absence of the Agreement.

(391) Those changes in the normal pattern of competitive behaviour by which more efficient companies enjoy increases in market share may also influence competition between ports in different Member States, by artificially increasing or decreasing the volume of cargo which flows through them<sup>(114)</sup> and the market shares of shipping lines operating out of those ports.

(392) The effect on the supply of maritime transport and carrier haulage services described in recitals (386) to (391) is likely to have a consequential effect on the supply of services related to the supply of maritime transport and carrier haulage services. Such services include port services and stevedoring services. The effect on these services will principally be brought about by the alteration in the flow of transport services between Member States.

(393) The Commission thus considers that the agreement affects trade between Member States in relation to the supply of transport and related services. This effect is likely to be appreciable in view of the very large number of containers involved. The value of the services in question amounts to some ECU 2 billion.

(394) An agreement, such as the agreement of the members of the TACA on prices for maritime transport, inland transport, the terms on which service contracts are offered and freight forwarders are rewarded, which has an effect on the cost of exporting to other countries goods produced within the Community may affect the trade in those goods within the Community. This effect arises from the fact that manufacturers seek alternative markets to which the cost of transporting their goods is lower. Such alternative markets include both the

manufacturer's domestic market and the other Community countries<sup>(115)</sup>.

(395) The agreement as to the maximum level of freight forwarder compensation (together with the other restrictions on intermediaries) is likely to affect trade between Member States in two main ways. First, in affecting competition between the TACA parties themselves, it is likely to affect the volume of goods which each TACA party carries (or arranges to be carried) across the internal frontiers of the Community. Secondly, it is likely to distort the competitive position of freight forwarders located in different Member States and affect the volume of services they provide. This in turn may cause deflections of trade between ports in the Community.

(396) The Commission therefore considers that the agreements of the parties to the TACA to fix prices for maritime transport services and carrier haulage services, to impose conditions on the TACA parties' freedom to enter into service contracts and to fix maximum levels of freight forwarder compensation have an effect on trade in goods and services between Member States.

#### XVI. ARTICLE 3 OF REGULATION (EEC) NO 4056/86: THE SCOPE OF THE GROUP EXEMPTION

(397) Article 3 of Regulation (EEC) No 4056/86 grants exemption from the prohibition under Article 85(1) of the Treaty to the members of a liner conference in respect of the fixing of uniform or common freight rates and any other agreed conditions with respect to the provision of scheduled maritime transport services. It also grants exemption to a limited number of other activities if one or more of them is carried on by the members of a liner conference in addition to fixing prices and conditions of carriage for maritime transport services. The

<sup>(114)</sup> See six recital of Regulation (EEC) No 4056/86 describing the effects which restrictive practices concerning international maritime transport may have on Community ports. See footnote 113 CEWAL, paragraph 202.

<sup>(115)</sup> Case 136/86, *BNIC v. Aubert*, Judgment of 3 December 1987, [1987] ECR 4789, paragraph 18. Similarly, the Court ruled under Article 92 of the EC Treaty in Joined Cases 67, 68 and 70/85 *Kwekerij Gebroeders van der Kooy BV and Others v. Commission* (Dutch Natural Gas Prices I, [1988] ECR 219, paragraphs 57, 58 and 59, that subsidisation of the price of natural gas to Dutch glasshouse crop producers by 5,5 % affected trade between Member States because of the importance of energy costs (25 % to 30 % of the selling price) and of the market share (65 %) and the exports (91 %) of the firm receiving the State aid.

reasons for which exemption is granted include the benefits to shippers described in the recitals to Regulation (EEC) No 4056/86 and in particular the stabilising effect of conferences which assures shippers reliable services:

Whereas provision should be made for block exemption of liner conferences; whereas liner conferences have a stabilising effect, assuring shippers of reliable services; whereas they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users; whereas such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income; whereas in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport; whereas the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conference to constant competition which they are unable as a rule to eliminate as far as a substantial proportion of the shipping services in question is concerned.

- (398) Activities which are not expressly referred to in Article 3 are not exempted pursuant to the group exemption contained therein<sup>(116)</sup>. Moreover, whilst shipping conferences are, in general, considered to bring about certain benefits and thereby justify the exemptions

<sup>(116)</sup> See Judgments of the Court of Justice of 24 October 1995 in Case C-70/93, *BMW v. ALD* [1995] ECR I-3439, at paragraph 28, and of Case C-266/93, *Bundeskartellamt v. Volkswagen and VAG*, [1995] ECR I-3477, at paragraph 33 '...having regard to the general principle prohibiting anticompetitive agreements laid down in Article 85(1) of the Treaty, provisions in a block exemption which derogate from that principle cannot be interpreted widely and cannot be construed in such a way as to extend the effects of the regulation beyond what is necessary to protect the interests which they are intended to safeguard.'

granted by the regulation, this fact cannot signify that every impairment of competition brought about by shipping conferences fall outside the prohibition broadly laid down by Article 85(1) of the Treaty<sup>(117)</sup>.

- (399) Without prejudice to an examination as to whether other aspects of the TACA fall outside the scope of the group exemption, the Commission considers that the following elements of the TACA are not covered by the group exemption contained in Article 3 of Regulation (EEC) No 4056/86:

- (a) the price agreement between the parties to the TACA relating to inland transport services supplied within the territory of the Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo ('carrier haulage services') between Northern Europe and the United States of America;
- (b) the agreement between the parties to the TACA as to the terms and conditions on and under which they may enter into service contracts with shippers;
- (c) the agreement between the parties to the TACA relating to the fixing of maximum levels of freight forwarder compensation; and
- (d) (to the extent that it falls within the scope of Article 85(1) of the Treaty, if at all) the agreement between the parties to the TACA in relation to the exchange of equipment.

#### XVII. INLAND PRICE FIXING AND EQUIPMENT EXCHANGE

- (400) For the reasons set out below, the Commission is of the view that the price agreement between the parties to the TACA relating to the supply to shippers of inland transport services undertaken within the territory of the Community in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between Northern Europe and the United States of America does not fall within the scope of the group exemption contained in Article 3 of Regulation (EEC) No 4056/86.

<sup>(117)</sup> See CEWAL, cited in footnote 113, paragraph 50.



- (401) The Commission has considered the question of price-fixing agreements concerning the provision of carrier haulage services on a number of occasions. It has presented a Report to the Council concerning the Application of the Community's Competition Rules to Maritime Transport<sup>(118)</sup>, which dealt primarily with this question, and it has adopted two decisions in which price-fixing for carrier haulage services was discussed, and prohibited: the TAA Decision and the FEFC Decision.
- (402) The grounds on which the TAA's rate-fixing agreement for carrier haulage services did not fall within the scope of Article 3 of Regulation (EEC) No 4056/86 were set out at paragraphs 371 to 378 of the TAA Decision. That reasoning applies, *mutatis mutandis*, to the TACA rate fixing agreement for carrier haulage services, the terms of which are identical to the TAA rate fixing agreement for carrier haulage services.
- (403) Furthermore, the Court of Justice has considered the scope of application of Council Regulation (EEC) No 4055/86<sup>(119)</sup> in the *Spediporto* case<sup>(120)</sup>, ruling that
- ‘... Regulation (EEC) No 4055/86 does not apply to the transportation by road of goods unloaded from the vessel.’
- (404) The Commission considers that the ruling of the Court of Justice in *Spediporto* confirms the Commission's view as previously stated in the TAA and FEFC decisions, namely that the scope of the group exemption cannot be wider than the scope of the Regulation itself. If Regulation (EEC) No 4056/86, like Regulation (EEC) No 4055/86, does not apply to the transportation by road of goods unloaded from or loaded onto vessels, then the scope of the group exemption cannot cover price-fixing in respect of carrier haulage services<sup>(121)</sup>.
- (405) In this context, it is relevant to note the eleventh recital of Regulation (EEC) No 4056/86 and the fact that at the time of the consultations leading to the adoption of Regulation (EEC) No 4056/86, the European Parliament proposed the addition of the following words to Article 3 of the draft regulation proposed by the Commission:
- ‘the aforesaid exemption shall also apply to “intermodal transport” (i.e. maritime transport including transport to and from ports)’<sup>(122)</sup>.
- (406) This proposed amendment was not adopted by the Council, indicating that it was the intention of the Council that price-fixing agreements for inland transport services should not be covered by the group exemption contained in Article 3 of Regulation (EEC) No 4056/86.
- (407) It is important to note that the fact that price-fixing for carrier haulage services or for multimodal services does not fall within the scope of Article 3 of Regulation (EEC) No 4056/86 in no way prevents the individual TACA parties from individually offering through rates for multimodal transport services, since this involves no restriction of competition.
- (408) The Commission accordingly considers that the price agreement between the parties to the TACA relating to the supply to shippers of inland transport services undertaken within the territory of the Community in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America does not fall within the scope of the group exemption for liner conferences contained in Article 3 of Regulation (EEC) No 4056/86.

<sup>(118)</sup> SEC(94) 933 final, adopted by the Commission on 8 June 1994.

<sup>(119)</sup> OJ L 378, 31.12.1986, p. 1.

<sup>(120)</sup> Judgment of the Court of Justice in Case C-96/94, *Centro Servizi Spediporto v. Spedizioni Marittima del Golfo* [1995] ECR I-2883, paragraph 92.

<sup>(121)</sup> The Court of Justice did not accept the argument, made by the United Kingdom as intervener, that the effectiveness of Regulation (EEC) No 4055/86 would be undermined if, given the prevalence of multimodalism in international trade, the Regulation were held not to apply at all to multimodal transport services.

<sup>(122)</sup> See the European Parliament's amendments to the Proposal for a Council Regulation laying down detailed rules for the application of Articles 85 and 86 of the Treaty to Maritime Transport, OJ C 255, 3.10.1986, p. 176.

XVIII. THE POSSIBILITY OF INDIVIDUAL  
EXEMPTION

## A. Inland price fixing

- (409) In both the TAA Decision and the FEFC Decision, the Commission examined the question whether price-fixing in respect of the inland segment of a multimodal transport operation fulfilled the conditions of Article 85(3) (as also set out in Article 5 of Regulation (EEC) No 1017/68). In both cases, the Commission concluded that such agreements did not fulfil the conditions necessary for the grant of individual exemption. The TACA provisions relating to price-fixing for carrier haulage services are identical to those contained in the TAA and substantially the same as to those practised by the FEFC.
- (410) There is no evidence that the charging of a collectively agreed price for the provision of the carrier haulage services contributes to improving the quality of inland transport services. Further, although the price for carrier haulage is established within the forum of the TACA, the individual members negotiate with inland carriers on an individual basis. Improvements in the quality of the service to respond to demand from shippers are not brought about by the price-fixing activities but by negotiations between individual shippers and individual lines.
- (411) No evidence has been supplied by the members of the TACA that the market in which carrier haulage services are supplied is a market where supply and demand are subject to considerable temporal fluctuation. Even if the market in question could be so categorised, it has not been shown that the collective fixing of rates for inland transport by members of the TACA would contribute to continuity and stability in that market.
- (412) No evidence has been supplied by the members of the TACA that price-fixing for carrier haulage has led or is likely to lead to increases in productivity on the part of the undertakings concerned in relation either to the provision of inland transport services or to the provision of multimodal transport services. Nor has any evidence been furnished by the members of the TACA that price-fixing for carrier haulage contributes to furthering technical or economic progress, either in the provision of inland transport services or in the provision of multimodal transport services.
- (413) So far as the actual providers of the inland transport services are concerned, price-fixing by the TACA has no direct bearing on the service they provide or the way in which they are provided since they sell their services to members of the TACA at prevailing market rates and not at the price set by the conference. So far as the members of the TACA are concerned, they are not, on the whole, engaged in inland haulage themselves and the price-fixing agreement as to carrier haulage does not therefore directly affect any service which they actually provide themselves. Price-fixing for carrier haulage services does not therefore contribute to increasing productivity or promoting technical or economic progress in respect of such services.
- (414) The Commission is of the opinion that the TACA does not take fair account of the interests of users in so far as it concerns price-fixing for inland haulage. Agreement by the members of the TACA on the price for carrier haulage services, without more, does not take adequate account of the interests of shippers and other transport users. It simply serves to ensure that prices are maintained at levels higher than they would otherwise be. This is directly contrary to the interests of users.
- (415) In the FEFC Decision, the Commission stated at paragraph 141 that:
- ‘while the development of multimodal transport may constitute a means of improving transport services, collective price-fixing for carrier haulage services does not furthermore, transport users do not obtain a fair share of the benefits of price-fixing for carrier haulage services and the restrictions of competition are not indispensable. Accordingly, the conditions of Article 85(3) and of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.’

(416) The reasons for which the Commission considers that inland rate fixing is not indispensable for the preservation of maritime rate stability brought about by liner conferences was set out in recitals (127) to (137) of the FEFC Decision, the contents of which are summarised below:

(a) In the Commission's view, a conference brings stability to the trades it affects by fixing a uniform tariff which serves as a reference point for the market. Prices set in this way are likely to remain unchanged for a longer period of time than if they are set by individual lines. This reduction in the price fluctuations which would be expected in a normally competitive market may benefit shippers by reducing uncertainty as to future trading conditions.

(b) It has not been shown that price-fixing for carrier haulage is indispensable for the preservation of the 'stabilising role' of conferences. In particular, it has not been shown that price-fixing for carrier haulage is essential in order to preserve the rate discipline on the maritime leg from which the stability in question arises and that there is no less restrictive way of doing so.

(c) In this context, it must be remembered that conferences such as the FEFC are no exception to the general rule that all cartels are susceptible to cheating or secret discounting at times when members of the cartel have spare capacity. Thus, it is not necessary to have absolute discipline in order to maintain the stability which the conference system brings about, that is say, reliable services at prices which do not fluctuate greatly in the short term. In particular, competitive discounting does not upset the stability envisaged by Regulation (EEC) No 4056/86, since it has not been shown that it leads to the absence of reliable services or of stable prices over a period of time.

(417) The reasons for which the Commission does not accept the definition of the notion of stability

put forward by the TACA parties are set out in recitals (329) to (377). The reasons given by the Commission in the FEFC Decision for rejecting the argument that price-fixing for carrier haulage services is essential for the preservation of the stability brought about by conference price-fixing for maritime transport services are equally applicable to the TACA.

(418) In this context, it is relevant to note that there is 'no agreement between Canadian Conference lines when they operate via the Canadian Gateway as to freight rates charged in respect of US intermodal cargoes' because 'Any agreement on freight rates for US intermodal cargoes between Canadian gateway operators would not ... attract US antitrust immunity'<sup>(123)</sup>. An agreement to fix inland prices is therefore demonstrably not indispensable for the provision of multimodal services operating through the Canadian Gateway.

