II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 October 1994

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

(IV/34.446 — Trans-Atlantic Agreement)

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

(94/980/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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 [1], as last amended by the Act of Accession of Greece, and in particular Article 11 (1) 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 [2], and in particular Article 11 (1) thereof,

Having regard to the application submitted on 28 August 1992, pursuant to Article 12 (1) of Regulation (EEC) No 4056/86, by a number of shipping lines and concerning an agreement concluded between them called the Trans-Atlantic Agreement (hereinafter referred to as 'the TAA'),

Having informed the notifying parties by letter of 24 September 1992, pursuant to Article 4 (8) of Commission Regulation (EEC) No 4260/88 on the communications, complaints and applications and the hearings provided for in Council Regulation (EEC) No 4056/86 [3], as amended by Regulation (EC) No 3666/93 [4], that it would examine the Agreement under the provisions of Regulation (EEC) No 1017/68 as well,

Having regard to the applications for a finding of an infringement lodged pursuant to Article 10 of Regulation (EEC) No 1017/68 and Article 10 of Regulation (EEC) No 4056/86,

Having regard to the decision taken by the Commission on 14 April 1993 to initiate proceedings in this case,

Having given the undertakings concerned, in accordance with Article 26 (1) of Regulation (EEC) No 1017/68, Article 23 (1) of Regulation (EEC) No 4056/86, the provisions of Commission Regulation (EEC) No 1630/69 of 8 August 1969 on the hearings provided for in Article 26 (1) and (2) of Regulation (EEC) No 1017/68 [5], and the provisions of Regulation (EEC) No 4260/88, the opportunity to make known their views on the objections raised by the Commission,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions (land and maritime transport),

Whereas:

(1) OJ No L 175, 23. 7. 1968, p. 1.
(2) OJ No L 378, 31. 12. 1986, p. 4.
(3) OJ No L 376, 31. 12. 1988, p. 1.
(4) OJ No L 336, 31. 12. 1993, p. 1.
(5) OJ No No L 209, 21. 8. 1969, p. 11.

PART I: THE AGREEMENT

I. THE PARTIES

(1) A total of 15 shipping lines are members of the Trans-Atlantic Agreement (hereinafter referred to as 'the TAA'). They are:

(2) Since 28 August 1992, the date of the notification:

— Sea-Land Service (Sea-Land),

— A. P. Møller-Maersk Line (Maersk),

— Atlantic Container Line (ACL),

— Hapag Lloyd,

— Nedlloyd Lijnen,

— P&O Containers Limited (P&OCL),

— MSC Mediterranean Shipping Co. (MSC),

— Orient Overseas Container Line (UK) Ltd (OOCL),

— Polish Ocean Lines (POL),

— DSR/Senator Lines,

— Cho Yang Shipping Company.

(3) Since 12 March 1993 [6]:

— Nippon Yusen Kaisha Line (Europe) (NYK).

(4) Since 31 March 1993 [7]:

— Neptune Orient Lines (NOL),

— NYK and NOL had previously been absent from the transatlantic trade.

(5) Since 7 April 1993 [8]:

— Transportación Marítima Mexicana (TMM),

— Tecomar.

TMM and Tecomar had already been involved in the transatlantic trade.

(6) Hanjin Shipping Co. Ltd became a party to the TAA on 26 August 1994, entering the transatlantic trade through a slot-charter agreement with DSR/Senator Lines GmbH and Cho Yang. This Decision is not addressed to Hanjin Shipping Co. Ltd but it should be read in the light of the fact that Hanjin has chosen to enter the transatlantic trade as a party to the TAA (see in particular, recitals 186, 261, 458, 459 and Annex II).

II. THE NOTIFIED AGREEMENT

1. *Scope of the agreement*

(7) The TAA became effective on 31 August 1992 and covers eastbound and westbound shipping routes between (i) on the one hand, ports in Europe situated in latitudes from Bayonne, France, to the North Cape, Norway (except non-Baltic ports in Russia, Mediterranean ports and ports in Spain and Portugal), and interior and coastal points in Europe via the said non-excepted European ports other than points in Spain and Portugal; and (ii) on the other hand, ports in the 48 contiguous States of the United States and the District of Columbia and points in the United States via the said ports.

2. *Alleged objectives of the agreement*

(8) According to the parties, the TAA has as its chief aim the achievement of stability on the North Atlantic trade. Given the existing excess capacity (see recital 102 for figures), the carriers maintain that stability can be achieved only by regulating the utilization of existing capacity, in order to allow them to increase freight rate levels.

3. *Main aspects of the agreement*

(a) General

(9) The TAA provides that its members may discuss and agree in common a vast range of subjects relating to transatlantic liner transport such as prices (on both the maritime and inland sectors), conditions of carriage and capacity (Article 5 of the TAA).

(10) The members of the TAA have an organization and rules which allow them to determine in common their policies and to put them into practice (Article 8 of the TAA).

(b) Tariff rates

(11) The members of the TAA establish their tariffs for both the maritime and inland sectors and publish them jointly. Any independent action by one of the members (the offer of a lower rate than the tariff — see recital 78) must be notified 10 days in advance to the secretariat of the TAA, which informs the other members (Article 13 of the agreement as amended).

(12) A standing 'Rate Committee' monitors the application of the objectives of the agreement in so far as they concern tariffs (Article 13 of the agreement). It is made up of the former members of the conferences established in the trade between northern Europe and the east coast of the United States [9] (i.e. ACL, Hapag Lloyd, P&O, Nedlloyd,

[6] TAA letter, 30 March 1993.
[7] TAA letter, 5 April 1993.
[8] TAA letter, 26 April 1993.

[9] North Europe-USA Rate Agreement (Neusara) and USA-North Europe Rate Agreement (Usanera) conferences.

Sealand and Maersk) plus OOCL and NYK ([10]). Application of those conference agreements was suspended following the entry into force of the TAA (see recital 117 *et seq.*).

(c) **Service contracts**

(13) The service contracts ([11]) concluded by the members of the TAA must conform to certain rules, of which the principal ones are the following:

— no contracts may last longer than one year; all contracts must terminate on or before 31 December of the relevant year,

— no contracts may be signed for annual volumes less than 250 TEU containers (20-foot equivalent units) ([12]). On 16 September 1993 the Commission was informed by the parties that they had lodged with the Federal Maritime Commission an amendment to the agreement lowering the limit to 200 TEU as from 1 January 1994.

(14) A standing 'Contract Committee', made up of the same members as the Rate Committee, i.e. mainly the former members of the conferences, monitors the implementation of the policy of the TAA so far as service contracts are concerned (Article 14 of the agreement).

(15) In particular, Contract Committee members can jointly negotiate and enter into collective service contracts but are not allowed to enter into individual service contracts. Non-members may negotiate and enter into contracts individually and/or jointly among themselves without prior notice. Non-members can enter into Contract Committee members' service contracts only on a case-by-case basis, subject to mutual agreement.

(d) **Capacity management programme (CMP)**

(16) All the parties to the TAA participate in a capacity management programme (CMP), described in Article 18 of the Agreement.

(17) For the moment, the CMP is implemented only in the westbound, i.e. Europe-United States, sector of the trade. The TAA also provides that the parties can extend the programme to the eastbound, i.e. United States-Europe, trade if they consider it necessary, but only with the prior agreement of the United States authorities.

(18) The CMP thus at present mainly affects European exports to the United States.

(19) The purpose of the CMP is to limit the supply of transport on the market without reducing the real available capacity of shipowners. To do that, shipowners have agreed not to utilize a substantial part (up to 25 %) of their available capacity.

(20) In practical terms, the members of the TAA have established for two years, by periods of three months, the real available capacity of each of them and the volume of goods that each member is authorized to carry. Thus, shipowner A, which could for example carry 10 000 TEU over three months, undertakes not to carry more than 8 000 and to pay to the TAA secretariat a fine of US $ 500 per TEU that it carries in excess of this quota. Accordingly, even if its vessel is not full, this shipowner must refuse to carry goods if it has exhausted its quota for the three-month period in question. However, it may charter slots from other TAA members if they have not reached their quota.

(21) The volumes prescribed by the programme may be revised.

(22) The CMP is therefore a capacity non-utilization agreement, or in other words an agreement to limit the utilization of capacity, rather than one which provides for a real reduction in capacity.

(e) **Financial guarantee**

(23) It is provided that each party must take a deposit of US $ 600 000, which may be increased. A neutral body and, in the case of the CMP, the TAA Secretariat and an auditor monitor the parties' compliance with the TAA. They may impose heavy fines if necessary in the event of non-compliance with the provisions of the TAA or the CMP [. . .] (*).

([10]) OOCL currently operates using former conference members' ships, while NYK did not operate Atlantic services before 1993.
See also the explanation of the presence of these two shipping lines on the Committee set out in recital 137.

([11]) Contract between a shipper and shipping companies under which the shipper undertakes to ship a minimum quantity over a given period, in exchange for a rate of carriage that is less than the tariff (see recital 78).

([12]) A 20-foot container equals 1 TEU, a 40-foot container equals 2 TEU.

(*) [. . .]: In the published version of this Decision, some information has hereinafter been omitted, pursuant to Article 28 of Regulation (EEC) No 1017/68 concerning non-disclosure of business secrets.

(f) **Space/slot chartering and equipment exchange**

(24) In addition to six vessel-sharing agreements currently in effect among various TAA parties (agreements outside the TAA framework), the TAA makes provision for additional slot-charter activity and equipment exchange. Such provisions replicate the voluntary slot-charter provisions of the Neusara and Usanera conferences.

PART II: THE TRANSATLANTIC TRADE

I. THE MARKET

(25) Generally speaking, a shipper may arrange for the carriage of his goods between a point in northern Europe and a point in the United States in one of the following three ways:

— he purchases the inland transport and sea transport services separately;

— he makes use of a forwarding agent, who organizes the inland and sea transport for him;

— he uses the services of a shipowner who can organize the inland and sea transport operations on behalf of the shipper, usually by subcontracting the inland transport section.

(26) The TAA covers containerized liner shipping services between northern Europe and the United States and inland container transport services, in Europe and in the United States.

A. *Sea transport*

1. Market for sea transport services

(27) The market for sea transport services to which the TAA relates is that for containerized 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.