(419) Furthermore, reference should also be made to the Commission's Report to the Council concerning the application of the competition rules to maritime transport (see paragraph 401), which, whilst recognising the possible risk of the prohibition of inland price fixing destabilising the maritime part of the services provided by conferences, also contained the following statement:

'The mere fact that the shipowners are offering door-to-door services, or the fact that the shipowners wish to fix prices for door-to-door services to prevent price cutting on the land parts of the journey, are not in themselves enough to justify exemption (of multimodal price-fixing).'

(420) As was pointed out in the Report, members of liner conferences generally sub-contract the inland part of multimodal transport operations to inland hauliers. Individual lines make inland transport arrangements on behalf of shippers

<sup>(123)</sup> See reply to the statement of objections, paragraph (11).

without conference involvement, with the exception of pricing which is based on the conference's inland transport tariff.

(421) The role of conferences in relation to inland transport is accordingly different from their role in relation to sea transport. Whereas conferences do perform a role in the organisation of the sea transport services provided by their members, they play no role in the organisation of the inland transport services provided by their members: they merely set inland transport prices.

(422) The Commission's Report to the Council emphasised that multimodal price-fixing did not in itself improve the quality of the services provided nor did it bring about any reduction in costs. Individual exemption can therefore only be justified where cooperation between shipping lines lead to improvements in services and cost reductions. Further, the price-fixing has to be indispensable to the achievement of these aims.

(423) The Commission's analysis set out above as to the applicability of Article 85(3) of the EC Treaty and Article 5 of Regulation (EEC) No 1017/68 to price agreements for carrier haulage services is equally applicable to the question of the applicability of Article 53(3) of the EEA Agreement.

(424) For the above reasons, the Commission considers that the price agreement between the parties to the TACA relating to inland transport services supplied within the territory of the Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America does not lead to an improvement in the quality of those transport services, does not allow shippers a fair share of the resulting benefits, and contains restrictions of competition which are not indispensable. Accordingly, the conditions of Article 85(3) of the EC Treaty and Article 5 of Regulation (EEC) No 1017/68 and of Article 53(3) of the EEA Agreement do not appear to be fulfilled.

#### **B. 'The European inland equipment interchange arrangement'**

(425) The TACA parties have argued that the European inland equipment interchange arrangement (described above in recitals (36) to (46)).

'to the extent it may not be covered by the block exemption, also qualifies for individual exemption under Article 85(3) and, furthermore, justifies exemption being granted to European Intermodal Authority (that is price-fixing for carrier haulage services) under Article 85(3).'

(426) As was stated above, it is unclear at this stage whether and, if so, to what extent the European inland equipment interchange agreement affects competition to any appreciable degree. The applicability of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement to the European Inland Equipment Interchange Agreement is therefore not addressed in this Decision.

(427) This Decision does, however, address the second of the two claims put forward by the TACA parties concerning the European Inland Equipment Interchange Agreement: the question whether the EIEIA justifies individual exemption being granted to be TACA parties' agreement to fix prices for carrier haulage services.

(428) The TACA parties have argued that the agreement on multimodal rates is an integral and necessary part of the 'framework' in which the inland cooperation is undertaken by all the TACA parties. The cooperation by all seventeen members of the TACA to promote and facilitate empty container interchanges enables such interchanges to take place on a scale not otherwise feasible. Because of the number of carriers involved, there is a greater possibility and incentive for interchanges to take place: there is greater opportunity over a wider geographic range and a better chance for a 'fit' or match between carriers with a deficit and those with a surplus at a particular location.

- (429) The Commission does not consider the introduction of a limited form of information exchange on the location of empty containers causes its analysis as to the exemptability of price-fixing for carrier haulage services to be revised. The arrangement provides only for exchange of information on the position of empty containers and involves no duty on the part of any company to make an empty container available to any other company. In itself, it makes no direct contribution to saving money or to reducing the number of movements of empty containers and the parties have not shown the extent to which it will facilitate consequential bilateral exchanges of containers.
- (430) In particular, the Commission does not consider that price-fixing for carrier haulage services is indispensable for or indeed contributes to any benefits provided by the European inland equipment interchange arrangement. Consequently, the Commission does not consider that these arrangements justify the exemption of such price-fixing<sup>(124)</sup>.
- (431) There is no reason to believe that inland price-fixing is in any way related to the new system of exchanging containers. It follows that inland price-fixing is not indispensable for the notified arrangements, the purpose of which is to exchange information on the position of empty containers. In particular, the absence of any connection between the European inland equipment interchange arrangement and inland price-fixing is demonstrated by the fact that the parties either agree bilaterally as to the charges for the exchange of the equipment or apply the TACA-agreed per diem rates (see paragraph (43)). In any event, any line wishing to reduce costs and limit environmental harm has sufficient incentive to participate in such an arrangement.
- (432) It is not clear whether all the parties to the TACA actually participate in the new system
- even though it only consists in exchanging information. Unlike concrete proposals for joint facilities, no one can judge whether the new system will have any significant impact. There is nothing to ensure that lines will make use of the information or that, if they try to do so, the other line will make the empty container available.
- (433) The only argument put forward by the parties as to indispensability is that 'the agreement on multimodal rates is an integral and necessary part of the "framework" in which the cooperation is undertaken by all the applicants'. This is an argument which is entirely unsubstantiated. The parties have made no attempt to show that joint price-fixing is indispensable to the European inland equipment interchange Arrangement or to any benefits which may flow from that arrangements.
- (434) These views as to the nature of the new system are largely confirmed by comments of Olav K Rakkenes, Chairman of TACA and ACL reported in the October 1995 edition of the American Shipper:
- 'It's up to each individual line'.*
- (435) It is also worth noting the comments of Günther Casjens, executive board members of Hapag Lloyd (another of the TACA parties), who was quoted in the Journal of Commerce on 6 December 1995 as having described the European inland equipment interchange arrangement as a:
- 'Mickey Mouse arrangement, a very minor step in the right direction'.*
- (436) The Commission accordingly does not consider that the European inland equipment interchange agreement justifies individual exemption being granted to the TACA parties' agreement to fix prices for carrier haulage services.

<sup>(124)</sup> For a general discussion of this question see paragraphs 61 to 67 of the 'Interim report of the multimodal group', presented to Commissioner van Miert on 6 February 1996 by a group of independent experts set up to consider certain aspects of collective inland price-fixing by liner shipping companies.

### C. The hub and spoke system

(437) Under the TACA's inland arrangements as supplemented by the hub and spoke system, the TACA parties will continue to fix prices for all inland transport services carried out under conditions of carrier haulage. This includes:

(a) the rail or barge movement between the port and the three hubs;

(b) the road movement between the hub and the shipper's premises; and

(c) all carrier haulage operations which do not involve a rail or barge move to or from one of the three hubs<sup>(125)</sup>.

(438) This Decision does not address the merits of the hub and spoke system itself (described in recitals (47) to (59), nor whether price-fixing for the basic hub rate and for the road movement between the hub and the shipper's premises is indispensable in order to bring about any benefits which are derived from the implementation of that system.

(439) However, the TACA parties consider that the introduction of the hub and spoke system not only brings about substantial benefits but that the collective fixing of prices for all their inland transport activities (as set out in the TACA's inland tariff) is indispensable to the achievement of those benefits. They argue that the price reductions implemented under the hub and spoke system are essential if such a system is to be competitive with road haulage and that this could not be achieved without the cooperation and transparency as to inland price-fixing which is brought about by the TACA parties' agreement to fix inland prices for all the carrier haulage service they provide within the scope of the TACA.

(440) The TACA parties have provided details of how the hub and spoke system could, in theory, be

expanded to cover significant numbers of inland movements of maritime containers in France and Germany. However, the TACA parties have not provided any evidence that significant numbers of containers have been transferred from road haulage to rail or barge haulage as a result of the hub and spoke system nor that there are any concrete plans to extend its scope. They have produced no evidence to support their claim that they would not or could not participate in the hub and spoke system unless they are also allowed to fix prices for their inland transport operations falling outside the scope of the hub and spoke system. Accordingly, the Commission considers that there is no justification for concluding that the implementation of the hub and spoke system justifies the grant of exemption to the TACA parties generalised practice of fixing prices for all their inland transport activities<sup>(126)</sup>.

(441) Finally, whilst it is true that the existence of certain TACA rules discriminating against merchant haulage (see recital (33)) would have a serious adverse effect on the likelihood of the TACA being granted individual exemption, it cannot be said that their removal, in whole or in part, makes the other restrictions of competition identified in this decision less objectionable.

### XIX. SERVICE CONTRACTS — APPLICATION OF ARTICLE 85(1)

(442) Until 1996, the TACA parties had an agreement not to allow individual service contracts (service contracts between a shipper and a single carrier). Furthermore, all joint service contracts (service contracts between a shipper and some or all of the members of a conference) were submitted to scrutiny and approval by the TACA parties as a whole (see recital (30). Notwithstanding changes made to the TACA's rules, all service contracts entered into by the

<sup>(125)</sup> It should be noted that, as indicated above, the hub and spoke system does not cover rail movements between the Benelux ports and the Frankfurt/Mainz hub.

<sup>(126)</sup> This view is consistent with the view expressed in the Final Report of the multimodal group submitted to Commissioner Van Miert on 18 November 1997.

TACA parties (whether joint or individual) remain subject to the rules agreed by the TACA parties governing the conditions under which they may be entered into including their constants (see recitals (17)(f) and (g), (29), (31)(d), (32) and (35).

(443) Individual service contracts to which only one carrier is party and in respect of which the parties are free to negotiate the terms, do not, in principle, fall within the scope of Article 85(1). Joint service contracts to which two or more carriers are party may restrict competition, *inter alia*, where there is an express or implied agreement between those carriers not individually to enter into a service contract with that shipper. Such an agreement may be implied where a pattern of behaviour show that the carriers in question systematically or repeatedly enter into service contracts together with other carriers in circumstances where they would be capable of providing the services required under the terms of the service contract on an individual basis. In making this assessment, it is relevant to take into account other cooperative arrangements on the relevant trades, such as slot-chartering or vessel-sharing arrangements, since this might help to determine whether the carrier in question was individually capable of providing the services in question. It would also be relevant if a carrier was a party to an service contract but did not carry any cargo under the terms of that contract.

(444) As indicated in recitals (142), (143) and (144), in 1996 the former members of the TAA's Contract Committee carried between them less than 1 % (0,8 %) of the TACA's total carryings on the direct trades pursuant to individual service contracts. Of 46 individual service contracts entered into in the first six months of 1996, Sea-Land entered into one individual service contract, as did Maersk and NYK, Nedlloyd entered into two individual service contracts and P&O into five: 36 were entered into with the former non-Contract committee members. Moreover, as was indicated in recitals (181) to (198), the TACA parties have extensive vessel-sharing and slot-chartering arrangements on the northern Europe/US trades and are accordingly in a position to provide on an individual basis an extremely wide range of vessel services.

(445) Joint service contracts of the kind entered into by the TACA parties therefore fall within Article 85(1) of the EC Treaty and Article 53(1)

of the EEA Agreement, since their object or effect is to restrict competition on price and other terms between competitors supplying the same service rather than to offer a new service to shippers. The TACA parties have supplied no evidence that joint service contracts result in additional benefits for shippers in comparison with the services that could be offered by individual lines.

(446) Where the service being supplied is capable of being supplied by an individual shipping line, in the absence of a joint service contract carriers might offer such additional services as increased freetime, extended credit and free documentation or discounts on services provided in other trades<sup>(127)</sup>. Joint service contracts may therefore help to eliminate any non-price competition.

(447) The agreement between the TACA parties to place restrictions on the conditions under which individual service contracts may be entered into also fall within Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement since its object or effect is to restrict competition on price and other terms.

(448) For the purposes of this analysis, the Commission does not consider that it is necessary to draw a distinction between binding guidelines (namely those to which the parties agree to adhere) and non-binding guidelines. The mere fact that in certain cases, some of the TACA parties might not follow the guidelines does not mean that the other TACA parties would not be able to predict with a reasonable degree of certainty the policy which would generally be followed<sup>(128)</sup>. Furthermore, the Commission agrees with the analysis of the US

<sup>(127)</sup> 'As a general guideline, any element of a supplier's offer that has an economic value in the eyes of the customer is likely to influence his choice between competing offers and therefore enable one supplier, through modifying his terms, to gain a competitive advantage.' *Butterworths Competition Law II* [849].

<sup>(128)</sup> Judgment of the Court of First Instance in Joined Cases T-213/95 and T-18/96, *SCK & FNK v. Commission*, [1997] ECR II-1739, paragraph 164.

Department of transportation which considers that 'it is likely that such guidelines would not be used to produce lower rates or other benefits for shippers but, instead, would be used as means of adversely affecting independent action by conference members' <sup>(129)</sup>.

parties are traditional conference practices and, although the Regulation makes no mention of them, should be implicitly exempted pursuant to Regulation (EEC) No 4056/86.

#### XX. JOINT SERVICE CONTRACTS – APPLICATION OF ARTICLE 85(3)

(449) The group exemption for liner conferences contained in Regulation (EEC) No 4056/86 does not authorise:

(a) joint service contracts;

(b) a prohibition on individual service contracts or restrictions, whether binding or non-binding, on the contents of such contracts;

(c) a prohibition of independent action on joint service contracts.

(450) Under the group exemption, members of an exempted conference may offer loyalty arrangements or time/volume rates (or other volume related rates) provided that they are available to all shippers on a uniform basis <sup>(130)</sup>. Such rates are commonly found in conference tariffs. Where individual lines which are members of a conference enjoying a group exemption offer services which are materially different from those normally provided to shippers paying the conference tariff rates, they may charge different prices.

#### A. Joint service contracts and the scope of the group exemption

(451) The TACA parties have argued that service contracts of the kind entered into by the TACA

(452) Logically such an implication could only arise in one of the following three ways. First, they could form part of the common or uniform tariff and therefore fall within Article 3 of Regulation (EEC) No 4056/86. Secondly, they could be the same as loyalty arrangements and could therefore be covered by Article 5 of Regulation (EEC) No 4056/86. Thirdly, it might be considered that the legislator must have intended service contracts of the type entered into by the TACA parties to be exempted as a group, since otherwise the effective purpose of the Regulation would have been reduced.

(453) Each of these points is wrong. Service contract prices are not tariff rates and indeed are an entirely different form of arrangement between shippers and shipowners from the arrangements which arise under a conference tariff. For that and other reasons, service contracts are different from loyalty arrangements. The legislator did not intend service contracts to fall within the scope of the group exemption.