(28) To determine whether these services constitute a market in their own right, it is necessary to assess the scope for substitution between them and, on the one hand, other transport services on the same routes and, on the other hand, transport services with the same technical characteristics but offered on other sea routes. A description of the market for sea transport services therefore has to comprise both a technical analysis and a geographical analysis.

(a) *Technical analysis of the service*

(29) There are several types of goods transport service between northern Europe and the United States. A distinction first has to be drawn between air transport and sea transport.

(30) Because it costs a great deal more, air transport between northern Europe and the United States involves only limited quantities of high value-added goods or goods for which the transport time is a decisive factor. Compared with containerized sea transport, the volumes transported by air are much smaller.

(31) In its reply of 17 March 1994, the TAA states that, for certain categories of goods, air transport accounts for a substantial proportion of the volumes carried (between 14 and 19 %). But it does not produce any evidence that goods falling into these categories and normally carried by sea can easily be switched to air transport. It is also clear from the tables provided by the TAA ([13]) that, for each category of goods carried (categories which, it claims, can be switched), the average value of goods carried by air is substantially higher than the average value of goods carried by sea. It is consequently not proven that a substantial proportion of the goods carried by container could easily be switched to air transport. It seems instead that the categories of goods mentioned by the TAA include a wide variety of products some of which, according to their physical properties, could be transported economically by air while others could not. (It should also be noted that the tariff system for air transport does not discriminate between different types of goods but is based on the weight or volume of the goods: see recital 77).

(32) The Commission takes the view that air transport forms a separate market from containerized liner shipping.

(33) As far as sea transport is concerned, a distinction has to be drawn between several types of service:

— unscheduled (tramp) transport,

— scheduled (liner) transport, and

— specialized transport.

([13]) TAA reply, 17 March 1994, Annex 16 (reply concerning Article 85).

(i) Unscheduled (tramp) transport

(34) Unscheduled sea transport, commonly called tramp transport, accounts for most of the volumes carried by sea. It consists of unscheduled transport services using vessels chartered on demand ([14]) and, nowadays, mainly involves the bulk transport of particular categories of goods (oil, ores, cereals, etc.) for which vessels are specially equipped. The goods are homogeneous and take up all or a good part of the capacity available in the ships. The terms of contract are generally laid down in a charter-party ([15]) negotiated between the shipowner and the user ([16]).

(ii) Liner transport

— General features

(35) Scheduled sea transport, or liner shipping, accounts for the bulk of maritime transport in value terms. The supply and demand conditions are highly specific in comparison with other modes of transport.

(36) The demand is extremely varied, both in terms of the types of goods carried and in terms of the variety and number of customers (transport users). Liner shipping is particularly well suited to the carriage of goods in small or medium quantities which are not in themselves sufficient to fill a ship or a substantial part of it economically. The goods have very heterogeneous physical characteristics and values and are shipped by a large number of shippers (see Annex III, paragraph 5).

(37) The suppliers of liner transport are in the nature of 'common carriers': their transport capacity is on offer all the time, independently of any specific demand, to all transport users on a predetermined and non-discriminatory basis, at prices which are set in advance (see Annex III, paragraph 1). This type of transport is thus available to everyone on the basis of published tariffs, and the most frequently used form of contract is the bill of lading ([17]).

(38) There are two different types of liner transport:

— containerized liner transport, and

— conventional (or break-bulk) liner transport.

These two types of transport are sometimes substitutable.

— Containerized liner transport

(39) As their name suggests, containerized liner shipping services involve the carriage of goods by container, that is to say in boxes of standard shape and size (usually 20 feet or 40 feet long) on ships specially equipped for the purpose.

(40) Containers are carried on either 'lolo' (lift-on/lift-off) vessels, cellular vessels onto which they are loaded vertically using cranes, or on 'roro' (roll-on/roll-off) vessels, into the holds of which they are introduced horizontally on lorry chassis via access ramps ([18]).

(41) The supply of containerized transport services is regular and frequent (a large majority of the container carriers in the Atlantic trade offer weekly sailings). Containerization greatly reduces the risk of the goods being damaged during loading and unloading and reduces the costs of packing and insurance for the user ([19]). Containerization also enables the port

([14]) Tramp vessel services are defined in Article 1 (3) (a) of Regulation (EEC) No 4056/86.

([15]) Charter-party: 'A contract by which an entire ship or some principal part of it is let by her owner to a charterer.' (Dictionary of Shipping Law, Hardy Ivamy).

([16]) The TAA refers to 'charters' as a further source of competition (points 3.88 *et seq.*), but these are the same as tramp vessels. Charters and tramps are not two forms of transport, but the same form under two different names: the term 'tramp' refers to unscheduled shipping, and a 'charter' is the most common means whereby a tramp vessel is hired.

([17]) Bill of lading: this document sets out the terms of the contract between the shipper and the carrier, and includes a clear allocation of responsibilities and a breakdown of the transport costs.

([18]) Other horizontally loaded vessels are also called roro ships by the TAA, but these are in fact specialized vessels, usually for carrying non-containerized loads (e.g. cars), and are not economically suitable for container transport.
LASH (lighter abroad ship) transport is the transport of barges in the holds of specialized ships. Containers can be carried on barges. But this type of shipping is suited to river transport or to congested or shallow ports. Here the TAA is in fact referring to specialized carriers.

([19]) TAA reply, 17 March 1993, point 3.76 (Article 85).

handling, and usually the inland haulage operations, to be carried out economically and very swiftly.

— Conventional (or break-bulk) liner transport

(42) Conventional, or break-bulk, liner transport involves the non-containerized transport of a variety of goods. Ships have open holds in which consignments of goods are stacked, one by one, until they are filled to capacity. This was the most common form of liner shipping until containerization in the late 1960s. The productivity gains achieved through containerization have been so great, particularly in port handling ([20]), that container services have almost completely replaced break-bulk transport on the major east—west routes for all goods that can be containerized.

(43) Nevertheless, there are still today a number of goods which are either too heavy or too large to be containerized and therefore have to be shipped in the traditional manner. These are mostly certain steel or metal products or certain 'project cargoes' (prefabricated building materials).

— Conventional maritime transport according to trade

(44) In certain north—south trades such as those which have been the subject of Commission Decisions 92/262/EEC ([21]) (shipowners' committees) and 93/82/EEC ([22]) (Cewal, Cowac and Ukwal), the inefficiency of port services and the lack of land transport infrastructures erodes considerably the competitive advantages of containerized transport over conventional transport. There is therefore some substitutability in these trades between the two forms of liner transport, so that shipowners often place on these trades ships that can cater simultaneously for containerized and for break-bulk transport.

(45) Conversely, in highly developed trades such as transatlantic shipping, the two forms of transport are no longer substitutable, the trade is highly containerized, the major services are operated with ships fitted exclusively for carrying containers, and conventional (break-bulk) liner transport is now reasonable attractive only for non-containerizable goods (see Annex III, paragraph 4).

(46) Since the transatlantic trade links two highly industrialized regions of the world, it handles a particularly large share of manufactured goods, for which containers are usually the most suitable mode of transport. The exporters of these goods are furthermore likely to be particularly attracted by certain specific features of containerized transport, namely its speed, regularity and frequency, its reliability, the safety of the goods, the savings it offers on packing and insurance costs, and its suitability for multimodal transport. These aspects of containerized transport are particularly well developed in the transatlantic trade (see Annex III, paragraph 6).

(iii) Specialized transport

(47) There are also shipping operators who specialize in certain types of containerizable goods. Where a shipper has a large quantity of homogeneous containerizable goods to be carried on a regular basis and can put together the necessary quantities, it can be more economical to use specialized ships than to carry the goods by container.

(48) This type of transport (which is termed 'neo-bulk') thus involves certain categories of goods in consignments which are too large to be economically carried by container and which may themselves fill a good part, if not the whole of the vessel. They include above all steel or metal products, fertilizers, certain chemicals, forest and wood products, and motor vehicles.

(49) In this case, carriers conclude long-term contracts with one or a few large shippers and operate these specialized services regularly, but mainly on the basis of charter-parties or service contracts. This regularity, which is linked to an isolated or concentrated demand for transport services, is negotiated between specialized carriers and their customers and differs from the regularity of liner shipping services, which operate regular services independently of any specific demand and offer their services on a non-discriminatory basis to all shippers.

(iv) Substitutability analysis

(50) Tramp transport caters for goods with characteristics that differ from those of goods

([20]) There has been as much as a 50-fold increase in port-handling productivity.
([21]) OJ No L 134, 18. 5. 1992, p. 1.
([22]) OJ No L 34, 10. 2. 1993, p. 20.

carried by container in much larger quantities, under contractual terms that are distinct from those governing containerized transport and with a demand structure that is completely different from that of liner transport.

(51) Conventional (break-bulk) liner transport is no longer, in the transatlantic trade, a reasonable alternative to containerized transport for almost all containerizable goods and now constitutes a separate market from that in containerized liner transport services (see recitals 42 to 46).

(52) Although it mostly handles containerizable goods, specialized (neo-bulk) transport offers a different kind of transport service from containerized liner shipping and constitutes a reasonable alternative to it only for shippers with *large quantities of only a few categories of goods* for which shipowners have had their vessels specially built. This form of transport is not, therefore, an alternative for the vast majority of containerized transport customers and it therefore forms a separate market from the containerized liner shipping services market.

(53) As regards liquid goods, which are cited by the TAA as being a separate type of goods ([23]), the analysis is the same: tank-containers are carried on container ships, such as those covered by the TAA, which belong to the containerized liner shipping sector. On the other hand, tankers are specialized ships and belong to the specialized transport sector as described above.

(54) Certain goods which may sometimes be carried by tramp or by neo-bulk vessels are none the less also attracted by the shipping lines' system of tariffs, which is very advantageous for this type of goods: by this system of tariffs which are differentiated or discriminatory according to the nature of the goods, some goods can be carried at a much lower price than that charged for most containerized liner cargoes. In certain exceptional cases, therefore, the prices offered by the two modes of transport can be similar, as the TAA states in its reply.

(55) However, such a similarity in prices can arise only for certain categories of goods and is, above all, confined to a very small proportion of containerized liner shipping users. And even if the price is similar, the types of service offered are different and, as the TAA points out in its reply ([24]), the customer's choice will still be largely influenced by certain distinctive characteristics of each mode of transport (regularity, speed, frequency, number of ports, date of transport, final destination and multimodal transport, volumes concerned).

(56) Consequently, even if there are a number of categories of goods that are carried in containers either in the conventional way or by specialized ship ([25]), this does not mean that customers wishing to ship goods of this kind can switch readily, swiftly and economically between the two modes of transport. Despite the substantial price increases it has introduced on containerized transport, the TAA has not provided the Commission with any example of a customer who has genuinely switched from containerized transport to another form of transport.

(57) The Dynamar report ([26]), which presents a number of carriers operating regular services on the Atlantic ([27]), shows that most of these break-bulk, neo-bulk or other operators do not offer an equivalent service to that of entirely containerized carriers (frequency of service ([28]), number of ports of call, absence of multimodal service, etc.).

(58) It consequently has to be concluded that, for the vast majority of categories of goods and users of containerized liner shipping, the other forms of maritime transport, including conventional (break-bulk) liner transport, do not offer a reasonable alternative to containerized transport services and that these services constitute a market in their own right.

(b) *Geographical analysis of the service*

(59) In the transport sector, services which are equivalent technically but cover different geographical areas are not normally substitutable and do not therefore belong to the same services market (for instance, a containerized service from Rotterdam to New York is not substitutable for a containerized service from Rotterdam to Hong Kong). The definition of the services market consequently has a geographical aspect here, irrespective of the definition of the geographic market, which relates to the area in which the services are marketed.

([23]) TAA reply, 17 March 1994, point 3.72, p. 55 (Article 85).
([24]) TAA reply, 17 March 1994, point 3.76 (Article 85).
([25]) TAA reply, 17 March 1994, point 3.73 (Article 85).
([26]) Report produced for the purposes of the proceeding by Dynamar and presented by the TAA in Annexes 12 and 15 of its reply of 17 March 1994 (Article 85).
([27]) Some of which are containerized liner shipping companies which the Commission has taken into account in its analysis of this market.
([28]) The TAA stresses the importance of the weekly frequency of scheduled services for the quality of service.

(60) The services in question are containerized liner shipping services between nothern Europe and the United States, via the sea routes between ports in northern Europe and ports in the United States and Canada.

(61) The whole of northern Europe is served by the ports there, namely, for the major east—west trades, the ports of Hamburg, Bremen, Rotterdam, Antwerp, Le Havre and Felixstowe. The United States is served by all the ports on its east and west coasts and on the Gulf coast and, for certain areas, the ports on the east coast of Canada, namely Halifax and Montreal. When examining maritime transport between Europe and the United States, the routes to be taken into consideration are therefore the sea routes between ports in northern Europe and ports in the United States and Canada.

(62) The services in question are not all substitutable on a two-for-two basis: for example, services via ports on the west coast and those via ports on the east coast of the United States are separate segments of the relevant market. Services via ports in the United Kingdom and those via the continental ports in northern Europe can likewise be regarded as separate market segments. Similarly, the Canadian ports can compete for transport services only on routes originating or ending in the north-east of the United States or in the Great Lakes region. In the case in point, however, the TAA covers all the services concerned (except for services via the Canadian ports [29]) and the conditions of competition for those services are reasonably homogeneous. All of the services concerned should therefore be considered as a market within the meaning of Article 85 of the EC Treaty.

(63) There is another maritime transport route between Europe and the United States: it links ports on the Mediterranean and ports in the United States. But possible competition from these services on the relevant market is very marginal, for the following reasons:

(64) The costs of inland haulage and the time factor limit considerably the substitutability between ports in northern Europe and ports on the Mediterranean. For shippers in northern Europe, services via the Mediterranean are not a reasonable alternative to the services concerned.

(65) In the present circumstances, competition from Mediterranean services is further reduced by the fact that the Mediterranean ports are less efficient and the services less frequent. This is why services via ports in northern Europe occasionally attract shippers in southern Europe (for example, northern Italy), whereas, conversely, shippers in northern Europe rarely use services via the Mediterranean.

(66) The Mediterranean ports offer a real alternative to the northern European ports, therefore, only for shippers located near the Mediterranean [30]. These factors suggest that services through the Mediterranean ports compete only marginally and negligibly on the transport markets in question, namely between the United States and northern Europe.

2. Geographic market

(67) The geographic market is the area in which the services defined above are marketed. Thus, the European geographic market for containerized liner shipping services between northern Europe and the United States, via the maritime routes between the northern European ports and ports in the United States and Canada, consists of the catchment areas of such northern European ports.

(68) The catchment areas in question depend both on distances from the ports and on the costs of inland haulage. In the case in point, the catchment areas of the northern European ports can be regarded as covering, in particular, Ireland, the United Kingdom, Denmark, the Netherlands, Belgium, Luxembourg, most of Germany and northern and central France.

3. Conclusion

(69) The TAA states in its reply [31] that the different sources of competition must be considered collectively, and not separately, when assessing the nature of the relevant market. Such would indeed be the case if shipping operators were unable to discriminate between the different demands and if

[29] Two points should be made here:
— traffic between northern Europe and the United States via the Canadian ports accounts for a relatively small share of the relevant market, as can be seen in recital 147, and competes with only some of the services via ports in the United States,
— United States and Canadian law is different, with the result that the TAA, which is subject to United States law, covers only traffic via ports in the United States.

[30] As far as the Commission is aware, only some shippers in the south of France have been able to shift their traffic to the Mediterranean ports following the entry into force of the TAA.

[31] TAA reply, 17 March 1994, point 3.1, p. 32 (Article 85).

a competitive alternative in relation to part of the demand could have an impact on prices throughout the market. In the present case, however, shipping operators discriminate in particular between the different categories of goods by applying differentiated rates (see recital 77) and are therefore able to limit the effects of marginal competition for the carriage of specific categories of goods. The services described above should accordingly be considered the relevant market.

(70) The sea transport services market thus described is a field of activity in its own right with relatively uniform conditions of competition. The TAA covers it almost in its entirety (with the exception of the routes via the Canadian ports, which are not subject to United States law) and establishes rules in it for its members.

B. *Land transport*

(71) The land transport services that are of relevance to this Decision are containerized land transport services offered to shippers, in addition to sea transport, by the TAA members amongst others, as part of a multimodal transport operation.

(72) More specifically, these services concern the inland haulage of containers between ports in northern Europe and inland points in Europe as part of a transatlantic multimodal transport operation.

C. *Organization of the sea transport market*

1. **Organization of services**

(73) Liner shipping between northern Europe and the United States is organized on the basis of scheduled services; each scheduled service consists of a given number of vessels (four or five in general) which make continual crossings and make calls on specified dates at each port. The sailings are either return trips between northern Europe and one or more of the United States coasts (east coast, Gulf coast or west coast), or round-the-world trips in either direction.

(74) In organizing such much-used scheduled services, the shipping lines frequently have to regroup, either by sharing vessels within one and the same service, by withdrawing their own vessels and using the services of the others or by leasing space on each other's vessels.

(75) Within the TAA, all the member companies participate in such capacity-sharing agreements, in groups of two, three or four shipping lines. Such agreements, most of which pre-date the conclusion of the TAA, are separate from the price agreements or agreements limiting capacity utilization concluded between all the TAA members.

2. **Traditional commercial organization**

(76) Until the entry into force of the TAA, the commercial organization of the trade was traditionally based on the system of liner conferences: a number of shipping lines were linked by a conference agreement, and the other shipping lines remained independent and operated as outsiders in the trade, in competition with the other conferences. The liner conference (Usanera or Neusara, depending on whether the trade was eastbound or westbound), which has had a market share of the order of 50 % in recent years, published a tariff to be observed by all its members.

(77) A particular feature of the shipping tariffs is that they discriminate between the various products, generally on the basis of value: higher-value goods pay a higher price than lower-value goods. Prices for shipping certain goods can thus amount to five times the prices for shipping other goods on one and the same route, and in some cases even more.

(78) Business relation between a customer and a conference could be of three types:

— the customer paid the tariff charged by the conference and could have his goods shipped by the conference member of his choice,

— the customer could obtain a discount from one of the conference members, who then had to inform the other members of his 'independent rate action' ([32]),

— the customer could sign a service contract with the conference, under which he undertook to ship a minimum quantity over a given period, at an overall price 15 to 20 % below the tariff rate, and sometimes more.

(79) The conferences operating on the Atlantic never authorized their members to sign service contracts individually.

(80) Business relations with the independent shipping lines were similar:

([32]) Section 5 (b) (8) of the United States Shipping Act of 1984 stipulates that the right of independent rate action is mandatory in trades to or from the United States.

— either the customer paid the independent shipping line's tariff,

— or he signed a service contract with the independent shipping line.

(81) In recent years in the transatlantic trade, independent rate action within the conferences remained relatively marginal, while the volumes transported under service contracts accounted for around [. . .] of the trade.

(82) Even in negotiations on service contracts, reference to the tariff remained very important in determining the price of the service contract.

II. ECONOMIC CONTEXT

(83) The transatlantic trade, although the smallest of the major east—west trades in volume terms, is the third-largest world trade after the transpacific and the Europe/Far East trade. It is therefore a major world trade, and a particularly important one for the European economy.

(84) By way of illustration of the size of the transatlantic trade, total trade between the European Community and the United States in 1992 amounted to ECU 73,9 billion in European exports and ECU 86,7 billion in United States exports. It is generally estimated that trade in manufactured goods accounts for 69% of world trade in value terms. Furthermore, miscellaneous goods account for two-thirds in terms of value of the goods traded by sea ([33]). It would thus seem that a substantial proportion in value terms of trade between Europe and the United States is carried by liner shipping. However, the Commission does not have any precise information on the value of the goods carried in the transatlantic liner trade.

(85) In terms of volume, the direct transatlantic trade between northern Europe and the United States in 1992 amounted to approximately 1 million TEU in each direction.

A. *Supply*

(86) The transatlantic trade saw some growth in available capacities up to 1990: the Drewry Report of 1991 puts the increase at 4% from 1985 to 1987 and at 12,8% from 1987 to 1990 in the northern Europe—North America trades as a whole ([34]).