(a) *Do TACA service contracts contain common or uniform rates?*

(454) In answer to the question whether joint service contracts lead to common or uniform rates, the TACA parties have argued they contain a certain rate or rate schedule and are accordingly within the scope of the group exemption. This was expanded upon in a letter to the Commission dated 3 May 1995 as follows:

<sup>(129)</sup> Letter from Ms Nancy E. McFadden, General Counsel, US Department of Transportation, to Senator John McCain, Chairman of the US Senate Committee on Commerce, Science and Transportation dated 8 October 1997.

<sup>(130)</sup> This Decision does not deal with the possible application of Article 86 to such arrangements where they have a significant foreclosing effect.

'First, the terms of Article 3 (of Regulation (EEC) No 4056/86) cover agreements between the members of a liner conference to fix rates: no distinction is made between tariff, loyalty contract, time/volume, and service contract rates. Secondly, to the extent that service contract rates depart



from the relevant tariff rates, the service contract procedure is applicable to all TACA parties in the same way that the IA procedure is applicable to all TACA parties: in other words, the charging of service contract rates is consistent with the concept of "common or uniform" as interpreted by the Commission in the TAA Decision.'

- (455) That interpretation is not a reasonable interpretation, for the reasons set out in recital (349) of the TAA Decision.

'The reasoning of the TAA would in fact mean that every agreement on prices between shipping lines would be exempted, provided it were reached "in common", which is an obvious feature of an agreement of any kind, and used the name "liner conference". Such an interpretation would be tantamount to treating Article 3 of the Regulation as an automatic derogation from Article 85(1) of the Treaty for every kind of agreement which provides for some kind of understanding concerning prices in the maritime sector. The very criteria which bring Article 85(1) into play would make Article 3 of the Regulation applicable automatically. Such an interpretation is impossible, as it would make Article 3 of the Regulation incompatible with Article 85(3) of the Treaty, which provides for exemption only in specified circumstances not present in this case.'

- (456) Service contracts do not fall within the group exemption merely because they contain a price agreed upon by two or more members of a conference. To have a common or uniform tariff, a conference price must be common or uniform not only as between the shipping lines but also with regard to all shippers of the same commodity. Not only does 'common or uniform' preclude a two- or multi-tier price structure as between carriers, it precludes the creation of different classes of shipper.

- (457) Though all goods of the same description/category travel at the same rate under the tariff<sup>(131)</sup>, under service contracts the rate is not part of the standard published tariff but is determined more or less *ad hoc* by the bargaining process between supplier and consumer. The result of that bargaining process is that shippers shipping goods of the same description do not necessarily pay the same service contract rate as one other. Service contract rates are different from tariff rates but do not differ uniformly. This means that although each TACA party may be charging the same rate to a particular shipper, different shippers (of the same category of goods) are paying different rates and not 'uniform or common freight rates.'

- (458) Article 3 of Regulation (EEC) No 4056/86 requires that under the tariff all goods of the same category travel at the same rate. This is not possible under service contracts because, in theory, the price results from individual negotiations with the shipper. Paragraph 326 of the TAA Decision reads as follows:

'Article 1(3)(b) of Regulation (EEC) No 4056/86 uses the words uniform or "common freight rates"; this means that the rates laid down in the tariff are to be identical for all members of a conference as far as any one commodity is concerned;' (emphasis added)

- (459) As can be seen from recitals (120) and (121), time/volume rates form part of the tariff and are common or uniform.

- (460) In addition to the fact that service contracts contain prices which do not form part of the tariff and which are not common or uniform, it must be remembered that a significant proportion of the TACA parties' service contracts contain a dual-rate structure whereby the carriers which were formerly unstructured members of the TAA charge prices which are significantly lower than those charged by the carriers which were formerly structured members of the TAA.

<sup>(131)</sup> See the TAA Decision, paragraphs (322) and (323).

- (461) Contrary to the claims of the TACA parties, agreements between carriers relating to the prices to be charged for contract carriage, are not to be treated in the same way as the ability of members of an exempted conference to engage in independent action. Independent action is the right of a conference member to depart from the tariff on a one-off basis. Although the other members are informed, there is no agreement between them. In particular, there is no agreement to charge a rate different from the tariff rate.
- (462) Service contract prices are, accordingly, not part of the tariff and are neither common nor uniform. They do not therefore fall within the scope of Article 3 of Regulation (EEC) No 4056/86.
- (b) *Are TACA service contracts the same as loyalty arrangements?*
- (463) Loyalty arrangements are expressly dealt with in Regulation (EEC) No 4056/86, Article 5(2) of which contains detailed safeguards for shippers. These provisions do not cover service contracts because there is no express mention of service contracts, and service contracts envisage no obligation of loyalty (in the sense of 'exclusivity') on the part of the shipper. Loyalty arrangements envisage that a portion or a percentage of a shipper's cargo is carried by the conference: such arrangements are expressly excluded from the US law definition of a service contract. Furthermore, it is not reasonable to argue that service contracts are covered by Article 3 of Regulation (EEC) No 4056/86 without any safeguard equivalent to those which apply to loyalty contracts.
- (c) *What was the intention of the legislator?*
- (464) Joint service contracts of the kind entered into by the TACA parties are not one of the traditional conference activities which have been group-exempted, since they were only introduced following the implementation of the US Shipping Act 1984. It also follows that restrictions on the availability or content of individual service contracts are not group-exempted and must be shown to satisfy the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement if they are to qualify for individual exemption.
- (465) The TACA parties have argued that contractual arrangements of the kind entered into by the TACA parties with shippers have existed from the very beginning of the history of the liner conference. The evidence which they have put forward (recitals (250) to (302) of the reply of the statement of objections) does not support this view.
- (466) In general, the TACA have sought to confuse the distinct notions of loyalty arrangements and contract carriage by describing the contract for a rebate in return for loyalty to the conference tariff as a contractual arrangements of the type entered into by the TACA parties. For the reasons given in recitals (107) and (108), there is a clear distinction to be drawn between tariff arrangements and contract carriage. Almost all of the examples relied on by the TACA parties are examples of loyalty arrangements.
- (467) This is not to say that tariff arrangements have entirely displaced contractual arrangements. It is clear that notwithstanding the virtual extinction of contract carriage for liner cargoes as a result of the introduction of the conference system and the ubiquity of tariff arrangements, certain cargoes have not lost the capacity to be carried on a contract basis. These cargoes are usually distinguishable from liner cargoes because of their size: thus, government departments have been able to ship to colonies on a contract basis, monopoly export boards still manage to obtain contractual arrangements for their cargoes and project cargo can be shipped on a contract basis.
- (468) The explanation for this is probably that such cargoes, unlike liner cargoes, are not shipped in small quantities on a regular basis. They are cargoes which could be carried as bulk cargo and which are attracted to liner shipping by the use of special prices. This is another example of price discrimination and also another example

of one-way substitutability as discussed in recitals (66) to (71).

(469) One specific allegation by the TACA parties deserves clarification. The TACA parties have cited an aide-memoire sent to the US Senate Subcommittee on Merchant Marine by a number of governments in 1981 as evidence for the proposition that '11 of the current 15 Member States felt strongly enough about the need to preserve the operation of conference contracts that they wrote to the US Government to voice their support for them'<sup>(132)</sup>. This would be irrelevant even if it were not for the fact that the claim put forward by the TACA parties is an inaccurate account of the point addressed in the aide-memoire in question.

(470) The aide-memoire refers to joint service agreements. The TACA parties claim that this expression referred to conference contracts for the carriage of a specific volume of cargo. In fact it is clear both from the aide-memoire itself and from academic authority that in this context the expression joint service agreement relates to the provision of a joint service such as might be offered by a liner shipping consortium. As explained by Daniel Marx:

'joint service agreements ... are agreements between independent shipping companies to cooperate in furnishing a liner service or they may be agreements between owners of individual vessels to have their ships operated as a line by an operating agent'<sup>(133)</sup>.

(471) Such arrangements have nothing to do with the kind of service contracts entered into by the TACA parties. On the other hand, it is true both that the Member States have recognised the importance of jointly provided services and that in 1995 the Commission adopted Regulation (EC) No 870/95 granting group exemption to them<sup>(134)</sup>.

<sup>(132)</sup> See reply to the statement of objections, paragraph (293).

<sup>(133)</sup> Daniel Marx Junior, *International shipping cartels: a study of industrial self-regulation by shipping conferences* (Princeton University Press).

<sup>(134)</sup> OJ L 89, 21.4.1995, p. 7.

## B. The possibility of individual exemption

(472) Service contracts may be considered to provide benefits to shippers for two main reasons<sup>(135)</sup>. First, improving the quality of the supply chain from manufacturer to ultimate consumer is an essential part of improving industrial competitiveness; Community manufacturers have frequently emphasised their need for special services tailored to their own particular needs. Examples<sup>(136)</sup> of such special services are as follows:

(a) notification deadlines for arrival and pick-up of containers;

(b) handling of hazardous cargo;

(c) compliance with ISO 9002 (quality management);

(d) guaranteed just-in-time delivery;

(e) provision of special equipment.

(473) Secondly, because the price negotiated is established in advance and does not fluctuate for a predetermined period of up to several years, service contracts can contribute to price stability – if that is what an individual shipper wants. This kind of stability cuts both ways, benefiting carriers in times of falling rates (low demand and excess capacity) and shippers in times of rising rates (high demand and tight capacity)<sup>(137)</sup>.

(474) Service contracts also help to reduce search costs: shippers need not search for available

<sup>(135)</sup> Article 9 of Commission Regulation (EC) No 870/95 (the Consortia Group Exemption) demonstrates the Commission's positive attitude to service arrangements – but does not accept that price-fixing is necessary to obtain their advantages.

<sup>(136)</sup> See also *Contracts between Shippers and Shipping Conferences*, Brinkman-ship Ltd, February 1996, p. 25.

<sup>(137)</sup> See *Contracts between Shippers and Shipping Conferences*, Brinkman-ship Ltd, February 1996, p. 26.

space in tight markets and carriers need not search for customers. Both shipper and carrier are assisted in making future output decisions. They should also reduce bureaucracy.

- (475) Service contracts can also offer 'all-in' prices, thereby removing the uncertainty as to the level of surcharges to be imposed. Surcharges remain one of the major complaints of shippers but conferences, unlike independents, tend to try and exclude them from the scope of service contracts.

- (476) On 30 April 1997, John Clancey, CEO and President of Sea-Land, made clear why such contracts are so important.

'Customers of the future will demand a seamless, intelligent transportation chain – a transportation chain that produces real value either in terms of cost reduction, strategy enhancement or both. Global shippers today are facing tougher competition and a higher degree of complexity in their businesses. The intermodal industry must find ways to help our customers become more efficient and productive' <sup>(138)</sup>.

(a) *The prohibition on individual service contracts*

- (477) Although the TACA parties no longer prohibit individual service contracts, it is useful to discuss the possibility of exempting such an agreement both in relation to past behaviour and in case the TACA parties decide once again to agree not to offer individual service contracts.

- (478) The Commission found in the TAA Decision (recital (410)) that one of the reasons for which the TAA did not fulfil the conditions of Article

85(3) was that by prohibiting direct and individual business negotiations between structured members of the TAA and shippers, and by obliging clients to discuss transport rates with the TAA secretariat for both former conference members and former independents, the TAA limited the opportunities for direct cooperation and partnership in the medium or long term between suppliers and clients.

- (479) At paragraph 6.3.3 of the application for exemption, the TACA parties claimed:

'Any further reduction in the level of control over service contract pricing would result in the inability of the lines to avoid rates collapsing towards incremental costs thereby undermining profitability and, in the longer term, service.'

- (480) Although the parties to the TACA made the claim that the notified arrangements were the bare minimum, the TACA has since been modified to lessen the restrictive effect of the provisions relating to service contracts. No corresponding statement that these new arrangements constitute the bare minimum has been made.

- (481) In contrast to the claims made in the application for exemption, it is worth noting that, as part of its settlement with the US Federal Maritime Commission, the TACA parties agreed to remove the prohibition on individual service contracts with effect from 1996. The TACA parties have provided no evidence that this, voluntary, 'reduction in the level of control over service contract pricing' has resulted in the inability of the TACA parties to avoid a general collapse in rates.

- (482) It should also be noted that the TACA parties do not appear to be arguing that, in the absence of severe restrictions of competition, service contract prices will fall towards incremental costs. Although prices for such contracts are

<sup>(138)</sup> Sea-Land press release.

likely to fall<sup>(139)</sup>, there is no evidence at all that service contracts would be offered routinely at prices at or around marginal costs. Furthermore, the Commission categorically rejects the argument that tariff rates are at all susceptible to collapse towards marginal cost, let alone that this would be likely to result from the removal of the prohibition on individual service contracts.

(483) In this context, it is important to note that whatever opportunistic behaviour a shipping line may engage in to obtain short-term advantages, there would be no rational explanation for a shipping line's entering into a long-term arrangement with a shipper at prices which were not profitable in one way or another.

(484) The importance of service contracts is unquestioned. Service contracts are at the centre of the commercial relationship between those shippers which require regular services and those shipowners which provide them. The prohibition of individual service contracts agreed by the TACA parties prior to 1996 did not fulfil the conditions of Article 85(3) for the following reasons:

(a) it did not allow individual carriers to take advantage of their individual circumstances: for instance, individual carriers might use service contracts to reduce repositioning costs;

(b) it may have hindered the development of long-term trading relationships between shippers and individual carriers;

(c) it may have reduced the service level provided to that of the least efficient member of the conference;

(d) it may have inhibited the development of new value-added carrier services;

(e) it may have obstructed the negotiation of specific contractual terms which might benefit shippers, such as the negotiation of higher liability limits for damaged goods or liquidated damages;

(f) it prevented the negotiation of global service contracts<sup>(140)</sup>.

(485) Contrary to the assertions made by the TACA parties in the application for exemption, the prohibition of individual service contracts was not indispensable. This is clear from the fact that the TACA parties agreed to remove this restriction on competition at the behest of the FMC (see recital (32)).

(486) For the reasons given above, the Commission considers that the prohibition on individual service contracts neither contributed to the productivity of the shipping lines concerned nor promoted technical or economic progress. Further, it did not allow shippers a fair share of the benefits arising from it and in any event has been shown not to have been indispensable. Accordingly, the Commission does not consider that the agreement by the TACA parties not to enter into individual service contracts fulfilled the conditions of Article 85(3).

#### (b) *Other restrictions on service contracts*

(487) The various restrictions on the contents of service contracts (restrictions as to duration, bans on contingency clauses and multiple contracts, obligations as to non-confidentiality, agreement as to level of liquidated damages) are intended to restrict competition between the TACA parties and are also incapable of individual exemption.

<sup>(139)</sup> See *The Effectiveness of Collusion under Antitrust Immunity – the Case of Liner Shipping Conferences*, Paul S. Clyde and James D. Reitzes, Bureau of Economics Staff Report, Federal Trade Commission, December 1995 – ‘we do find that the level of freight rates is significantly lower on routes where conference members are free to negotiate service contracts with shippers’.

<sup>(140)</sup> This is particularly important for ‘advanced’ shippers: high volumes (1 000 teu or more per annum), global coverage (three main trades plus others) and needing value-added services (warehousing, labelling, etc).

- (488) For the reasons set out below, the Commission considers that the conditions of Article 85(3) are not fulfilled. Moreover, the TACA parties have given no reasons why the prohibition of these provisions should be exempted.

#### *Contingency clauses*

- (489) Contingency clauses (see recital (17(g)) may provide important benefits to shippers. The ACCOS<sup>(141)</sup> Report of April 1992, drawing on an analysis by David Butz, concluded that:

'If shippers are willing to pay for the guarantee of a maximum rate, then the addition of meet-or-release and most-favoured-customer clauses can increase revenue and cargo volume.'

Butz himself concluded that such provisions effectively benefit the weakest producers and the weakest shippers, and stated that:

'Quite simply, most-favoured shipper clauses serve as efficient and flexible price indexes by ensuring that the terms in (shipper) A's contract with carrier X adjust to the changing market conditions reflected in subsequent tariff rates.'

- (490) As indicated above, the TACA parties have not put forward any arguments to show how and why a prohibition on contingency clauses fulfils the conditions for the application of Article 85(3). The Commission considers that such clauses are likely to be of benefit to certain shippers and that no benefits to shippers arise from their prohibition. Accordingly, the Commission considers that the prohibition on contingency clauses does not fulfil the conditions of Article 85(3).

#### *The prohibition of contracts for longer than one year*

- (491) The prohibition on service contracts for periods of longer than one year (since increased to two and then three years) undoubtedly restricts

competition and seems to militate against price stability. The TACA parties have claimed that the ban on longer service contracts leads to 'administrative efficiencies' and that without the ban some shippers will suffer 'competitive disadvantages'<sup>(142)</sup> but no details have been given of what these benefits amount to and how a fair share will be passed on to shippers.

- (492) No adequate explanation has been given as to why this prohibition fulfils the conditions for exemption and the Commission can discern no benefit to users, let alone a fair share of the benefit arising to shipowners. Accordingly, the Commission concludes that the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled in respect of the prohibition on service contracts of one or more years' duration.

#### *Ban on multiple contracts*

- (493) The TACA parties agree that they will not enter into more than one contract at a time with any particular shipper. The effect of this is that a TACA Party which is party to a joint service contract cannot enter into an individual contract and *vice versa*. The Commission has been given no good reason why an individual line should not be free both to enter into an individual contract for a certain minimum quantity and to participate in a joint contract for a further minimum quantity (wherever the conclusion of the joint contract complies with Community law).

- (494) It is probable that the effect of the prohibition on multiple contracts is to promote the conclusion of TACA service contracts by inhibiting lines from entering into individual service contracts. That is not a sufficient reason for restricting competition in this very important way. Individual service contracts may be extremely important to individual shippers, and the commission believes shipping lines must

<sup>(141)</sup> The US Advisory commission on Conferences in Ocean Shipping.

<sup>(142)</sup> See (first) letter of Lovell White Durrant to the Commission dated 3 May 1995.

not be prevented from entering into them. Accordingly, the Commission considers that this restriction on service contracts does not fulfil the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

#### *Liquidated damages*

(495) The TACA parties agree on the level of liquidated damages clauses included in service contracts entered into by TACA parties and have sought to justify the agreement relating to the amount of liquidated damages to be included in service contracts on the basis of US law<sup>(143)</sup>. It is not the Commission's understanding that US law requires service contracts to contain liquidated damages clauses<sup>(144)</sup>, still less that US law specifies at what level any that are included should be set. In the absence of any justification the Commission concludes that the agreement as to the level of liquidated damages to be included in service contracts does not fulfil the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

#### *Confidentiality of service contracts*

(496) The TACA parties currently require the disclosure to each other of the terms of all service contracts to which they are Party and make this information available to carriers which become party to the TACA (see recital (229)).

(497) The Commission considers that the supply chain from manufacturer to consumer is at the heart of industrial competitiveness. One way in which the improvement in the supply chain can be brought about is through shippers' discussing

their transport needs direct with shipowners. The fruits of such negotiations should remain confidential unless both parties wish otherwise. For the shipper, it is normal that he should seek to obtain an advantage over his competitors by improving his supply chain. For the shipowner, it is normal that he should obtain the benefits of having invested the time and effort in providing a tailored service to a particular customer.

(498) Accordingly, the Commission does not consider that an agreement to disclose the existence of an individual service contract, or, *a fortiori*, the terms of that contract to lines that are not party to the contract fulfils the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

(499) This analysis appears to be supported by at least two of the TACA parties, Maersk and Sea-Land. On 3 April 1997, Maersk wrote to the US Senate's 'Surface transportation and Merchant Marine Subcommittee' to make clear its support for the right of

'carriers and shippers to individually enter into service contracts and to keep these contracts confidential.'

Maersk added

'It is especially important in relation to our global partnership with Sea-Land that Maersk and Sea-Land have the ability to sign joint confidential contracts with our major shippers.'

#### *Prohibition of independent action (IA) on service contracts*

(500) The TACA parties currently prohibit the taking of independent action on service contracts, yet have given no reasons why this prohibition fulfils the conditions for exemption. In this respect, it is to be noted that independent action on service contracts has been allowed by conferences in the past (see recital (126)).

<sup>(143)</sup> See (first) letter of LWD to the Commission dated 3 May 1995: 'This provision relating to liquidated damages reflects the requirement of the US legal framework that minimum cargo/value commitments should be meaningful (see the Regulation of the FMC at 46 § 514.17 (d)(7)(vii), which states that "Mandatory Term No 7 shall include liquidated damages for non-performance").'

<sup>(144)</sup> See Section 3(21) of the US Shipping Act 1984 '... the contract may also specify provisions in the event of non-performance on the part of either party' and Section 8(c) 'The essential terms shall include ... the liquidated damages for nonperformance, if any' (emphasis added).

- (501) Given the existence of independent action on tariff rates (even to limited extent exercised by the TACA parties), the prohibition against taking independent action on service contracts would not appear to be indispensable, particularly in view of the fact that in the past some conferences in US trades have permitted independent action on service contracts. Furthermore, this prohibition provides no benefits to consumers. Accordingly, the Commission does not consider that this prohibition fulfils the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

### *Conclusions*

- (502) For the reasons given above, the Commission considers that the placing of restrictions on the contents of the service contracts entered into by the TACA parties neither contributes to the productivity of the shipping lines concerned nor promotes technical or economic progress. Further, it does not allow shippers a fair share of the benefits arising from it and in any event has not been shown to have indispensable. Accordingly, the Commission considers that the agreement by the TACA parties to place restrictions on the contents of the service contracts entered into by the TACA parties does not fulfil the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

### XXI. SERVICE CONTRACTS AND INLAND PRICE-FIXING

- (503) The fixing of prices for carrier haulage services provided pursuant to the terms of a service contract falls outside the scope of the group exemption for liner conferences contained in Regulation (EEC) No 4056/86 for the same reasons as the fixing of inland tariff rates falls outside the group exemption.
- (504) Finally, the fixing of prices for carrier haulage services provided pursuant to the terms of a service contracts is incapable of individual exemption for the same reasons as the fixing of inland tariff rates is incapable of individual exemption.

### XXII. FREIGHT FORWARDER COMPENSATION

#### **A. The application of Article 85(1) to the Agreement to fix freight forwarder commissions**

- (505) The TACA parties agree the amounts, levels or rates of brokerage and freight forwarder remuneration, the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers (see recital (19)). This agreement prevents, restricts or distorts competition both between the TACA parties and also between freight forwarders and other intermediaries. Accordingly, it falls within the scope of Article 85(1) of the Treaty and Article 53(1) of the EEA Agreement. The TACA parties acknowledge in paragraph 326 of the reply that an agreement to fix maximum levels of freight forwarder commission has the effect of reducing competition to provide maritime transport services by the parties to that agreement.
- (506) It is clear that the issue of freight forwarder compensation (in particular the agreement of the TACA parties to fix maximum rates of commission to freight forwarders) is limited to the second of the two roles of freight forwarders discussed in recitals (158) to (164) namely where the freight forwarder is acting as agent and not as principal.
- (507) In principle the services supplied by such intermediaries are not transport services and accordingly an agreement to fix the price for the payment for such services falls within the scope of Regulation No 17. (In the event that some part of these services does not fall within the scope of Regulation No 17 but within the scope of one or other of the transport regulations, in adopting this Decision the Commission has adhered to all of the procedural requirements arising under the relevant regulations. In any event, the analysis under the transport regulations is identical to that under Regulation No 17).
- (508) The reasons for which the agreement to fix maximum levels of freight forwarder compensation is likely to have the requisite effect on trade between Member States is discussed above at paragraph 395.



**B. The application of Article 85(3) to the Agreement to fix freight forwarder commissions**

*(a) The application of the group exemption*

(509) Article 3 of Regulation (EEC) No 4056/86 concerns the fixing of rates and conditions of carriage, that is to say, the terms on which maritime transport services are sold to shippers. It does not expressly cover, and no arguments have been put forward which suggest that it implicitly covers, an agreement to fix the terms on which freight forwarders or other intermediaries are rewarded for providing intermediary services to the members of a conference.

(510) The fixing of maximum levels of freight forwarder compensation is likely to eliminate competition between the TACA parties to win the custom of such intermediaries by offering higher commissions. The effect of this on competition is likely to be especially high in countries where the proportion of relevant business done through intermediaries is significant. It also restricts competitors between intermediaries, since their incentive to provide a better service than their competitors is reduced. Such a restriction cannot be considered to fall within the scope of the group exemption or to be a technical agreement falling within the scope of Article 3 of Regulation (EEC) No 1017/68.

(511) Whilst the agreement to fix maximum levels of freight forwarder compensation is intended to have an effect on prices by reducing or eliminating competition, it cannot be said that it has as its object the fixing of rates and conditions of carriage. If the contrary were true and the fact that an agreement had an effect on prices meant that it had as its object the fixing of those prices, the consequence would be that every agreement between the TACA parties falling within the scope of Article 85(1) of the Treaty would automatically fall within the scope of the group exemption. Such an interpretation would be fundamentally contradictory to the general principle that the scope of group exemptions is to be construed restrictively.

*(b) The possibility of individual exemption*

(512) The TACA parties have put forward no arguments to justify the settings of maximum

levels of freight forwarder compensation. They have merely argued that conferences operating on the Northern Europe/US trades have fixed 'westbound levels of commissions agreed to be paid to European (other than United Kingdom and Irish) forwarders' since the early 1970s. They have also argued that other, unspecified, conferences have fixed such prices since the beginning of the twentieth century.

(513) The Commission considers that such a practice is intended to and is likely to restrict competition between the parties to the TACA. Thus, competition may be adversely affected as regards the demand for services supplied by freight forwarders to the TACA parties. This may deprive customers of the benefits which would result from competition between the TACA parties.

(514) It may also inhibit competition between freight forwarders and be distinctive to improvements in the quality of services provided by freight forwarders, who may be encouraged to concentrate on the volume as opposed to the quality of business. Thus, competition may also be adversely affected on the supply side.

(515) The Commission does not consider that the removal of maximum levels of freight forwarder commissions (together with the other restriction described above) would lead to higher prices overall and so justify this restriction of competition. In any event, this is an argument which could be made for every price-fixing agreement on the demand side. In order to achieve optimal allocation, prices should reflect the real economic value of products and services as determined by individual buyers.

(516) If the cost of using freight forwarder services rose too sharply for shippers they would be likely to switch very quickly to dealing with the carrier. If, however, the freight forwarder is perceived as being capable of contributing material added value, there is no reason why this should not be reflected in higher prices. In

this respect freight forwarders are in the same position as very many other intermediaries: if the cost of going through the intermediary becomes too high, the consumer will seek other distribution channels such as direct purchase from the supplier.

- (517) These elements demonstrate that the agreement to fix maximum levels of freight forwarder compensation does not improve production or distribution of the services in question. Moreover, it does not bring about benefits to consumers. Finally, the fact that no commissions are paid by the TACA parties to freight forwarders in the UK and Ireland suggests that an agreement to fix maximum rates of commission is not indispensable.

- (518) Accordingly, the Commission does not consider that the agreement between the TACA parties to fix the amounts, levels or rates of brokerage and freight forwarder remuneration, the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers fulfils the conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement.

### XXIII. ASSESSMENT UNDER ARTICLE 86

#### A. Relevant market

- (519) The relevant market for maritime transport services is described at paragraphs 60 to 75. The geographic market considers of the area in which the maritime transport services defined above are marketed, that is, in this case the catchment areas of the ports in Northern Europe. Such a geographic market is commensurate with the scope of the TACA's inland tariff and constitutes a substantial part of the common market.

#### B. Collective dominant position

- (520) The first question is whether the TACA parties are capable of being jointly dominant and the second is whether they are in fact jointly dominant in the geographic market in question for the supply for the relevant maritime transport services.

##### (a) *Economic links*

- (521) It is settled case law that Article 86 is capable of applying to situations in which a number of

independent undertakings together hold a dominant position on the relevant market, provided that those undertakings are united by economic links<sup>(145)</sup>. In *Società Italiana Vetro*<sup>(146)</sup>, the Court of First Instance specifically referred to liner shipping conferences as an example of agreements between economically independent entities which enable economic links to be formed that can give those entities jointly a dominant position in relation to other operators on the same market, and it found support for that conclusion in the wording of Article 8 of Regulation (EEC) No 4056/86. The principle was confirmed in the *CEWAL* case<sup>(147)</sup>, in which it was specifically applied to liner shipping conferences.

- (522) It is noteworthy that the Court of First Instance did not adopt the test suggested by the United Kingdom as intervener, that it was necessary to find of institutional links between the undertakings analogous to those that exist between parent and subsidiary<sup>(148)</sup>. Thus the Court of First Instance did not accept that undertakings must act on the relevant market as a single economic entity if they are to enjoy a collective dominant position. This makes clear that the continued existence of a possible degree of competition between the parties does not rule out the finding of a collective dominant position.