(87) Between 1990 and 1992 the transatlantic trade tended to decline. It is estimated that total capacities on the transatlantic trade fell by 2,4% in the westbound sector and by 1,1% in the eastbound sector ([35]).

B. *Demand*

(88) As far as demand is concerned, westbound traffic in the period 1987/88 was much greater than eastbound traffic: in 1988, westbound volumes between northern Europe and North America (including the Canadian east coast, but excluding the American west coast) were 27% greater than eastbound volumes ([36]).

(89) From 1988 to 1992 trends in the two sectors of the trade differed: there was stagnation in the westbound sector and growth in the eastbound sector:

(in %)

Year	Westbound	Eastbound
1988/89	+ 6,6	+16,3 ([37])
1989/90	- 2,6	+10,2 ([38])
1990/91	+10,1	+ 7,1 ([39])
1991/92	+ 9,1	+ 6,9 ([40])

([33]) Pierre Bauchet, Le Transport Maritime, Economica 1992, pp. 17 and 34.

([34]) Strategy and Profitability in Global Container Shipping, Drewry, November 1991, p. 122.
A figure of [. . .] was given by the TAA in its notification of 28 August 1992, p. 2.

([35]) Drewry, Container market profitability to 1997, December 1992, p. 79.

([36]) Drewry, November 1991, p. 123, included in the TAA notification, 28 August 1992, p. 19.

([37]) North America except west coast, Drewry, November 1991, p. 123, included in the TAA notification, 28 August 1992, p. 19.

([38]) Trade between Europe and the United States (three coasts), excluding Canada, JOC/Piers. United States Liner Trade Review 1991 Annual Issue, included in the TAA notification, 28 August 1992, p. 17. See also Europe/North American (excluding west coast) trade, Drewry, November 1991, p. 123, and TAA notification, 28 August 1992, p. 19: westbound: -2,5%; eastbound: +10,2%.

([39]) Trade between Europe and the United States (three coasts), excluding Canada, JOC/Piers United States Liner Trade Review 1991 Annual Issue, included in TAA notification, 28 August 1992, p. 17. See also trade between Europe and North America (including west coast and Canada), Drewry, December 1992, p. 54: westbound -9,1%; eastbound +8,1%.

([40]) Trade between Europe and the United States (three coasts), JOC/Piers and TAA reply, 15 July 1993.

(90) Thus, while the westbound sector was stagnating in volume terms, with a marked decline in 1991 which was partly made up the following year, the eastbound sector had relatively strong and steady growth from 1988 to 1992.

(91) The trends were as follows in 1993, according to the TAA's figures:

(in %)

Year	Westbound	Eastbound
1992/93 ([41])	+11	-10

(92) Thus, the westbound sector continued to enjoy strong growth in 1993, while the eastbound sector shrank considerably.

C. *Imbalance between the eastbound and westbound sectors*

(93) With the transatlantic trade initially much heavier in the westbound sector (westbound volumes 27 % greater than eastbound volumes in 1988: see point 88), the changes between 1988 and 1992 resulted in eastbound volumes first catching up with westbound volumes in 1990 and then exceeding them in 1991, creating a slight imbalance in favour of eastbound traffic. It is estimated that eastbound volumes exceed westbound volumes by 10,2 % ([42]) in 1991. In 1992 the recovery of westbound traffic reduced the imbalance to a gap of around 6,9 % ([43]).

(94) Thus, the imbalances observed in 1991 and 1992 (10,2 and 6,9 %) between the eastbound and westbound sectors of the transatlantic trade appear both transitory and fairly slight compared with the previous imbalances that existed in the trade (27 % in 1988), or compared with those in the other two major east-west world trades: in 1991 the imbalances were of the order of 25 % in the transpacific trade and of the oder of 35 % in the Far Easth trade ([44]).

(95) In 1993 the contrasting trends in eastbound and westbound demand caused a new reversal in the imbalance: westbound volumes exceeded eastbound volumes by 15 % ([45]). More precisely, the eastbound and westbound sectors were back in balance in the first quarter of 1993, and westbound volumes exceeded eastbound volumes in each of the last three quarters of the year ([46]). Consequently, the imbalance prevailing at the time when the TAA was established was reversed in 1993.

D. *Utilization rates*

(96) The rate of utilization of vessels is the ratio between the volume of demand and total capacity available. It provides a good indicator of the market situation. Since the services are regular, scheduled services, there is always excess capacity, and the rate of utilization rarely comes close to 100 %.

(97) In 1990 the utilization rates of the vessels were estimated at 60,5 % westbound and 59,4 % eastbound ([47]). These figures are cited by the TAA in its notification of 28 August 1992.

(98) The Drewry Report of December 1992 estimates average utilization rates in the whole of the trade between northern Europe and the United States, Canada and Mexico as follows ([48]):

(in %)

Year	Westbound	Eastbound
1990	64,7	64,2
1991	60,1	69,1
1992	62,6	72,4

(99) These figures show a stagnation in the westbound sector and an improvement in the eastbound sector, a pattern which corresponds to that in the volumes in both sectors (see recital 90).

([41]) European containerized exports to the United States moving via north European ports, TAA reply, 17 March 1994, point 3,57 (Article 85). See also Figure 23 presented at the hearing of 28/29 April 1994 and TAA letter, 1 June 1994.

([42]) Traffic from the three coasts of the United States, JOC/Piers 1991, and TAA notification, 28 August 1992, p. 17.

([43]) Trade with the three coasts of the United States, JOC/Piers, and TAA reply, 15 July 1993.

([44]) Drewry, December 1992, p. 54.

([45]) See Figure 26 presented at the hearing of the TAA of 28/29 April 1994. See also 12,7 % imbalance according to the figures supplied by the TAA on 25 May 1994 concerning volumes excluding transhipment. See also imbalance of 26 % on all trades between Europe and the United States, TAA reply, 17 March 1994, Tables 13 and 14 (Article 85).

([46]) TAA reply of 19 November 1993 to a request for information. See also TAA reply of 25 May 1994 to a request for information.

([47]) Drewry, November 1991, p. 1.

([48]) Drewry, December 1992, p. 81. The rates are based on the volumes transported excluding military cargoes, and relay traffic; they are therefore lower than the actual rates of vessel utilization.

(100) The TAA informed the Commission that the average utilization rates of its vessels were ([49]):

(in %)

Year	Westbound	Eastbound
1991	[. . .]	[. . .]
1992	[. . .]	[. . .]

(101) These averages mask fairly large disparities. TAA members' utilization rates ranged in 1992 from [. . .] to [. . .] in the eastbound sector and from [. . .] to [. . .] in the westbound sector.

(102) The members of the TAA estimate that overcapacities in the transatlantic trade were 30 % in the westbound sector and 19 % in the eastbound sector in 1991 ([50]), which seems realistic in the light of the general figures provided in the Drewry Report but perhaps somewhat pessimistic in relation to the average real utilization rates of the TAA members in 1991.

(103) The Drewry Report estimates utilization rates in 1992 in the three major world trades as follows ([51]):

	Strong sector %	Weak sector %
Transatlantic	72,4 (EB) ([1])	62,6 (WB)
Transpacific	82,7 (EB)	66,2 (WB)
Europe/Far East	81,8 (WB) ([2])	56,8 (EB)

([1]) EB = eastbound.
([2]) WB = westbound.

(104) In the transatlantic trade, compared with the other major trades, the utilization rate in the strong sector (eastbound, 72,4 %) seems low in 1992, indicating general overcapacity. On this basis, the transatlantic trade seems to be the one from among the three major east-west trades in which overcapacities are greatest in terms of overall trade volumes.

(105) On the other hand, the utilization rate of the weak sector (westbound, 62,6 %) is of the same order as that of the other trades. The utilization rate in the westbound sector in 1992 also appears relatively normal for a weak sector when compared with the 46 % rate recorded in the eastbound transatlantic sector in 1987 ([52]).

([49]) For 1991, see notification of 28 August 1992, p. 25. For 1992, see TAA reply, 15 July 1993.
([50]) TAA notification, 28 August 1993, p. 23.
([51]) Drewry, December 1992, p. 9.
([52]) Drewry, November 1991, p. 1, referred to in the TAA notification, 28 August 1992, p. 24.

(106) As far as 1993 is concerned, the TAA members' average utilization rates confirm the trends analysed above: utilization rates rose to [. . .] in the westbound sector but slipped back slightly to [. . .] in the eastbound sector ([53]).

E. *Freight rates*

(107) Analysis of freight rates is a complex matter: the rates vary very widely from one type of goods to another, and the average depends very much on the nature of the goods being shipped (see point 77) ([54]). Similarly, service contract prices are often quite a lot cheaper than the tariffs, and it is difficult to quantifiy their effects. Lastly, surcharges (see point 191) and inland haulage costs may exceed the sea transport costs, without any breakdown being given that would allow an analysis of the sea transport section.

(108) Nevertheless, it is generally estimated that rates fell substantially from 1980 to 1992, displaying the following trend ([55]):

(in US $/TEU)

	1980	1984	1990	1991
Westbound	1 200	1 500	950	750
Eastbound	1 200	1 350	750	800

Source: Drewry, December 1992, p. 114, partly included in the TAA notification, 28 August 1993, p. 26. Excluding inland transport and THC.

(109) On the other hand, according to the Drewry Report of 1992 ([56]), while freight rates seem to have fallen by 23 to 27 % between 1988 and 1991 in the westbound sector, they rose over the same period by 10 to 13 % in the eastbound sector.

(110) According to the TAA ([57]), revenues per TEU ([58]) showed the following trend:

(in US $/TEU) ([1])

	1989	1990	1991
Westbound	[. . .]	[. . .]	[. . .]
Eastbound	[. . .]	[. . .]	[. . .]

([1]) BAF, CAF, THC and inland transport included.

([53]) TAA reply of 25 May 1994.
([54]) In the continental Europe-United States Atantic coast trade in 1993, the rates in the maritime sector range from US$ 500 to US$ 3 500 for a 40-foot container depending on the category of goods being shipped.
([55]) In current United States dollars.
([56]) Drewry, December 1992, p. 115.
([57]) TAA notification, 28 August 1992, p. 27.
([58]) In current United States dollars.

(111) That represents a fall of 20 % in the westbound sector and stability in the eastbound sector.

(112) The TAA also states that rates in the westbound sector declined steadily from 1985 [. . .] to 1992 [. . .], reaching a particularly low level in that year ([59]).

(113) In the period prior to the establishment of the TAA, it would thus seem, in the light of the different information available, that the stagnation in volumes in the westbound sector between 1988 and 1992 was followed by a steady fall in freight rates and that the sharp improvement in volumes in the eastbound sector during the same period allowed little or no increase in rates in that sector.

F. *Financial losses*

(114) The members of the TAA have stated that the excess capacities available and the steady fall in freight rates resulted in substantial losses in the transatlantic trade for all shipowners. The combined losses of the TAA members operating in the transatlantic trade in 1991 amounted, according to the TAA, to US $ [. . .], ranging from US $ [. . .] to [. . .] for individual shipping lines.

(115) For 1992 and 1993, the members of the TAA have informed the Commission of the profits or losses achieved (i) in terms of the group to which they belong, (ii) in terms of the whole of their world liner shipping activities and (iii) in terms of their liner shipping activities in the transatlantic trade ([60]).

Aggregate profits (losses) of the TAA members in 1992 and 1993

(in million US $)

	Group	Liner shipping	Transatlantic trade
Total 1992	[. . .]	[. . .]	[. . .]
Total 1993	[. . .]	[. . .]	[. . .]

These losses in the transatlantic trade, expressed in terms of the volumes shipped in both sectors, are equivalent to a loss of US $ [. . .] per TEU in 1992 ([61]).

([59]) TAA reply to the statement of objections of 14 April 1993, 24 May 1993, Part I, p. 8.

([60]) TAA reply to a request for information, 15 July 1993. with the exchange rates communicated by the TAA in its reply of 24 May 1993, Annex 17.

([61]) TAA members' losses in the transatlantic trade, expressed in term of the eastbound and westbound volumes carried by TAA members in the relevant year (see point 146).

(116) According to the TAA these losses are the reason why the members of the TAA introduced a 'loss elimination programme' in the form of rate increases spread over the period 1993 to 1995 ([62]). It should be pointed out, however, that the results for the transatlantic trade are not the only factor taken into account by shipowners when deciding to introduce capacity on the Atlantic. The vessels operated on the Atlantic form part of services covering several oceans at once: of the 10 TAA services offered in January 1994 ([63]), four were pendulum services (including at the same time the transpacific trade) or round-the-world services. For these reasons, and for reasons of market presence and logistics (repositioning of empty containers, for example), providing a service on the transatlantic route may be considered necessary by shipowners despite certain losses in that sector.

PART III: THE ROLE OF THE TAA

I. ORIGIN OF THE TAA

A. *Conferences, outsiders and Eurocorde*

(117) Before the TAA entered into force, shipowners operating in the transatlantic trade were divided into those organized in conferences and those operating as outsiders.

(118) Before 1984 there were no less than nine liner conferences operating between the United States east coast and Europe. After 1984 the liner conferences operating between the United States east coast and northern Europe were, in the westbound sector, the Neusara conference and, in the eastbound sector, the Usanera conference. In 1992 these two conferences comprised the same membership, namely:

Atlantic Container Line (ACL),

Compagnie Générale Maritime (CGM),

Hapag Lloyd,

Maersk Line,

Nedlloyd,

P&OCL,

Sea-Land.

(119) In 1992 the market share of the above shipping lines in the trade between the United States and northern Europe was 52,9 % in the eastbound sector and 55,7 % in the westbound sector ([64]).

([62]) TAA reply, 17 March 1994, point 2.58, p. 31 (Article 85).

([63]) TAA reply, 17 March 1994, Annex 4 (Article 85).

([64]) FMC Statistics, 19 July 1993.

(120) The other main lines operating across the Atlantic in 1992 were:

OOCL,

Cho Yang Line,

DSR/Senator,

Mediterranean Shipping Company,

Polish Ocean Line,

Atlantic Cargo Shipping,

Evergreen,

Independent Container,

Lykes,

Star Shipping.

(121) All the other shipping lines operating in the trade had market shares of less than 1 % in both sectors in 1992 ([65]).

(122) As from 1985, the conferences were linked to a number of outsiders through the Eurocorde ([66]) and Gulfway ([67]) agreements. These agreements, which are termed discussion agreements, allowed their members to discuss prices, tariffs, contracts, and terms and conditions of transportation. However, the agreements did not directly limit the commercial freedom of the shipowners by binding decisions.

(123) In 1992 outsider membership of the Eurocorde agreements was as follows:

Evergreen,

Polish Ocean Lines,

Mediterranean Shipping Co.,

OOCL,

Lykes.

(124) The Eurocorde agreements were the subject of a detailed inquiry by the Commission. The parties to the agreement were informed, by letter dated 30 January 1992, that an exemption pursuant to Article 85 (3) was not justified. The Commission did not, however, take a decision to prohibit the agreement but merely indicated to the parties that they 'continue to be protected from Commission fines by the notification, in accordance with Regulation (EEC) No 4056/86, but otherwise continue their activities pursuant to the agreement at their own risk'.

(125) In the same letter, the Commission also wrote to the parties to Eurocorde that, 'if any significant change in the market situation occurs before then (for example, in the membership of the North Atlantic Conferences, or in the parties to the Eurocorde agreements or in the market as a whole, or if any further restrictive arrangements are entered into including the conclusion of a stabilization agreement limiting or reducing the capacity in the trade), the position will be reconsidered in the light of the circumstances at the relevant time'. By 'stabilization agreement' the Commission meant specifically any agreement such as the TAA agreement.

B. *The genesis of the TAA*

(126) However, the shipowners did not consider the Eurocorde Discussion Agreements to be sufficient to impose the necessary discipline on the trade, in order to achieve rate increases which would satisfy both conference and non-conference members.

(127) Since 1990 if not earlier, conference lines and independents in the north Atlantic have met to discuss the limitation of vessel capacity in the trade ([68]).

(128) The desirability of a new basis of understanding beyond the possibilities of the Eurocorde agreements has been stressed by the north Atlantic lines' managers since 1990.

(129) Karl Heinz Sager, the chairman of Senator Line (a formerly independent line belonging neither to the conferences nor to the Eurocorde agreements, but now a member of the TAA), has consistently defended the need for a new structure in liner shipping, bringing together conference and non-conference lines such as Senator Line ([69]).

(130) According to Mr Sager, the new structure should be of a different nature from the traditional conference agreements.

([65]) FMC Statistics, 19 July 1993.

([66]) Eurocorde I (EC-I) and Eurocorde Discussion Agreement (EDA). See Commission communication of 3 July 1990 (OJ No C 162, 3. 7. 1990, p. 13).

([67]) See Commission communication of 29 March 1990 (Gulfway) (OJ No C 130, 29. 5. 1990, p. 3).

([68]) See editorial of the *Journal of Commerce* of 20 March 1990, in which the point was made that 'the line between conference carriers and independent lines was becoming blurred' and that 'if conference carriers and independent lines can discuss rates and capacity programmes together at any time, why bother having a federally sanctioned conference at all?' See also the *Journal of Commerce* (International Edition Special Report), 2 July 1990, p. 12.

([69]) Speech by Karl Heinz Sager, chairman, Senator Line, Bremen, Germany, before the Eurofreight conference, Brussels, Belgium, 9 to 11 April 1990.
Speech by Karl Heinz Sager, chairman, Senator Line, Bremen, Germany, before the 'Financial Times' conference, Amsterdam, Netherlands, RAI International Exhibition Centre, 12 November 1991.

(131) The economic problems encountered in 1991 and 1992 (described in recitals 114 to 116) prompted the shipowners to discuss and implement this type of stabilization agreement, hitherto unknown in the transatlantic trade but already tried out in the Pacific.

(132) The conference members and a number of non-conference carriers thus concluded an agreement of the new type, the TAA, which goes beyond the previous flexible forum for discussion (created by the Eurocorde and Gulfway agreements) by adding a capacity management programme as a supplementary tool to increase rate levels.

C. *The two types of members*

(133) One of the main features of the TAA agreement, a product of the history of the transatlantic trade and evident both in the agreement itself and in the current practice of the TAA, is the existence of two types of member within the TAA.

(134) Regrouping such a proportion of the trade within one and the same agreement was impossible under a conference agreement because some of the constraints traditionally imposed by the conference agreements were difficult for the former non-conference carriers to accept.

(135) It is for this reason that, even inside the TAA, the former independents have been given more freedom than the former conference members in respect of tariff rates and service contracts ([70]).

(136) According to documents of the TAA itself ([71]), all former conference members constituted the 'structured members', whereas the former independents remained 'unstructured members'. The structured members are parties to the 'Rate Committee' and to the 'Service Contracts Committee'.

(137) Two other members (OOCL and NYK), which did not participate in the Usanera and Neusara conferences, joined these two committees, for the following reasons: for its part, OOCL was until 1992 an independent carrier and operated its own vessels in the transatlantic trade; shortly after the introduction of the TAA, OOCL withdrew its vessels from the trade and rented space on the vessels of Sea Land, P&O and Nedlloyd, who are structured members; consequently, the status of unstructured member was no longer justified in the case of OOCL, which took its place alongside the former conference members within the committees. For its part, NYK did not operate in the Atlantic in 1992 but is generally a member of the conferences in the trades which it services ([72]).

(138) One of the differences between structured and unstructured members was the means of taking independent action (IA), i.e. applying tariff rates lower than those of the tariff of the TAA. Structured members had to give 10 days' notice, while unstructured members were under no such obligation.

(139) Following a letter sent by the Commission on 27 August 1992 explaining why the TAA's structure prevented it from benefiting from the block exemption granted to conferences, one of the reasons being the different rules govering IA, the TAA modified the agreement in December 1992 as regards the period of prior notice. Now all TAA members have to give 10 days' prior notice for IA ([73]).

(140) There is, however, still evidence that the TAA provides for two kinds of members and different price levels. Firstly, TAA documents show that (i) unstructured members have been directly allowed to underquote structured members by US $ 100 per TEU ([74]) and (ii) all TAA members have agreed that unstructured members will, if necessary, use independent action to establish rate differentials ([75]).