- (523) In the *CEWAL* case, the Court of First Instance examined the economic links between the members of the *CEWAL* conference which justified the finding that the market position of those parties should be assessed collectively<sup>(149)</sup>. The Court of First Instance referred specifically to the fact that the conference formed a framework for a number of committees to which conference members belonged, such as the Zaire Pool Committee and the Special Fighting Committee.

- (524) The Court of First Instance also referred to the intention to define and apply uniform freight rates and other common conditions of carriage, the consequence of which was that the

<sup>(145)</sup> Judgment of the Court of Justice in Case C-393-92, *Gemeente Almelo and Others v. Energiebedrijf IJsselmij NV*, [1994] ECR I-1477, paragraphs 42 and 43. See also the opinion of Advocate-General Darmon at paragraph 117.

<sup>(146)</sup> Judgment of the Court of First Instance in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others v. Commission* (Flat Glass) [1992] ECR II-1403, paragraphs 357 to 359.

<sup>(147)</sup> See footnote 113, recital (64).

<sup>(148)</sup> See footnote 146, recital (343).

<sup>(149)</sup> See footnote 113, recital (65).

conference presented itself on the market as one and the same entity. Lastly, the Court also observed that the practices of which CEWAL members stood accused revealed an intention to adopt together the same conduct on the market in order to react unilaterally to a change, deemed to be a threat, in the competitive situation on the market in which they operated. Those practices constituted aspects of an overall strategy which CEWAL members pooled their forces in order to implement.

(525) The Commission considers that the members of the TACA collectively enjoy a dominant position by reason of the fact that they are bound together by a considerable number of economic links which has led to a significant diminution of their ability to act independently of each other.

(526) The first such link is the tariff. As is indicated at paragraph 174, the TACA parties not only agree to adhere to a tariff but are required to do so by US law: failure to adhere to the tariff can result in civil liabilities of up to USD 25 000 per violation.

(527) Adherence to the TACA is also ensured by the extensive enforcement provisions described at paragraphs 21 and 22. These provisions are the most extensive policing arrangements ever seen by the Commission in the liner shipping sector. Policing takes the form of the payment of substantial guarantees, fines for exceeding quotas as well the appointment of an independent body to act as 'the Enforcement Authority' which has 'total unfettered access ... to all documents which may be related to a Carrier's activities in the Trade'.

(528) These restrictions on the TACA parties' ability to act independently of each other are intended to eliminate substantially price competition between them. The TACA parties have also adopted measures which are intended to present the TACA parties as a single united body and so diminish pressure for price reductions from customers. Of particular importance in this respect has been the role of the TACA secretariat and the publication of annual business plans.

(529) The TACA Secretariat has extensive administrative and financial functions. It is authorised to act as agent for the TACA parties

by entering into transport contractors on their behalf. It has the right to attend service contract negotiations between shippers and individual TACA parties. The TACA Secretariat issues press notices on behalf of the TACA parties.

(530) Each year the TACA parties publish a 'business plan', examples of which are not out in Annex III. These demonstrate that the TACA parties appear to shippers as having a joint commercial strategy on the market<sup>(150)</sup>.

(531) The economic links between the TACA parties are reinforced by the economic links between individual TACA parties arising out of their various consortia arrangements and which are described above in recitals (180) to (198). Thus the members of the TACA have very close economic links and are therefore capable of enjoying a collective dominant position.

#### (b) *Dominance*

(532) The central element of a dominant position is the power to prevent effective competition. The best known formulation of this power, which is equally applicable to collective dominance, is that set out in the Vitamins case<sup>(151)</sup>:

<sup>(150)</sup> Judgment of the Court of Justice Joined Cases 6 and 7/73 *Commercial Solvents v. Commission* [1974] ECR 223, p 266: 'The consumer, after all, is interested only in the end product, and it is detrimental to the consumer, whether direct or indirect, with which Article 86 is concerned...' Advocate-General Warner.

<sup>(151)</sup> Judgment of the Court of Justice in Case 85/76 *Hoffman-La-Roche v. Commission* [1979] ECR 461, paragraphs 38 and 39. See also its judgment in Cases 78/70, *Deutsche Grammophon v. Metro* [1971] ECR 487, paragraph 17: 'the ability to prevent effective competition on an important part of the relevant market taking into account the existence of any other producers selling similar products and their position on the market', and 322/81 *NV Nederlandsche Banden-industrie Michelin v. Commission* [1983] ECR 3461, paragraph 48: 'it is not a precondition for a finding that a dominant position exists in the case of a given product that there should be a complete absence of competition from other partially interchangeable products so long as such there should be a complete absence of competition from other partially interchangeable products so long as such competition does not affect the undertaking's ability to influence appreciably the conditions in which that competition may be exerted or at any rate to conduct itself to a large extent without having to take account of that competition and without suffering any adverse effects as a result of its attitude.'

‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and, ultimately of its consumers.

Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.’.

- (533) As is indicated in recitals (85) to (88), the TACA parties had a market share of some 60 % in 1994, 1995 and 1996. In the most important segment of the market, they had a share of approximately 70 % in each year. This market share must also be seen in the light of the growing demand in the market. Such a large market share give rise to a strong presumption of a dominant position<sup>(152)</sup>. This Decision does not consider whether the TACA parties maintained their dominant position in 1997. In any event, whilst decline in market shares which are still very large cannot in itself constitute proof of the absence of a dominant position<sup>(153)</sup>. It follows, as a matter of principle, that the fact that an undertaking is not currently in a dominant position cannot be taken as proof that it was never in a dominant position.

- (534) This presumption is confirmed, *inter alia*, by the fact that the TACA parties have succeeded in maintaining a discriminatory price structure. The TACA tariff for maritime transport services sets different rates for different products on a basis related to their value. Although the range of tariffs is considerably narrower than the range of commodity values, prices can vary as

much as five-fold. In other words, although the cost of transporting a container is almost entirely unrelated to the type of goods transported, freight rates are up to five times higher for high value commodities than for low value commodities<sup>(154)</sup>.

- (535) This system of differentiated pricing, the purpose of which is to maximise revenues, is normally only found in market situations where one or more undertakings has a substantial degree of market power. In transport markets where there was no significant concentration of market power, the transport price would probably be fixed by references to the type of service on offer and not by reference to the goods transported, on the basis of the actual costs in line with market forces<sup>(155)</sup>.

- (536) A further example of discrimination in the conditions of carriage imposed by TACA relates to currency adjustment factors (CAF): this is a surcharge imposed by the TACA parties which is intended to compensate for currency fluctuations. In 1997, TACA charged 38 % CAF for shipments to and from ports between Hamburg and Le Havre, 16 % CAF for shipments to and from Scandinavian ports and 6 % for shipments to and from UK ports. To the extent that the difference in CAF levels cannot be economically justified, it is another indication of discriminatory pricing arising from market power<sup>(156)</sup>.

<sup>(152)</sup> Judgment of the Court of Justice in Case C 62/86 *Akzo Chemie BV* [1991] ECR I-3359, paragraph 60, where the Court held that ‘very large (market) shares are in themselves, save in exceptional circumstances evidence of the existence of a dominant position... That is the situation where there is a market share of 50 % such as that found in this case’.

<sup>(153)</sup> See footnote 113, paragraph (77).

<sup>(154)</sup> Compare this with the inland tariff, where rates are not quoted by commodity and do not vary according to the value of the contents of the container, although variations may be encountered depending on whether the container is a teu or an feu. The Commission recognised in the TAA decision that the TAA parties had not eliminated competition so far as the inland transport of containers was concerned.

<sup>(155)</sup> Price discrimination is recognised as one of the most frequently cited *direct* measurements of market power; especially where the absence of cost differences is readily discernible. See eg B. Hawk, US, common market and international antitrust (1990), p. 790. See also F M Scherer and David Ross, Industrial market structure and economic performance, Chapter 13 (Houghton Mifflin, 1990).

<sup>(156)</sup> This Decision does not address the question whether the TACA parties’ agreement relating to CAF meets the conditions of Article 4 of Regulation (EEC) No 4056/86.

- (537) The Commission has asked the TACA parties on several occasions to justify current differences in CAF levels by reference not only to movements in the relative values of European currencies as against the US Dollar, but also by reference to the effect that this has had on actual costs incurred. For example, where goods are carried by sea from New York to Rotterdam, the TACA parties were asked to show how the costs incurred in Dutch guilders had risen relative to freight rates such as to justify a 38 % CAF surcharge. No explanations have been forthcoming.
- (538) The final elements in demonstrating TACA's dominant position is the limited ability of its customers to switch to alternative suppliers, thereby making the TACA an unavoidable trading partner even for its disaffected customers. As the Court held in its judgement in Case 27/76 *United Brands v. Commission*<sup>(157)</sup>, a market share must also be viewed in the light of the strength and number of competitors.
- (539) For the three years 1993-1995, the TACA parties had over 70 % of the available capacity on the direct Northern Europe/US trades (76 %, 74 %, 75 %). Their biggest competitor, Evergreen, had 11 % in each year<sup>(158)</sup>. The capacity of the other main competitors was discussed in recitals (244) to (264). There is no reason to believe that these figures changed to any significant extent in 1996.
- (540) The possibility of switching to non-TACA carriers should also be considered in the light of the importance to shippers of service contracts (see recital (122)). Shippers who require regular maritime transport services over a period of one year or more, and who therefore find service contracts attractive, are unlikely to switch part of their requirements to smaller carriers, since this would reduce their minimum volume commitment under a TACA service contract and lead to a smaller discount.
- (541) This pattern of concentration allows the TACA to exercise a disproportionate degree of influence over the pricing policies of its competitors, who are likely to follow price rises. The price leadership of the TACA is also likely to be reinforced by the fact that it is one of the most restrictive agreements between liner shipping companies in the world and has acquired a reputation as the price leader in the market.
- (542) This situation is also reinforced by the fact that the tariff schedules and rate structures on this market are complicated and have been developed over a long period of time. The independent lines set their rates by reference to the TACA's tariff and are accordingly price takers. Such a situation enables the TACA and its members to act independently of its competitors and its customers.
- (543) The ability of the TACA parties to impose regular, albeit modest, price increases over the period 1994 to 1996, in stark contrast to the two other world arterial trades (see recitals (311) and (312)), demonstrates that the TACA parties have been able to maintain or increase prices. This has been made possible because of the elimination of effective competition. There is no evidence that the services in question have not been profitable since the implementation of the TACA: in any event, it is clear that lack of profitability is not a determinative factor in establishing a dominant position<sup>(159)</sup>.
- (544) There is no evidence that Evergreen is inclined to abandon its role of price-taker (see recital (249)) or that it has sufficient spare capacity to do so if it so wished. In the Reply to the Statement of Objections, the TACA parties produced a table showing examples of cargoes which had switched from one or more of the TACA parties to Evergreen. Examination of the examples chosen by the TACA parties reveals that in many cases the switching to Evergreen which occurred represented only a portion, and sometimes only a very small portion, of that shipper's requirements.

<sup>(157)</sup> *United Brands* [1978] ECR 207.

<sup>(158)</sup> Source: *Lloyd's shipping economist*.

<sup>(159)</sup> See paragraph (538) and footnote 157, *United Brands*: paragraphs 125 to 128.

- (545) Another important factor is the substantial barriers to entry on these trades. This arises from the commercial requirement of operating regular services which in turn requires the deployment of a large number of vessels and the acquisition of a large fleet of containers. The investment which this requires may be anything between USD 400 million and USD 2 billion and constitutes a considerable barrier to entry.
- (546) Account must also be taken of the opportunities for actual competitors to increase capacity for potential competitors to enter the trade. The contestability of the transatlantic trade so far as potential competitors is concerned has been discussed above. The increase of capacity by an actual competitor to the TACA must be viewed in the same way since increasing capacity involves large fixed costs, some of which will be sunk.
- (547) The nature of the vessels deployed on these routes is quite specialised. As one of the main trading routes it is necessary to deploy vessels of a relatively high standard and specialised in the carriage of containers. Economic developments such as just-in-time delivery and the decline in the cost of fuel have increased the importance of operating as fast a service as possible. Since many vessels are unable to perform to this standard the degree of vessel mobility which may formerly have existed is substantially decreased and this, too, constitutes a barrier to entry.
- (548) Finally, the fact the TACA is the price leader makes it unlikely that any competitor would wish to risk destabilising the market by competing aggressively against the TACA on price.
- (549) In the light of these factors, the Commission considers that the members of the TACA enjoyed a collective dominant position within the meaning of Article 86 of the Treaty, on the direct liner shipping trade between Northern Europe and the United States in each of the years 1994, 1995 and 1996. This Decision does not consider whether that dominant position was maintained in 1997.

### C. Abuse of dominant position

- (550) As a general principle, the fact that some of the activities of the TACA may at the present time be authorised by a block exemption does not prevent Article 86 from being applied<sup>(160)</sup>. The Commission considers that the TACA parties have abused their collective dominant position by entering into an agreement to place restrictions on the availability and contents of service contracts, and by altering the competitive structure of the market so as to reinforce the dominant position of the TACA.
- (a) *Abusive imposition of restrictions on the availability of service contracts*
- (551) The importance to shippers of service contracts is examined in some detail in recitals (122) to (126) and recitals (472) to (476). The TACA parties have an agreement between themselves to impose a number of restrictions on the contents of the service contracts and, in the past, have agreed that they will not enter into individual service contracts. One of the purposes, of imposing these restrictions has been to prevent price competition (see recital (479)). These restrictions are more fully described in recitals (487) to (502).
- (552) As part of a settlement agreement with the US Federal Maritime Commission, the TACA parties agreed in 1995 to abandon their prohibition on individual service contracts, with the result that shippers were able to negotiate direct with individual carriers for service contracts covering shipments made in 1996. However, even those individual service contracts were not freely negotiated because the TACA parties agreed to restrict the contents of individual service contracts and to disclose to each other the terms of those contracts.
- (553) A refusal to supply can take a number of forms: it can be an outright refusal to supply, a refusal to supply otherwise than on terms which the supplier knows to be unacceptable (a constructive refusal) or a refusal to supply other than on the basis of unfair conditions. Compliance with an agreement to place restrictions on the contents of service contracts amounts to a refusal to supply services pursuant to service contracts otherwise than in accordance with the terms of that agreement

<sup>(160)</sup> Commission Decision 88/501/EEC (IV/31.043 Tetra Pak I) OJ L 272, 4.10.1988, p. 27, pp. 41, 42 and 43: affirmed by the Court of First Instance on 10 July 1990, in Case T-51/89 *Tetra Pak v. Commission* [1990] ECR II-309, recitals 25, 29 and 30.

and falls into the third of these three categories of refusals to supply. Compliance with an agreement to place restrictions on the availability and contents of service contracts also limits the supply of transport products. Accordingly, such behaviour falls within the scope of Article 86 of the Treaty, an in particular points (a) and (b) thereof, where the supplier in question is in a dominant position.