(141) Secondly, structured members may not conclude individual independent service contracts, whereas

([70]) See the record of a meeting between all the future members of the TAA plus [. . .] (independent) on 13 January 1992 in Geneva sent to [. . .] (independent) by [. . .], a member of the TAA and containing a number of points indicating the desire to maintain a difference in treatment between the conference members and the former independents: [. . .].

([71]) See minutes of the 'Gulfway meeting', 8 October 1992.

([72]) See FEFC conference on the Europe—Far East trade, in which NYK participated.

([73]) See TAA reply to the Commission, 11 January 1993, Annex 1.

([74]) See Tariff Formation Committee, 1 October 1992.

([75]) See telex of 1 December 1992 on 'Highlights of TAA principals meeting — London 23 November 1992': 'Addressed DG IV complaint to TAA that fixed differentials by non-rate committee lines on class tariff would be violation of EC competition laws. Lines then agreed with counsel to file class tariff as uniform and common rates for all members. Non-rate committee lines may establish differentials via independent action, if necessary.' See legal analysis, recitals 320 to 358.

unstructured members are allowed to do so, which gives them much greater room for commercial manoeuvre.

(142) Thirdly, unstructured members may in certain circumstances take part in a service contract negotiated by the Service Contract Committee, whereas structured members may not take part in service contracts negotiated by unstructured members.

(143) Fourthly, transport rates are sometimes different for structured and unstructured members under the same service contract ([76]).

(144) The TAA thus gathers former conference members (who adhere to standard north Atlantic conference practices) and independents wishing to maintain price flexibility within a framework allowing rate levels to increase for the benefit of both types of parties to the TAA.

II. THE MARKET POWER OF THE TAA

A. *Market shares of the TAA*

(145) As defined in recital 27, the relevant market embraces both the trade through United States ports and the trade to the United States via Canadian ports. However, most statistics relate to the direct transatlantic trade, i.e. that via United States ports. The TAA's market shares in the direct transatlantic trade will therefore be given first, and the impact of volumes passing through the Canadian ports on the TAA's market share in all the trades concerned will then be estimated.

(146) The members of the TAA held the following market shares in the direct transatlantic trade covered by the geographic scope of the agreement:

Market share of the TAA lines in the direct transatlantic trade in the period 1991 to 1993 ([77])

In total (westbound/eastbound combined)

	1991	1992 ([78])	1993 ([79])
TAA lines volume ([80])	1 410 200	1 516 000	
All liner operating volume	1 737 600	1 869 000	
TAA lines share	81,2 %	81,1 %	

Sub-trades (westbound) (by same method)

(in %)

	1991	1992 ([78])	1993 ([79])
TAA lines share via United States Atlantic	84,0	82,8	73,2
TAA lines share via United States Gulf	69,9	72,7	69,2
TAA lines share via United States west coast	79,3	82,5	71,8
TAA lines share via all United States coasts	81,7	81,5	72,4

([76]) See TAA proposal to [...] of 30 November 1992 and TAA proposal to [...] of 13 November 1992, proposing within the same service contract different rates for structured members and others.

([77]) Data shown rounded off to nearest tenth of 1 %.

([78]) Source: JOC/Piers, reproduced by the TAA in its notification (p. 17, 28 August 1992) and in its reply of 15 July 1993 to a request for information (Annex 2, Table 4).

([79]) Source: JOC/Piers Special Data Run, TAA reply, 17 March 1994, Table 12. Figures calculated on a similar basis to those for 1991 and 1992, but without the total westbound and eastbound volumes combined. See also figures supplied by TAA on 25 May 1994, taken from JOC/Piers Global Container Report but calculated on a different basis from the figures supplied for 1991 and 1992. According to these new statistics, the TAA had in 1993 a share of the direct transatlantic trade between northern Europe and the United States of 69,7 % in the westbound sector and 71,7 % in the eastbound sector.

([80]) Cargo volume shown in TEUs, rounded off to the nearest 100 TEU increment and excluding bulk, military and government cargoes.

Sub-trades (eastbound) (by same method)

(in %)

	1991	1992 ([78])	1993 ([79])
TAA lines share via United States Atlantic	84,5	84,0	77,7
TAA lines share via United States Gulf	65,8	67,4	67,3
TAA lines share via United States west coast	82,5	82,2	76,2
TAA lines share via all United States coasts	80,7	80,7	75,5

(147) According to figures supplied by the TAA ([81]), the volumes of the trade between the United States and Europe passing through the Canadian ports in 1993 accounted for 7,8 % (7,8 % in the westbound sector and 7,8 % in the eastbound sector) of the total volumes shipped between the United States and Europe. The TAA members estimate that between 80 and 90 % of these volumes passing through the Canadian ports are carried by companies which are not members of the TAA. It can therefore be estimated that the shares in the whole of the market in question held by the TAA members were approximately 75 % in 1991 and 1992 and between 65 and 70 % in 1993 (on the basis of the data given in point 146, their share in 1993 was 67,5 % in the westbound sector and 70,4 % in the eastbound sector).

B. *The independent companies which are not members of the TAA*

(148) According to FMC Statistics ([82]), the market shares in 1992, on the direct routes between the United States and northern Europe, of the only companies to remain independent of the TAA were as follows:

(in %)

	Westbound	Eastbound
Evergreen	7,7	8,1
Lykes Line	6,4	4,0
ICL	2,1	2,5
Atlantic Cargo	3,0	2,2
Star Shipping	0,8	1,1

(149) These statistics show that the principal independent company which is not a member of the TAA is Evergreen. In 1993 Evergreen was the second largest shipping line in the world, and, of the companies outside the TAA, is the only one to have very large capacity, the necessary financial power, a commercial presence on the market in question and a global network allowing it to expand on this route. Evergreen is therefore in a much better position to exert some competitive pressure on the TAA than the other companies that are not members of the TAA.

(150) Evergreen accounted for 7 to 8 % of the direct transatlantic market in 1992, which, according to the above figures, would leave between 10 and 13 % for all the other independent shipping companies that are not members of the TAA on the trade via the United States ports.

(151) Evergreen is a member of the Eurocorde Discussion Agreement. That agreement allows discussions between Evergreen and the members of the TAA who are also members of the EDA (including those who are members of Neusara and Usanera: see recitals 118 and 123) on a vast range of subjects, in particular freight rates and general conditions of transport.

(152) In spite of the Commission's letter referred to in recital 124, TAA members which are also members of the EDA intend to maintain the latter agreement in operation alongside the TAA, in order to discuss freight rates and other conditions of transport with Evergreen and possibly other non-TAA member shipping lines, bearing in mind that EDA is an open membership agreement.

(153) Evergreen does not offer certain specialized equipment (open top, flat top) in the transatlantic trade and does not amount to a real alternative to the TAA for shippers whose goods need such equipment.

(154) Evergreen was associated with numerous working parties on the setting-up of the TAA, was initially supposed to participate in the agreement, and exchanged some information on available capacity with the future members of the TAA.

(155) Although Evergreen remained independent of the TAA, it maintained regular contacts on respective strategies with some TAA members and was very well informed of the TAA's policy on prices, with the consequences for Evergreen's tariffs described in recital 215.

([81]) TAA reoly, 17 March 1994, point 3.44 (Article 85).
([82]) FMC Statistics, 19 July 1993.

(156) Lykes is a much smaller company than Evergreen, operating mainly in the trade between northern Europe and the United States Gulf Coast. It is also a member of the Eurocorde and Gulfway agreements [. . .] ([83]).

(157) The other shipping lines which are independent of the TAA are very much smaller in size, have relatively small market shares in the transatlantic trade (except in some cases in certain sectors of the market) and cannot always offer sufficiently frequent services. They do not therefore have the capacity to exert any real competitive pressure on the TAA.

(158) The following shipping lines are engaged in the trades via the Canadian ports: Cast, Canada Maritime and Balt Canada Line. According to the TAA, these companies account for between 80 and 90 % of the trade to or from the United States via the Canadian ports and together took less than an 8 % share of the total trade in the relevant market in 1993.

(159) Cast and Canada Maritime, which thus each hold less than 3 or 4 % of the relevant market, are members of the existing conference on the trades between Canada and northern Europe, to which four members of the TAA (OOCL, POL, ACL and Hapag Lloyd) also belong. This conference is competent for the trades to or from points in Canada but not for the trades to or from the United States via Canadian ports.

(160) However, in examining the competitive behavior of Cast and Canada Maritime on the relevant market, account has to be taken of the close cooperation on rates between these companies and the four TAA members that belong to the conference on the northern Europe-Canada trade. It is unlikely that these two companies which have undertaken to offer conference rates in common with the four abovementioned TAA members for shipping containers between ports in northern Europe and Canadian ports to destinations in Canada could adopt radically different behaviour in charging for the same maritime transport but for goods originating in or destined for the United States.

(161) In addition, part of the volumes carried by Cast and Canada Maritime on the market in question via the Canadian ports is handled by merchant haulage: only the maritime section of the journey is the responsibility of the shipowners, with the result that the rates charged for such services fall under the authority of the Canadian conference, in which there is a majority of TAA members.

(162) It has to be concluded therefore that, because they belong to the conference on the trades between northern Europe and Canada, the companies Canada Maritime and Cast are not in a position to exert effective competitive pressure on the TAA in the relevant market.

(163) This analysis is confirmed by the evidence set out in recital 218, indicating that there is some cooperation between a TAA member and the two members of the Canadian conference which do not belong to the TAA as regards the rates applied in the trade to and from the United States.

(164) The third company, Balt Canada Line, has much smaller capacities still than those of Cast and Canada Maritime, and therefore holds a very small share of the relevant market.

C. *Potential competition*

(165) The TAA underlines the importance of two sources of potential competition ([84]):

— carriers already present on the Atlantic and capable of expanding the containerized services they offer,

— containerized shipping operators who are absent from the Atlantic but capable of entering that market.

(166) As to the first source of potential competition, the TAA refers to the conventional carriers (break-bulk) and to what it calls specialized operators (among whom it includes neo-bulk, roro and specialized tankers) present on the Atlantic, and bases its arguments on estimates of the container volume that these carriers could offer if they switched their traditional services to containerized services. Nevertheless, the TAA does not state how much conversion of their services would cost or how long it would take, or whether the services thus converted would then be economically competitive with the specialized container ships operated by TAA members.

(167) The transatlantic trade, like the other two major east-west trades, is a very high-volume trade and is

([83]) [. . .].

([84]) TAA reply, 17 March 1994, point 3.97 *et seq.* (Article 85).

serviced by regular, high-capacity services, so much so that the major world operators tend more often than not to group together in order to operate them jointly (for instance, the P&O, Nedlloyd and Sea Land services, and the NYK, Hapag Lloyd and NOL services).

(168) In such trades, in order to operate competitive services, shipping lines must have a sufficient number of large, modern vessels.

(169) It is therefore highly unlikely that the non-containerized operators could, even if they were to increase their supply of container transport, offer services that could compete with the major operators of containerized liner shipping.

(170) It is also clear from the information supplied by the TAA that the vast majority of the operators in question offer only monthly or fortnightly services, whereas, according to the TAA, a weekly frequency is an essential component of service quality. These services likewise call at only a limited number of ports in northern Europe or the United States. Even if these services were converted to carry containers, they would not, therefore, be capable of exerting real competitive pressure on the containerized liner services.

(171) This conclusion is borne out by the following analysis: potential competition has an economic effect inasmuch as, if transport prices were to rise above the level at which they were competitive, new operators could be expected to enter the market without delay. The differentiated rating system applied in sea transport means that some goods cost considerably (two, three or even five times) more to ship than others. It is highly probable that the price paid in order to ship such goods includes a large profit element and helps to subsidize the carriage of goods which are less profitable to the shipowners.

(172) If the non-containerized operators mentioned by the TAA exerted effective potential competition on the market, then they would be permanently interested in transporting such profitable goods and they would convert part of their ships so as to offer the appropriate capacity and cream off the top of the market, with the result that the differentiated rating system applied would be very difficult to maintain; the fact that the operators already established on the Atlantic but offering non-containerized services do not have a significant presence on the most profitable fringe of the relevant market is clear evidence that they do not exert effective potential competition on the market in containerized liner transport.

(173) The potential competition exerted by containerized liner shipping companies absent from the transatlantic trade is of a different kind. One of the peculiarities of the maritime transport sector often referred to is the mobility of fleets and therefore the ease with which trades can be penetrated by new entrants. This is mentioned in the eighth recital to Regulation (EEC) No 4056/86: 'the mobility of fleets, which is a characteristic feature of the structure of availability in the shipping field, subjects conferences 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' (emphasis added).

(174) Two factors should here be taken into account in the case in point: the special features of the transatlantic trade and the special features of the agreement in question.

(175) As stated earlier, the transatlantic trade is a very high-volume trade and, if they are to be competitive, operators in this trade have to offer regular, high-capacity services using a sufficient number of large, modern ships specialized in container transport. The major world operators group together in order to run joint services: of the TAA's 10 scheduled services, only the Maersk service is operated individually, the other nine being covered by vessel- and capacity-sharing agreements.

(176) Although it is easy to place ships on this trade, very few can exert effective potential competition since only a few large international shipowners, or possibly certain large groups of shipowners, are at present able to provide sufficient suitable capacities in the trade to exert any real competition in it.

(177) However, of the few major world shipowners not operating in the transatlantic trade, most have close links with certain TAA members in operatin services in other trades. Annex II contains a non-exhaustive list of agreements between the major, non-TAA international operators in the other two main east-west trades, namely the transpacific and Europe-Far East trades.

(178) More particularly, the participation of almost all these operators in the EATA and TSA stabilization agreements, which are similar to the TAA in terms

of the freezing of capacities, shows the propensity of such companies to enter into TAA-type agreements in the trades in which they operate. It also shows that they have a mutual interest in not exerting competition which might destabilize the TAA-type agreements in force around the world (see also the Lloyds List article quoted in Annex II).

(179) The TAA is furthermore a different kind of agreement from a conference, in that it enables unused excess capacities to be artificially maintained in the trade and it offers a flexible framework for fixing rates.

(180) Potential competition is effective only if the entry of a new operator constitutes a credible threat, in other words if a new entrant has a reasonable chance of making profits on the market and being able to leave it without incurring excessive costs. By maintaining excess capacities in the transatlantic trade while raising rates, the TAA creates conditions in which the arrival of new capacities in sufficient quantities to exert real competition would be liable to aggravate the excess capacities and to force down rates rapidly to unremunerative levels, thereby immediately making the new entrant's activities unprofitable.

(181) The maintenance of excess capacities thus reduces the incentive to penetrate a market, even if it is momentarily profitable, and thereby limits the pressure of potential competition. Through the CMP, the members of the TAA wield considerable market power and are therefore in a position to exert pressure that can deter a potential competitor.

(182) The other necessary condition for potential competition to be effective is that any shipowner able to enter the trade should also be able to leave it without losing too much money. Withdrawal from a major trade such as the transatlantic trade would damage the commercial reputation of a large shipowner and substantially affect his competitive position in other trades. It would also reduce his future prospects of returning to the trade if demand picked up in it. The costs of withdrawing from the market can thus reduce the incentive for a shipowner rapidly to enter a new trade.

(183) Furthermore, unlike the exempted liner conferences, the TAA provides a price-fixing framework that is flexible enough to permit the integration of outsiders and new entrants.

(184) For these reasons, the possibility of an independent shipowner introducing new capacity in sufficient quantities in the trade outside the TAA is remote; the structure of the TAA makes it more likely that shipowners interested in the transatlantic trade would seek to enter it within the framework of the TAA and share capacity with those operators already present.

(185) Indeed, that is what two large Asian shipowners (NKY and NOL) did when they entered into the transatlantic trade in March 1993. They did so within the framework of a joint service with Hapag Lloyd, inside the TAA. This type of entry is not likely to exert any further effective competition against the TAA.

(186) Finally, two Mexican shipowners, already operating in the transatlantic trade, joined the TAA in April 1993 within the framework of another joint service with Hapag Lloyd.

(187) These various points provide a basis for a cautious analysis of the notion of potential competition in the transatlantic trade and go some way towards explaining why the increases introduced by the TAA since 1 January 1993 and the dissatisfaction which this has created amongst the shipping lines' customers have not so far prompted the arrival on the market of any new operators offering real competition against the TAA.

(188) Clearly, although the special features of the transatlantic trade and of the TAA substantially reduce the impact of potential competition, they do not eliminate it altogether, and account should also be taken of the possibility of new entrants in the trade between northern Europe and Canada, which could have an impact on some segments of the market in question. On the other hand, a new entrant in the trade between the Mediterranean and the United States would not be likely to exert real pressure on the relevant market.

III. THE IMPACT OF THE AGREEMENT

(189) The members of the TAA have been able to impose very substantial changes in the structure of liner shipping prices across the Atlantic and, at the same time, considerable increases in the general level of freight rates.

A. *The impact on the structure of prices*

(190) Until the implementation of the TAA, commercial relations were organized in the manner described in recitals 78 and 80.

(191) In particular, the prices in service contracts could include inland sectors, container service charges (CSC), maritime transport as such, terminal handling charges (THC), the currency adjustment factor (CAF), and the bunker adjustment factor (BAF), as well as other charges.

(192) No limit was imposed as to the minimum quantity for which shippers could enter into service contracts; service contracts existed for annual volumes as low as 20 TEUs i.e. 20 containers of 20 feet or 10 containers of 40 feet.

(193) Finally, the price invoiced varied according to the nature of the goods carried and was fixed on the basis of a highly complex schedule of tariffs.

(194) The implementation of the TAA has led to its members' substantially modifying their tariff structure on the transatlantic trade ([85]).

(195) Firstly, the categories of products have been rearranged and the tariffs relating thereto have been regrouped into 26 classes ([86]). The tariffs themselves have been modified but, because the structure has changed, it is necessary to analyse them on a case-by-case basis to determine the size of the increases.

(196) Secondly, service contracts for the members of the Contract Committee, which includes the majority of TAA members, are negotiated jointly by Contract Committee members and are usually offered to customers via the secretariat of the TAA. This secretariat proposes service contracts specifying, where appropriate, the quantities which must be carried by each of its members ([87]). Shipowners who are not members of the Contract Committee can participate on a case-by-case basis in a contract of the Contract Committee and may negotiate individually ([88]).

(197) Thirdly, the members of the TAA no longer accept service contracts for annual quantities of less than 250 TEU ([89]) and shippers below this level are therefore generally obliged to pay the tariff, which is more expensive than a service contract ([90]).

(198) Fourthly, service contracts are now proposed on the following basis:

— port-to-port transport,

— CAF,

— THC,

— CSC,

— inland transport.

(199) The main difference from the previous system lies in the fact that shipowners no longer guarantee the amount of the surcharges (CAF, THC, CSC, inland transport) and, instead, indicate that these are liable to change during the period of the service contract ([91]).

(200) Fifthly, port classification has changed; ports in Scotland, the North of England and Denmark lose their classification as 'Base Ports', and the cargoes which pass through them are subject to a supplementary charge (arbitrary or range additionals) ([92]).

B. *The impact on the level of rates*

(201) One of the objectives of the TAA in the autumn of 1992 was to introduce on 1 January 1993 increases ranging between US$ per 20-foot container and between US$ per 40-foot container ([93]).

(202) Given the complexity and the variety of the changes made, the influence of the TAA on prices can be analysed only on a case-by-case basis.

(203) When the increases were introduced in December 1992 and January 1993, a large number of shippers were faced with very large price rises, generally between 30 and 100 %, but in one case amounting to as much as 175 %.