(554) The TACA parties have refused to supply shippers with maritime and inland transport services pursuant to a service contract except on the basis of certain terms which have been chosen by the TACA parties collectively. This refusal covered joint service contracts for the years 1994, 1995 and 1996 and individual service contracts for the year 1996. The TACA parties also refused in 1995 to supply transport services at all on an individual basis and consequently to supply in that year services adapted to the needs of individual customers in accordance with the individual capabilities of individual carriers. This refusal would have deprived shippers of any additional services which individual TACA parties may have been in a position to offer.

(555) The Commission considers that the agreement to place restrictions on the availability and contents of joint and individual service contracts and the consequent refusal in 1994, 1995 and 1996 to supply transport services pursuant to service contracts other than on the basis of certain terms collectively agreed by the TACA parties constituted an abuse of the TACA's dominant position.

(556) The Commission considers that this abuse arose, in particular, in relation to the terms imposed by the TACA parties (and without which they refused to supply transport services pursuant to service contracts in 1994, 1995 and 1996) concerning contingency clauses, the duration of service contracts, the ban on multiple contracts and liquidated damages.

(557) The Commission considers that the prohibition on individual service contracts in 1995 and the consequent refusal in 1995 to supply transport services pursuant to service contracts at all on an individual basis also constituted an abuse of the TACA's dominant position. The prohibition

of individual service contracts in 1995 is a particularly serious abuse given the willingness of the TACA parties to allow them in 1996. In addition, the arguments put forward by the TACA parties in the Application for Exemption were demonstrably not correct (see recital (479)).

(558) These abuses are likely to have had an appreciable affect given the very large number of containers involved (see recital (85)), the large market share of the TACA parties and the fact that some 60 % of the containerised cargo carried by the TACA parties between Northern Europe and the United States is carried pursuant to service contracts.

*(b) Abusive alteration of the competitive structure of the market*

(559) In *Continental Can*, the Court held that the mere fact that competition was substantially fettered on the relevant market by a dominant undertaking constituted an abuse, regardless of the means and procedure by which it was achieved<sup>(161)</sup>. In *CEWAL*, the Court of First Instance held that Article 86 covers all conduct of an undertaking in a dominant position which is such as to hinder the maintenance or the growth of the degree of competition still existing in a market where, as a result of the very presence of that undertaking, competition is weakened<sup>(162)</sup>.

(560) The judgment of the Court in *Continental Can* is authority for the proposition that the elimination of potential competition can be an abuse of a dominant position. The elimination of potential competition can in certain circumstances have a greater economic impact than the elimination of actual competition. This will, for example, be the case where the actual competitor is weak and the potential competitor is in a position to enter the market reasonably

<sup>(161)</sup> Judgment of the Court of Justice in Case 6-72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215. See also its judgment in Case 66/86 *Ahmed Saeed Flugreisen v. Zentrale* [1989] ECR 803; comments of Advocate-General Lenz in his first Opinion.

<sup>(162)</sup> See *CEWAL*, cited in footnote 113, paragraph 106 and judgment in *Tetra Pak I*, cited in footnote 160, recital (114).

easily and has the strength and resources to exert significant competitive pressure. It is not necessary for the elimination of potential competition to have led to a monopoly situation:

(Article 86) states a certain number of abusive practices which it prohibits. The list merely gives examples and is not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further be seen from letters (c) and (d) of Article 86(2), *the provision is not only aimed at practices which may cause damage to consumers directly but also at those which are detrimental to them through their impact on an effective competition structure*, such as is mentioned in Article 3(f) of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one<sup>(163)</sup>.

- (561) It is clear from the recitals to Regulation (EEC) No 4056/86 that the existence of competing non-conference services and, in particular, potential competition in the form of liner shipping companies not currently present on a particular trade but capable of entering that trade, form one of the principal justifications for the grant of the group exemption. In this context it is important to consider the statement of the TACA Chairman quoted in recital (292):

*'As I have said to every line concerned trying to enter the market, please come and talk to me and we will do everything we can to help you succeed with that goal.'*

- (562) However, it is clear that the intention of the TACA parties was not to assist potential competitors enter the market in order for those potential competitors to exert competitive pressure on the TACA parties. Such a strategy would have made no commercial sense whatsoever. Rather, the intention of the TACA parties was to ensure that if a potential

competitor wished to enter the market it would only do after it had become a party of the TACA.

- (563) In their reply to the statement of objections in the TAA case (dated 17 March 1994), the TAA parties specifically referred to Hanjin and Hyundai as independent shipowners which exerted 'significant competitive pressure' on the TAA parties by their threat of entry to the TAA trade. However, it is apparent that the TACA parties actively took measures to assist those potential competitors successfully to enter the market as parties to the TACA. This is evident from the fact that in anticipation of its entry to the trade and before it became a party to the TACA, Hanjin requested details of *'all relevant documents and statistics by TACA (including Tariff, Service Contracts, Portcall, lifting and performance) ...'* (see recital (229)). The disclosure of information, much of which constitutes confidential business secrets of significant value (customer identities, commodities, prices, transport patterns) and is not necessary for enabling a shipping line to become a member of a liner shipper conference engaged in activities falling within the scope of the group exemption, would have acted as a powerful inducement to Hanjin to enter the transatlantic trade as a party to the TACA and not as an independent carrier.

- (564) Similarly, as can be seen from recital (230), when Hyundai entered the transatlantic trade as a party to the TACA, it was included as a party in the TACA service contracts in which it wished to be included with effect from its first sailing on the trade. As has been explained above, the widespread existence of service contracts can act as a barrier to entry. The immediate access to such contracts would have acted as a powerful inducement to Hyundai to enter the transatlantic trade as a party to the TACA. Finally, the statement of the TACA Secretariat quoted at recital (239) concerning Hanjin demonstrates *a collective willingness to 'enable Hanjin to build-up a market share consistent with its slot capacity in the trade ...'*. Such a willingness on the part of the other TACA parties would have substantially reduced the commercial risks of entering a new market and thereby acted as an inducement to Hanjin to enter the transatlantic trade as a party to the TACA.

<sup>(163)</sup> See Continental Can, cited in footnote 161, recital (26) (emphasis added).



(565) The steps taken by the TACA parties to include potential competitors to enter the market as parties to the TACA include the fact that the TACA parties entered into a large number of dual-rate service contracts, and the fact that the former structured TAA members did not compete for certain service contracts with NVOCCs. As the Commission found in the TAA case (see recital (296) and footnote 84), the purpose and effect of offering a two-tier rate structure was to limit competition from independent shipowners by bringing them inside the conference. Following the prohibition of the TAA in 1994, the TACA parties abandoned their two-tier tariff but nevertheless have continued to offer service contracts with higher prices for the traditional conference members and lower prices for the traditional independents and for the new entrants. Furthermore, the traditional conference members have in effect reserved certain cargoes for the traditional independents and the new entrants by not competing for those cargoes. The effect of this would have been to induce potential competitors which wished to enter the market to do so as parties to the TACA.

(566) Each of these acts would have constituted inducements to potential competitors to enter the transatlantic trade, not as independent carriers but as parties to the TACA. In so far as the existence of potential competition may have worked as a restraint on the TACA's market power (theory of contestable markets), the elimination of this source of competition would have worked in two ways: the elimination of potential competition and the anticipatory elimination of actual competition. The Commission considers that such behaviour, which was not disclosed in the Application for Exemption, has damaged the competitive structure of the market and amounted to an abuse of the TACA parties' collective dominant position in 1994, 1995 and 1996.

(567) The Commission considers that the purpose of the members of the TACA was to eliminate price competition by damaging the structure of the market and limiting the supply of transport services. It should be noted in this context that an undertaking in a dominant position 'has a special responsibility not to allow its conduct to impair genuine undistorted competition' <sup>(164)</sup>.

<sup>(164)</sup> See *Nederlandsche Banden-industrie v. Commission*, cited in footnote 151, paragraph (57).

#### D. Effect on trade between Member States – Article 86

(568) With regard to the effect on trade between Member States, according to Community case law, for Article 86 to apply, it is both necessary and sufficient that the abusive conduct is capable of affecting trade between Member States. In this connection, it is not necessary to establish the existence of an actual effect on such trade. The condition of effect on trade must be deemed to be fulfilled where intraCommunity trade has been affected at least potentially to a significant extent <sup>(165)</sup>. Changes in the competitive structure of a market are especially likely to affect trade between Member States. <sup>(166)</sup>

(569) It should be pointed out that the sixth recital of Council Regulation (EEC) No 4056/86 states that trade between Member States may be affected 'where [...] abuses concern international maritime transport [...] from or to Community ports' and that 'such [...] abuses may influence competition, firstly, between ports in different Member States by altering their respective catchment areas, and secondly, between activities in those catchment areas, and disturb trade patterns within the common market'.

(570) The abuses described above are liable to affect trade between member States for similar reasons to those set out above in relation to Article 85(1).

(571) The TACA involves shipping lines operating in several Member States. The refusal to supply transport services pursuant to service contracts either at all or only on the basis of certain collectively agreed conditions, is likely to reduce significantly the advantages which would accrue to the more efficient of them. The abusive alteration of the competitive structure of the market leading to the neutralisation of

<sup>(165)</sup> Judgment of the Court of Justice in Case C 41/90 *Höfner and Elser v. Macroton* [1991] ECR I-1979, paragraphs 32 and 33 and also the judgment of the Court of First Instance in Case T-65/89 *BPB Industries and British Gypsum v. Commission* [1993] ECR II-389.

<sup>(166)</sup> Judgment of the Court of Justice in Case 30/87 *Bodson v. Pompes Funèbres* [1988] ECR 2479, paragraph 24.

potential competition is likely to have the same effect.

effect is likely to be appreciable in view of the very large number of containers involved.

(572) The refusal to supply transport services pursuant to service contracts, either at all or only on the basis of certain collectively agreed conditions, and the abusive alteration of the competitive structure of the market affects the number of transport operations undertaken by each shipping line which would be expected in the absence of the agreement. This distortion of competition between shipowners operating in several Member States consequently influences and alters trade flows in transport services within the Community, which would be different in the absence of the abusive imposition of restrictions on the availability of service contracts.

(573) These changes in the normal pattern of competitive behaviour by which more efficient companies enjoy increases in market share may also influence competition between ports in different Member States, by artificially increasing or decreasing the volume of cargo which flows through them<sup>(167)</sup> and the market shares of shipping lines operating out of those ports.

(574) The effect on the supply of services pursuant to service contracts and the abusive alteration of the competitive structure of the market described in the preceding paragraphs is likely to have a consequential effect on the supply of related services. Such services include port services and stevedoring services. The effect on these services will principally be brought about by the alteration in the flow of transport services between Member States.

(575) The Commission thus considers that the abusive imposition of restrictions on the availability of service contracts and the abusive alteration of the competitive structure of the market affects trade between Member States in relation to the supply of services related to services supplied pursuant to the terms of service contracts. This

#### E. Conclusion as to the applicability of Article 86

(576) The Commission considers that the members of the TACA have abused their collective dominant position by placing restrictions on the availability and contents of service contracts and by altering the competitive structure of the market so as to reinforce the dominant position of the TACA and have thereby infringed Article 86 of the Treaty. This Decision addresses certain steps taken by the TACA parties to induce potential competitors to enter the market as parties to the TACA. It does not address and therefore does not prejudice the ability of liner conferences whose activities fall within the scope of the group exemption contained in Article 3 of Regulation (EEC) No 4056/86 to admit new members on the same terms as existing members or the ability of the members of such liner conferences to exchange information necessary for the purposes of the activities falling within the scope of that group exemption.

#### XXIV. TERMINATION OF CONTRACTS

(577) In Article 5 of the TAA decision, the members of the TAA were required to inform customers with whom they had concluded service contracts and other contractual relations in the context of the TAA that such customers (were) entitled, if they so wish(ed), to renegotiate the terms of those contracts or to terminate them forthwith. The Commission considers it appropriate to impose a similar requirement on the TACA parties for the reasons given below.

(578) The main basis for such a provision is the clear principle that a party cannot take advantage of its own wrongdoing, nor can it keep fruits obtained unlawfully. A decision is adopted in order to achieve a complete and effective end to the infringement concerned.

(579) This entails not only putting an end to the unlawful arrangements between the parties, but also the 'restrictive effects residing in contracts' which were concluded with third parties 'under

<sup>(167)</sup> See sixth recital of Regulation (EEC) No 4056/86, describing the effect which restrictive practices concerning international maritime transport may have on Community ports.

the terms of these arrangements<sup>(168)</sup>. Such contracts perpetuate the restrictive effect because they are determined under conditions of distorted competition. Customers must be given the 'right of readjustment'<sup>(169)</sup> in order to end these restrictive effects perpetuated by the contracts.

- (580) In the case of the TACA, the parties have made joint service contracts that may be expected to remain in force after the date of this Decision, and in which prices are specified that have been found by this Decision to have fixed unlawfully. Although, the service contracts are not themselves void by reason of the operation of Article 85(2), they must nevertheless 'be assessed together and in the context of the operation as a whole'<sup>(170)</sup>.

- (581) Commission decisions are adopted to ensure compliance with community competition law and these contracts would have been on substantially different terms if the infringement had not taken place. They must therefore no longer be in operation although this does not mean that the contracts themselves are caught by Article 85(1) 'simply because of their links with the restrictive horizontal agreement'<sup>(171)</sup>.

<sup>(168)</sup> Commission Decision 93/50/EEC (IV/32.745 – Astra) OJ 20, 28.1.1993, p. 23, paragraphs (32) and (33), concerning joint venture between BT and SES. Restrictions *vis-à-vis* third parties took the form of foreclosure of other (potential) uplink providers, and also the choice of consumers was limited since United Kingdom customers were obliged to accept the uplink service offered by BT if they were interested in broadcasting via Astra. Contracts with third parties were made at a time when the third parties did not have the choice of concluding separate contracts as two different services. The terms of these contracts were determined by BT and SES in the context of their joint venture agreement.

<sup>(169)</sup> See footnote 168, recital (33) of the Decision.

<sup>(170)</sup> See Commission Decision 93/252/EEC (IV/33.440 and IV/33.486 – Gillette) OJ L 116, 12.5.1993, p. 21, at paragraph 34. Gillette had acquired an equity interest in Eemland, the company that bought the EC and USA interests of the Wilkinson Sword business. Gillette bought the interests of this business in the rest of the world. The relevant agreements for the context were a non-Community sale agreement, an intellectual property agreement, and a supply agreement. As a result the decision adopted by the Commission called for the sale of the equity interest in Eemland owned by Gillette, as well as the re-assignment to Eemland of the Wilkinson Sword business.

<sup>(171)</sup> See footnote 168 (Astra), recital (33).

- (582) Accordingly, shippers must be offered the opportunity to renegotiate or terminate any joint service contract. Any renegotiation will result in a new legal agreement, on new terms, to take effect from the date of that agreement, and in accordance with those terms. The content of the new agreements is not an issue for the commission, but for fresh negotiation between the shippers and the parties. This decision does not require shippers to renegotiate their joint service contracts nor does it impose any deadline within which any re-negotiation should take place.

## XXV. FINES

### A. Basis for the imposition of fines

- (583) According to Article 19(2) of Regulation (EEC) No 4056/86, the Commission may impose on undertakings fines from ECU 1 000 to 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 86 of the treaty<sup>(172)</sup>. In fixing the amount of the fine the Commission will have regard both to the gravity and to the duration of the infringement. The fines imposed by this Decision are imposed pursuant to Article 19(2) of Regulation (EEC) No 4056/86. However, in so far as the abuse of a dominant position relating to service contracts also falls within the scope of application of Regulation (EEC) No 1017/68, they are also imposed pursuant to Article 22 of that Regulation.

- (584) The fines provided for in Article 19(2)(a) of Regulation (EEC) No 4056/86 may not be imposed in respect of infringements of Article 85(1) taking place after notification to the Commission and before its Decision pursuant to Article 85(3) of the Treaty, provided that they fall within the limits of the activity described in the notification. There is no possibility of

<sup>(172)</sup> As the Court of Justice held in Joined Cases 100 to 103/80 *Musique Diffusion Française v. Commission* [1983] ECR 1825, that percentage refers to the undertaking's total turnover. See also the judgment of the Court of First Instance of 12 December 1991 in Case T-30/89, *Hilti v. Commission* [1991] ECR II-1439, paragraph 131.

immunity from fines with respect to infringements of Article 86. Further, in view of the fact that the Commission's statement of objections in the TAA case specifically referred to the possibility of imposing fines for breaches of Article 86 (including breaches of Article 86 relating to service contracts), there is no reason to believe that the TACA parties were unaware of this possibility, even if the Commission did not adopt a decision in that case finding that the TAA parties had infringed Article 86.

(585) No exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position: such abuse is simply prohibited by the Treaty<sup>(173)</sup>. moreover, abuse of a dominant position is an objective test, the intentions and understandings of the parties being irrelevant to the finding of an infringement of Article 86 of the Treaty.

(586) In this case, the Commission considers that the members of the TACA have abused their collective dominant position by placing restrictions on the availability and contents of service contracts and by altering the competitive structure of the market so as to reinforce the dominant position of the TACA.

(587) This Decision imposes fines only for the infringements of Article 86. This Decision does not impose fines for inland rate fixing in accordance with the statement of the Commission in the TACA immunity decision<sup>(174)</sup> to the effect that the Commission did not intend to take any decision as to whether to impose fines until such time as the Court of Justice or the Court of First Instance has ruled on the scope of Article 3 of Regulation (EEC) No 4056/86.

## B. Impact of the infringements

(588) The value of the services directly affected by the practices in question in 1996 – the last year of the Article 86 infringements – was in the region of ECU 3,2 billion (total turnover in respect of transport services relating to the carriage of

containerised cargo where the services supplied included a maritime element falling within the geographic scope of the TACA).

(589) It is impossible to estimate with any degree of accuracy how much lower this figure would have been in the absence of the infringements, but it is clear that restrictions on service contracts contribute significantly to raising prices<sup>(175)</sup>. Furthermore, account should also be taken of the fact that the TACA parties took measures to ensure that potential competitors entered the market as parties to the TACA thereby further restricting the degree of price competition in the market.

(590) In this context, it is useful to note three further elements:

(a) First, the transatlantic trade has appeared relatively immune to the competitive forces working on the other main trades (transpacific and Europe/Asia) to bring about a reduction in prices, thus demonstrating the anti-competitive effect of the TACA<sup>(176)</sup>.

(b) Secondly, since the advent of TAA/TACA the members of the conference are reported to have turned a USD 400 million aggregate annual loss in 1992 (the year the TAA was introduced) into a reported USD 350 million aggregate annual profit in 1996<sup>(177)</sup>.

(c) Finally, it has been calculated by the US Federal Maritime Commission that the price increases imposed by the TACA parties in 1995 were of the order of USD 70 to 80 million: in the event these increases were withdrawn as a result of pressure from the FMC (see paragraph 31).

<sup>(175)</sup> See *The effectiveness of collusion under antitrust immunity – the case of liner shipping conferences*, Paul S. Clyde and James D. Reitzes, Bureau of Economics Staff Report, Federal Trade Commission, December 1995 – 'we do find that the level of freight rates is significantly lower on routes where conference members are free to negotiate (individual) service contracts with shippers'.

<sup>(176)</sup> *The Journal of Commerce* stated on 18 October 1996 that The Atlantic is the only major trade lane that has not endured a serious price war this year. 'While prices on the Pacific and Europe-Asia trade lanes have dropped significantly over the last year, Atlantic freight rates have remained fairly stable'.

<sup>(177)</sup> Drewry, *Global Container Markets*, London, 1996, p. 8.

<sup>(173)</sup> See footnote 161 (Ahmed Saeed), recital (32).

<sup>(174)</sup> Commission Decision of 26 November 1996, C(95) 3414 final.

### C. Service Contracts

- (591) The Commission considers that, in general, practices aimed at restricting price competition are a matter of indisputable gravity<sup>(178)</sup>. The aim of abusing a dominant position in relation to service contracts has been to increase the general level of prices by substantially reducing the choice available to shippers. This infringement concerned refusals to deal either at all or only on the basis of certain conditions.
- (592) The Commission considers that this infringement is a serious one. The duration of the infringement relating to service contracts covered part of 1994 and the whole of 1995 and 1996.

### D. Alteration of the structure of the market

- (593) The measures taken by the TACA parties to eliminate competition and thereby damage the structure of the market are also restrictions on competition of indisputable gravity. Attempts to eliminate potential competition must be viewed as a very serious restriction of competition, particularly in the liner shipping sector where the existence of potential competition is one of the principal justifications for the group exemption. In view of the fact that the market in question is one in which competition had already been severely restricted, this infringement must be considered as being very serious.
- (594) The duration of this infringement also covered part of 1994 and the whole of 1995 and 1996.

### E. Calculation of fines

- (595) In order to take account of the effective capacity of the undertakings concerned to cause significant damage and the need to ensure that the amount of the fine has a sufficiently deterrent effect the Commission considers it appropriate that larger fines be imposed on the larger TACA parties than on the smaller ones because of the considerable disparity between their sizes. It has therefore divided the parties into four groups according to size and taken this into account in determining the gravity of the infringements.
- (596) Table 12 indicates these four groups and relative size of each of the TACA parties in 1996 (the final year of the Article 86 infringements) as compared with Maersk, the largest of the TACA parties. The comparison is made on the basis of turnover in respect of transport services relating to the carriage of

containerised cargo where the services supplied included a maritime element. It is appropriate to take world-wide liner shipping turnover as the basis for the comparison of the relative size of the undertakings because it enables the Commission to assess the real resources and importance of the undertakings concerned.

Table 12

Size of undertakings to be taken into account in order to determine capacity to cause damage and effectiveness of deterrence

		Size
Large carriers	Maersk	1,00
	Sea-Land	0,89
Medium to large carriers	P&O	0,50
	OOCL	0,44
	NYK	0,41
	Nedlloyd	0,39
	Hanjin	0,33
	Hapag Lloyd	0,32
Small to medium carriers	Hyundai	0,31
	DSR/Senator	0,24
	NOL	0,22
	MSC	0,21
Small carriers	Cho Yang	0,18
	TMM/Tecomar	0,12
	ACL	0,06
	POL	0,06

- (597) The duration of each of the infringements was two to three years: accordingly the level of the fines imposed should be increased by 25 %.

- (598) Table 13 sets out the calculation of the level of fines taking into account the above elements. Column 1 sets out the basic fines for the two infringements calculated on the basis of the nature of the infringements and their gravity. Column 2 set out the additional fine per individual company to take into account the duration of the infringements. Column 3 sets out the final amount.

<sup>(178)</sup> Commission Decision 94/210/EC (HOV SVZ/MCN), OJ L 104, 23.4.1994, p. 34, recital 259.

Table 13

## Calculation of fines in accordance with Guidelines

(ECU million)

	Column 1a	Column 1b	Column 2	Column 3
Maersk	2	20	5,50	27,50
Sea-Land	2	20	5,50	27,50
P&O	1,5	15	4,13	20,63
OOCL	1,5	15	4,13	20,63
NYK	1,5	15	4,13	20,63
Nedlloyd	1,5	15	4,13	20,63
Hanjin	1,5	15	4,13	20,63
Hapag Lloyd	1,5	15	4,13	20,63
Hyundai	1,5	15	2,06	18,56
DSR/Senator	1	10	2,75	13,75
NOL	1	10	2,75	13,75
MSC	1	10	2,75	13,75
Cho Yang	1	10	2,75	13,75
TMM/Tecomar	0,5	5	1,38	6,88
ACL	0,5	5	1,38	6,88
POL	0,5	5	1,38	6,88

## F. Aggravating and mitigating factors

(599) The facts that in 1997 P&O merged with Nedlloyd and Hanjin has bought DSR/Senator are not relevant for the calculation of the fines as the infringements occurred before the dates of those events, even if in the first cases where the companies no longer legally exist the order to pay must be addressed to their successor in business, P&O Nedlloyd Container Line Ltd. However, it is relevant that Hyundai joined the TACA during the course of 1995 and did not therefore participate in the infringements for the same period as the others: the fine imposed on Hyundai should take this into account. It is also relevant that Tecomar has been a subsidiary of TMM since January 1994 since it is appropriate to consider the two as a single undertaking for the purpose of the imposition of fines.

(600) In no case do the fines set out in column 3 of Table 13 exceed 10 % of the turnover of the group of companies of which each undertaking forms part.

(601) The purpose of the members of the TACA was to eliminate price competition by damaging the structure of the market and limiting the supply of transport products. Accordingly, they could not have been unaware that their activities had as their object the restriction of competition. Indeed, the Commission has been told by the TACA parties that they had received legal advice not to include dual-rate prices in service contracts since dual-rate pricing had been specifically prohibited in the TAA Decision.

(602) On the other hand, the TACA parties may claim (although they have not actually done so) that they were in doubt as to the scope of the group exemption and that they considered that they were immune from fines as a result of having notified their rules on service contracts.

(603) The TACA parties have known since at least 10 December 1993 that the Commission has considered that the TAA parties were in a dominant position and that the Commission was minded to impose fines on the TAA parties, *inter alia*, for their abuse of a dominant position in relation to service contracts. They have known since October 1994 that the Commission considered the banning of individual service contracts to be a serious restriction of competition (see recital (410) of the TAA Decision).

(604) In this context, it should also be borne in mind that the Deputy Director General of the Directorate-General for Competition of the Commission wrote to the TACA parties on 15 December 1994 indicating clearly the view that the TACA rules on service contracts did not fall within the scope of the group exemption for liner conferences. So far as uncertainty as to the question of immunity from fines is concerned, all of the TACA parties had access to sufficient legal advice to know of the possibility of fines for breaches of Article 86 notwithstanding the notification of the TACA and, in particular, of the Commission's view that notification cannot confer immunity from fines for breaches of Article 86.

(605) Finally, none of the TACA parties has put forward any reason for which it should be considered to have acted as a follower as opposed to a ringleader. Nor have any of the TACA parties given any evidence that any of the other TACA parties acted as a ringleader.

Accordingly, there is no reason which would justify distinguishing between the individual TACA parties as regards their participation in the infringements, except in the manner described above.

- (606) In the light of these factors, no adjustment should be made to the level of fines in order to take account of aggravating or attenuating circumstances.

## XXVI. CONCLUSIONS

- (607) The following elements of the TACA fall within the scope of the prohibition contained in Article 85(1) of the Treaty and Article 53(1) of the EEA Agreement of agreements between undertakings 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:

- (a) the agreement to fix prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between Northern Europe and the United States of America;
- (b) the agreement between the parties to the TACA as to the terms and conditions on and under which they may enter into service contracts with shippers; and
- (c) the agreement to fix the amounts, levels or rates of brokerage and freight forwarder remuneration, the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers.

- (608) None of these agreements fulfils the conditions of Article 85(3) of the Treaty and Article 53(3) of the EEA Agreement.

- (609) The Commission also considers that the members of the TACA have abused their collective dominant position:

- (a) by placing restrictions on the availability and contents of service contracts; and
- (b) by altering the competitive structure of the market so as to reinforce the dominant position of the TACA.

- (610) From an economic point of view, because the majority of European exporters to the United States are or may be affected by these abuses, the Commission considers that these infringements are of a serious nature and the Commission considers it appropriate to impose fines.

- (611) The Commission has followed the procedures laid down in Regulations (EEC) No 4056/86 and (EEC) No 1017/68 and, in so far as may be appropriate in connection with the agreement to fix maximum levels of freight forwarder compensation, Regulation No 17, for the adoption of this Decision,

HAS ADOPTED THIS DECISION:

### *Article 1*

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty, Article 53(1) of the EEA Agreement and Article 2 of Regulation (EEC) No 1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between Northern Europe and the United States of America. The conditions of Article 85(3) of the EC Treaty, Article 53(3) of the EEA Agreement and of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

### *Article 2*

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by fixing the amounts, levels or rates of brokerage and freight-forwarder remuneration, the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

### *Article 3*

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by agreeing the terms and conditions on and under which they may enter into service contracts with shippers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

*Article 4*

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 1, 2 and 3 and are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect to the agreements referred to in Articles 1, 2 and 3.

*Article 5*

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by altering the competitive structure of the market so as to reinforce the dominant position of the Transatlantic Conference Agreement.

*Article 6*

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by placing restrictions on the availability and contents of service contracts.

*Article 7*

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 5 and 6 and are hereby required to refrain in future from any action having the same or a similar object or effect to the infringements referred to in Articles 5 and 6.

*Article 8*

In respect of the infringement of the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement referred to in Articles 5 and 6, the following fines are imposed:

A.P. Møller-Maersk Line	ECU 27 500 000
Atlantic Container Line AB	ECU 6 880 000
Hapag Lloyd Container Linie GmbH	ECU 20 630 000
P&O Nedlloyd Container Line Limited	ECU 41 260 000
Sea-Land Service, Inc.	ECU 27 500 000
Mediterranean Shipping Co.	ECU 13 750 000
Orient Overseas Container Line (UK) Ltd	ECU 20 630 000
Polish Ocean Lines	ECU 6 880 000

DSR/Senator Lines	ECU 13 750 000
Cho Yang Shipping Co., Ltd	ECU 13 750 000
Neptune Orient Lines Ltd	ECU 13 750 000
Nippon Yusen Kaisha	ECU 20 630 000
Transportación Marítima Mexicana S.A. de CV/Tecomar S.A. de CV	ECU 6 880 000
Hanjin Shipping Co., Ltd	ECU 20 630 000
Hyundai Merchant Marine Co., Ltd	ECU 18 560 000.

*Article 9*

The undertakings listed in Annex I are hereby required, within a period of two months of the date of notification of this decision, to inform customers with whom they have concluded joint service contracts that those customers are entitled to renegotiate the terms of those contracts or to terminate them forthwith.

*Article 10*

The fines imposed under Article 8 shall be paid, in ECU, within three months of the date of notification of this Decision, into bank account No 310-0933000-43 of the European Commission, Banque Bruxelles Lambert, Agence Européenne, Rond-Point Schumann 5, B-1040 Brussels.

After expiry of that period, interest shall be automatically payable on the fine at the rate charged by the European Central Bank for transactions in ECU on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 7,5 %.

*Article 11*

This Decision is addressed to the undertakings listed in Annex I.

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

Done at Brussels, 16 September 1998.

*For the Commission*

Karel VAN MIERT

*Member of the Commission*



## ANNEX I

## Parties to the TACA

Sea-Land Service, Inc.  
6000, Carnegie Blvd  
Charlotte  
NC 28209  
USA

A.P. Møller-Maersk Line  
50, Esplanaden  
DK-1098 Copenhagen K

Atlantic Container Line AB  
Sydatlanten  
Skandiahallen  
S-403 36 Gothenburg

Hanjin Shipping Co., Ltd  
51 Sogong-Dong  
Chung-Ku, Seoul  
Korea

Hapag-Lloyd Container Linie GmbH  
Ballindamm 25  
D-20095 Hamburg

P&O Nedlloyd Container Line Ltd  
Beagle House  
Braham Street  
London E1 8EP

Mediterranean Shipping Co.  
40 Av Eugene Pittard  
CH-1206 Geneva

Orient Overseas Container  
Line (UK) Ltd  
15th Floor, City Tower  
40 Basinghall Street  
London EC2V 5DE

Polish Ocean Lines  
10 Lutego 24  
Gdynia 81-364  
Poland

DSR/Senator Lines  
Martinstrasse, 62-66  
D-28195 Bremen

Cho Yang Shipping Co., Ltd  
Cheong-Ahm Bldg  
85-3 Seosomun-Dong Chung-Ku  
Seoul  
Korea

Neptune Orient Lines Ltd  
456, Alexandra Road  
No 06-00 NOL Building  
Singapore 119962  
Republic of Singapore

Nippon Yusen Kaisha  
Yusen Building  
3-2 Marunouchi 2-Chome  
Chiyoda-Ku  
Tokyo  
Japan

Transportación Marítima Mexicana SA de CV  
Av de la Cuspide No 4755  
Col Parques del Pedregal  
Deleg Tlalpan  
14010 Mexico DF  
Mexico

Tecomar SA de CV  
Benjamin Franklin, 232  
11800 Mexico DF  
Mexico

Hyundai Merchant Marine Co. Ltd  
4-10th Floor  
Mukyo Hyundai Building  
96, Mukyo Dong  
Chung-Ku, Seoul  
Korea

## ANNEX II

## TAA/TACA CHRONOLOGY

**1992**

28.8.1992 Notification of the TAA.

**1993**

10.12.1993 TAA substantive statement of objections.

**1994**

11.4.1994 TAA oral hearing

5.7.1994 Notification of the TACA

30.9.1994 TAA advisory committee

19.10.1994 TAA decision

**1995**

21.6.1995 Statement of objections relating to the lifting of the TACA parties' immunity in respect of inland rate fixing in the EC.

29.11.1995 Notification of the European inland equipment interchange arrangement (EIEIA).

**1996**

1.3.1996 Supplementary statement of objections on the lifting of the TACA parties' immunity from fines in respect of inland rate fixing dealing with issues raised by the notification of the EIEIA.

6.5.1996 TACA oral hearing

24.5.1996 TACA substantive statement of objections.

25.10.1996 TACA oral hearing

28.11.1996 Commission Decision lifting the TACA parties' immunity in respect of inland rate fixing in the Community.

**1997**

10.1.1997 Notification of the inland hub and spoke system.

11.4.1997 TACA supplementary substantive statement of objections dealing with the issues raised by the notification of the hub and spoke system.

**1998**

26.5.1998 TACA advisory committee.

15.6.1998 Second TACA advisory committee.

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## ANNEX III

## TACA 1995 and 1996 business plans (extracts)

## ‘TAA 1995 WESTBOUND BUSINESS PLAN

TARIFF — No structural changes have been contemplated. Our planned increases are:

	40 ft
	USD
Class (1-26)	160
(Dry and temperature controlled)	

Non-class rates

20 ft rates will be at a level equal to 80 % of the 40 ft rate after the 1995 increase has been applied.

## SERVICE CONTRACTS

Our service contract proposals for current and increased minimum volume commitments come in two parts; the first part follows the lines of the 1994 programme with increases of:

Minimum volume commitment

	20 ft	40 ft
	USD	USD
200-499 teus	130	160
500-1 499 teus	115	140
1 500+ teus	100	120 ...’

## ‘TAA 1995 EASTBOUND BUSINESS PLAN

TARIFF — No structural changes have been contemplated. Our planned increases are:

	20 ft	40 ft
	USD	USD
Class 1-17	80	100
Classes 18 and up	zero	
Temperature controlled containers	120	150
Non-class rates	80(A)	100(A)

(A) — Except no increase where current rate value meets or exceeds the equivalent of the current Class 18, by coast.

## SERVICE CONTRACTS

Our service contract proposals for current and increased minimum volume commitments come in two parts; the first part follows the lines of the 1994 programme with increase of:

Minimum volume commitment

	20 ft	40 ft
	USD	USD
200-499 teus	130	160
500-1 499 teus	100	120
1 500+ teus	80	100 ...’

## ‘SUMMARY OF 1996 BUSINESS PLAN

## 1. TARIFF — eastbound and westbound:

per 20 ft container — USD 110

per 40 ft container — USD 140

Heated tanks additional — USD 250 per tank, eastbound and westbound, (tariff and service contracts), to cover on-board and terminal plug-in.

Westbound only:

## (a) Pacific North-West differential

(tariff and service contracts)

To be adjusted:

From

To

20 ft — USD 250

subject

20 ft — USD 320

not subject

40 ft — USD 350

to CAF

40 ft — USD 450

to CAF

## (b) special equipment surcharge

(tariff and service contracts)

To be adjusted:

From

To

20 ft — USD 200

20 ft — USD 450

40 ft — USD 300

40 ft — USD 550

No other changes to tariff assessorials are contemplated.

## 2. SERVICE CONTRACTS — renewed at, or above existing minimum commitment levels:

eastbound and westbound:

per 20 ft — USD 110

per 40 ft — USD 140

— subject to negotiated discounts, case-by-case.

## 3. SERVICE CONTRACTS — new or for reduced minimum volume commitments:

## (a) westbound

MOC

Discount from 1996 Tariff

20 ft

40 ft

USD

USD

dry van:

up to 199 teus

Classes 1-3

25

30

4+

40

50

200 up to 499 teus

40

50

500 up to 1 499 teus

55

70

1 500+ teus

75

90

temperature controlled:

Down 1 Class, except Class 22 discounted:

USD 80/20 ft

USD 100/40 ft

## (b) eastbound

Tariff less 1 Class (except Class 1 — no discount) ...'

## ANNEX IV

## Schedule of agreements in effect or in contemplation which relate to the transatlantic trade and involve TACA parties

as at 8 December 1995

Parties	Name of agreement (and brief description where not apparent from name)	Date of (a) first entry into effect and (b) additions/deletions of parties
Atlantic Container Line, Hapag-Lloyd	ACL/H-L Reciprocal Space Charter and Sailing Agreement (previously ACL/GCL/CGMIH-L Reciprocal space charter and sailing Agreement)	(a) 19.7.1986 (b) Deletion of GCL, CGM: 16.9.1991
Atlantic Container Line, Mediterranean Shipping Company, Polish Ocean Lines	MPA Space Charter and Sailing Agreement (previously MSC/POL Space Charter and Sailing Agreement)	(a) 9.7.1993 (b) Addition of ACL: 22.1.1995
Hyundai Merchant Marine Co., Mediterranean Shipping Company	Hyundai/MSC Agreement (slot charter agreement)	(a) 21.10.1995
Hapag Lloyd, Atlantic Container Line	North American Pacific Coast/Europe Space Charter and Sailing Agreement by and among Compagnie Générale Maritime, Hapag-Lloyd Aktiengesellschaft and Atlantic Container Line AB (previously by and among Compagnie Générale Maritime, Hapag Lloyd Aktiengesellschaft and Incotrans BV)	(a) 15.11.1985 (b) Substitution of ACL for Incotrans: 30.3.1990 Cancelled
Hapag Lloyd, Nippon Yusen Kaisha, Neptune Orient Lines	Nippon Yusen Kaisha, Hapag Lloyd, AG, and Neptune Orient Lines, Ltd, Far East/United States/North Europe Space Charter and Sailing Agreement	(a) 22.2.1993
Hapag Lloyd Transportación Marítima Mexicana	TMM/H-L Space Charter and Sailing Agreement	(a) 24.12.1992
Hapag Lloyd, Nippon Yusen Kaisha, Neptune Orient Lines, P&O Containers Ltd	HL/NYK/NOL and P&O Far East/US Pacific- and Atlantic Coasts/North Europe Discussion Agreement (grants the parties authority to discuss future cooperation on various trades including the transatlantic; at present there are no details as to actual contemplated cooperation on the transatlantic)	Discussion Agreement: (a) 27.7.1995

Parties	Name of agreement (and brief description where not apparent from name)	Date of (a) first entry into effect and (b) additions/deletions of parties
Hapag Lloyd, Nedlloyd Lijnen P&O Containers Ltd	North Europe/North American Pacific Coast Space Charter and Sailing Agreement	(a) 6.10.1988 (b) Substitution of ACL for Incotrans: 30.3.1990; Deletion of CGM, ACL and Sea-Land: 31.5.1995
P&O Containers Ltd, Nedlloyd Lijnen, Sea-Land Service	P&O Containers/Nedlloyd/Sea-Land Agreement (previously Trans Freight Lines/Nedlloyd/Sea-Land Agreement) (cooperative working agreement)	(a) 28.3.1988 (b) Substitution of P&OCL for TFL: 14.6.1990
P&O Containers Ltd, Nedlloyd Lijnen, Sea-Land Service, Orient Overseas Container Line (UK) Ltd	Space Charter and Sailing Agreement Between Orient Overseas Container Line (UK) Ltd and Sea-Land Service, Inc., P&O Containers Ltd, Nedlloyd Lijnen BV; also known as the VSAO Agreement	(a) 1.2.1993
P&O Containers Ltd, Nedlloyd Lijnen, Sea-Land Service, AP Møller-Maersk	Space Charter and Sailing Agreement Between A.P. Møller-Maersk Line and P&O Containers Limited, Sea-Land Service, Inc., Nedlloyd Lijnen BV; also known as the VSA/Maersk Agreement	(a) 1.2.1993
P&O Containers Ltd, Nedlloyd Lijnen, Sea-Land Service, AP Møller-Maersk, Orient Overseas Container Line (UK) Ltd	Cooperative Working Agreement Among Orient Overseas Container Line (UK) Ltd, A.P. Møller-Maersk Line and Sea-Land Service, Inc., P&O Containers, Ltd, Nedlloyd Lijnen BV; also known as Maersk, OOCL, VSA Agreement	(a) 1.2.1993
P&O Containers Ltd, Nedlloyd Lijnen, Sea-Land Service, AP Møller-Maersk	Slot Exchange and Rationalisation Agreement Between A.P. Møller-Maersk Line and Sea-Land Service, Inc., P&O Containers Limited, Nedlloyd Lijnen, BV; also known as the Maersk/VSA Slot Exchange Agreement	(a) 8.9.1995
P&O Containers Ltd, Nedlloyd Lijnen, Sea-Land Service, Compagnie Générale Maritime	Space Charter Agreement Between Compagnie Générale Maritime and Sea-Land Service, Inc., P&O Containers Ltd and Nedlloyd Lijnen, BV; also known as the CGM Agreement	(a) 5.1.1991 Due to expire: 4.1.1996
P&O Containers Ltd, Sea-Land Service, AP Møller-Maersk	Maersk/P&O Containers/Sea-Land Agreement (cooperative working agreement)	(a) 11.10.1990

Parties	Name of agreement (and brief description where not apparent from name)	Date of (a) first entry into effect and (b) additions/deletions of parties
Cho Yang Shipping Co, DSR-Senator Lines	Tricontinental Service Agreement (space/slot charter, sailing and cooperative working agreement)	(a) 10.12.1990 (b) Substitution of DSR-Senator Lines for DSR and Senator Lines: 22.10.1994
Cho Yang Shipping Co, DSR-Senator Lines, Hanjin Shipping Co	Hanjin/Tricon Agreement (slot charter agreement)	(a) 5.12.1994

‘Notes

For the purposes of this response to the Commission’s request for details of: “all other agreements, ..., which relate to the transatlantic trade and which involve TACA parties, ...” the TACA parties have interpreted “*transatlantic trade*” as synonymous with the geographic scope of the TACA ocean services between North European and US ports; thus, for example, a cooperative agreement between two or more TACA parties in respect of European inland rail transportation is not included in the above schedule.

The above schedule does not include details of bilateral equipment interchange agreements between TACA parties. Equipment interchange between TACA parties is the subject of the supplementary notification of the TACA European Inland Equipment Interchange Arrangement lodged with the Commission on 29 November 1995.

Further, the schedule does not include agreements which do not relate specifically to the transatlantic trade, such as the International Council of Containership Operators (ICCO) and the Intra-Industry Multi-Modal Committee (IMC), of which several TACA parties are members, and agreements relating to terminal operations.’ LWD letter to the Commission dated 8 December 1995.

*ANNEX V*

**Switching between Groups of Carriers**

(Business secrets omitted)

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*ANNEX VI*

(Business secrets omitted)

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