(204) In addition, the TAA sought to impose these very large increases in a particularly short space of time compared with the usual practices in the trade. For

([85]) See TAA 1993 Revenue Programme, TAA meeting, 4 September 1992.
([86]) See TAA Tariffs, 4 November 1992.
([87]) See TAA proposal to [...] of 6 November 1992, TAA proposals to [...] of 13 November 1992 and 26 October 1992.
([88]) See TAA proposal to [...] of 25 November 1992.
([89]) This limit was reduced to 200 TEU in 1994.
([90]) See Hapag Lloyd proposal to [...] of 4 December 1992.
([91]) See:
— letter from [...] of 4 December 1992,
— TAA proposal to [...] of 6 November 1992,
— TAA proposal to [...] of 13 November 1992.
([92]) See record of Gulfway meeting, 8 October 1992.
([93]) See TAA 1993 Revenue Programme.

example [...] complained to the Commission about the conditions and deadlines imposed on them by the TAA for the price increases (94).

(205) Following complaints from the shippers and the initiation of proceedings by the Commission against the TAA, a number of these price proposals were revised downwards, but the increases actually inplemented are nevertheless very substantial compared with 1992.

(206) The TAA has provided details on the trend of rates since 1989 for goods representing a little under 40 % of the volume of westbound trade so as to demonstrate that the increases introduced in relation to 1992 were merely a return to the 1989 level (95).

(207) None the less, for the abovementioned goods, the 1993 increases over 1992 are as follows:

	Change 1993/92
Beer [...]	[...]
Chemicals [...]	[...]
Paper	[...]
Spirits [...]	[...]
Motor vehicle parts	[...]
Steel cables	[...]
Tyres [...]	[...]

(208) In addition, in its reply to the statement of objections of 14 April 1993, with reference to the complaints lodged with the Commission, the TAA indicates that the increases imposed may, for certain shippers and certain products, range up to:

[...].

(209) A number of shippers were faced with very large increases and were able to find alternatives through the Mediterranean or through the few lines competing with the TAA, but in most cases they had to accept substantial rate increases there too (see, for example, recitals 215, 218 and 219).

(210) It is apparent from these figures that the TAA managed to impose a very large, general increase in freight rates compared with 1992 in the Europe-United States sector. Even if, as the TAA members claim, the increases were necessary in order to offset losses and return to the rate levels which had previously applied, the TAA brought about a very substantial change in the market and its effects are considerable.

(211) For 1994 the TAA has announced further increases of between US$ 40 and 160 per TEU over the 1993 rates in the westbound sector.

C. *Effect on the market*

(212) These very large increases made by the TAA have obviously had major repercussions on the direct transatlantic trade and on neighbouring markets.

(213) Confronted in 1993 with significant increases in freight rates charged by the TAA at relatively short periods of notice, shippers have sought to switch to the other alternatives available.

(214) The few independent lines have thus been able to benefit from the shock created by the TAA's price increases to gain market shares while at the same time substantially increasing their tariffs. Evergreen (Taiwan) in particular saw its market share in the direct westbound trade rise from 7 % in the first quarter of 1992 to 13,8 % in the first quarter of 1993 (96).

(215) At the same time, Evergreen amended its schedule of tariffs in line with the changes made by the TAA and introduced rate increases comparable to, but slightly lower than, those made by the TAA so as to safeguard its competitive position.

(216) The TAA, for its part, has lost several percentage points of market share in the westbound sector. The members of the TAA had a market share of 71 % in the first quarter of 1993, as against 78 % in the corresponding period in 1992 (97).

(217) As regards the trade through Canada, which can exert some competitive pressure on certain market segments, the Commission has information suggesting that there is some cooperation between the TAA and the Canadian conference aimed at limiting still further the real competitive impact of the trade through Canada.

(218) One of the TAA members sent the two members of the Canadian Conference that are not TAA

(94) See:
- letters sent by [...] to the TAA and the CNUT on 14 December 1992,
- letter sent by [...] to the FMC on 7 December 1992,
- letter sent by [...] to the BSC on 27 January 1993,
- letter to [...] of 13 November 1992,
- letter sent by the TAA to [...] on 3 December 1992.

(95) TAA reply to the statement of objections (interim measures), 24 May 1994.

(96) JOC/Piers, included in the TAA's reply to the statement of objections (interim measures), 24 May 1993, p. 46.

(97) JOC/Piers, included in the TAA's reply to the statement of objections (interim measures), 24 May 1993, p. 46.

members details of the tariff structure changes and the calculation methods used by the TAA for the increases to be introduced on 1 January 1993 ([98]). The information was transmitted with sufficient notice to enable the Canadian Conference to introduce similar increases. The Canadian Conference also informed shippers of a new schedule of tariffs, changes to the system of port tarification and substantial increases in service contract rates, all of which resulted in conditions that were very similar to those on offer from the TAA, to enter into force on 1 February 1993 ([99]).

(219) The effects of the TAA have also made themselves felt in the trade through the Mediterranean: the Seusa conference covering the trade from the Mediterranean has altered its tariffs along the same lines as the TAA and has introduced a number of significant increases. Four of the eight members of that conference also belong to the TAA (Maersk, Nedlloyd, P&O and Sea-Land).

(220) The trade through the Mediterranean has also benefited from the increases imposed by the TAA since the trade to the United States passing through the Mediterranean grew by 14 % between the first quarters of 1992 and 1993, whereas it increased by 9 % through the northern European ports. Some shippers, more particularly those based in the south of France catchment area, have decided to switch all or part of their cargoes to the Mediterranean ports because of the increases imposed by the TAA. However, this alternative is not possible for the very large majority of shippers in northern Europe affected by the TAA.

(221) As far as the Commission is aware, for the very large majority of shippers, the trade no longer offered any real alternative to the TAA in 1993, since the few independents operating in the trade were running at virtually full capacity and were no longer able to accommodate any additional transport demand.

D. *The effect of the capacity management programme (CMP)*

1. Arguments put forward by the TAA to justify the CMP

(222) In their notification of the agreement, the TAA members explained that the capacity management programme was intended to deal with the problem of the imbalance between eastbound and westbound volumes and hence of the excess capacities created in the westbound sector. Accordingly, the CMP was implemented only in the westbound sector, although the TAA members reserved the right in their agreement to extend it to the eastbound sector.

(223) In their reply of 17 March 1994, the TAA members explained that:

— one of the aims of the TAA was to rationalize the trade by physically withdrawing excess capacities,

— the CMP was indispensable if the rationalization programme was to be implemented,

— the CMP also served to tackle the problems of eastbound/westbound imbalances, seasonal fluctuations in demand and cyclical excess capacities.

(224) Each of these arguments comes up, however, against the following difficulties:

2. Rationalization of the trade

(225) As regards rationalization through the physical withdrawal of capacity, the Commission notes the following:

a) *rationalization as an aim of the TAA.*

(226) With regard to rationalization of the trade through the physical withdrawal of capacity, the TAA, in its reply of 17 March 1994, refers to a document dated 13 January 1992 as proof that such rationalization was one of its aims.

(227) That document was not brought to the Commissions's attention by the members of the TAA but was seized by the Commission during a check on a shipowner outside the TAA. On a more general level, rationalization of the trade was not mentioned by the TAA on its formation as being one of the objectives of the agreement, and when the agreement was notified to the Commission in August 1992 rationalization was not one of its stated aims.

(228) The TAA members have, moreover, never informed the Commission, either in the notification or during the proceedings, about a programme for future rationalization of the trade. The Commission was informed retroactively of the rationalization measures taken by some of the TAA members.

([98]) See fax sent by [. . .].
([99]) See article describing the Canadian route as being more expensive, Lloyds Antwerp, 16 January 1993.

(229) Not only has no agreement between all the members of the TAA concerning a physical withdrawal of capacity been notified to the Commission, but above all the TAA members stated in their notification of 28 August 1992 that one of the aims of the TAA was to avoid the physical withdrawal of capacity:

> '[. . .] under the Agreement, there is no provision relating to the physical withdrawal of capacity [. . .]' ([100]);
>
> 'That regulation (of excess capacity, provided by the TAA) nevertheless ensures [. . .] that no existing capacity is withdrawn permanently from the market' ([101]).

(230) of an increase in the amount of excess capacity, the adjustments provided for by the TAA agreement relate to the level at which capacity will be maintained and are not intended to lead to rationalization programmes.

Lastly, the capacity maintenance programme notified to the Commission allows for an unchanging proportion of excess capacity of approximately 20 % over two years (see recital 244). Clearly, therefore, when the notification was made the TAA members did not have any capacity withdrawal programme, as it would have had to be taken into account in the capacity maintenance programme. It was only *ex post facto*, after some capacity had been withdrawn by a few TAA members, that the capacity maintenance programme was modified (see recital 246).

(231) These various points provide a basis for concluding that the TAA members did not regard rationalization of capacities as one of the major objectives of the agreement, nor did they enter into their agreement with the aim of rationalizing the trade through substantial physical withdrawals of capacity;

(b) *the CMP, a necessary means of rationalization*

(232) The TAA explains in its reply of 17 March 1994 that the CMP is a necessary means of rationalizing the trade by withdrawing capacities.

(233) First, the Commission is not convinced that the introduction of sales quotas such as the CMP is in general necessary for the purpose of reducing excess capacities. On the contrary, such quotas permit as a rule the maintenance of excess capacities at the expense of clients or consumers ([102]).

(234) Secondly, it is clear from the explanations given by the TAA and from the history of the trade that capacity has been and can be physically withdrawn through capacity exchange or chartering agreements between a small number of shipowners (of the order of two to four) ([103]).

(235) This is what the TAA explains in a reply dated 15 July 1993 to a question by the Commission concerning precisely the links between the TAA and the rationalization measures undertaken. The TAA states in this connection merely that a framework for cooperation, in particular on rates, facilitates the implementation of such capacity-exchange agreements between certain members. No reference is made to the CMP in that reply.

(236) Lastly, in its reply of 24 May 1993 to the statement of objections on interim measures (Annex 6), the TAA outlines the different rationalization measures taken by shipowners between 1987 and 1993, i.e. both before and after implementation of the TAA. Reference is made to decisions taken individually by shipowners or to capacity-exchange agreements between a small number of shipowners, but nowhere is there any mention of a concerted decision by all the members of the TAA.

(237) The TAA explains in its reply of 17 March 1994 that the CMP ist necessary for the purpose of rationalization as it ensures the maintenance of the market shares of the operators who withdraw ships. First, the maintenance of the market shares of all operators, including those who have cause to rationalize their services, is not *prima facie* a prerequisite for the regulation of supply and demand; secondly, and more importantly, the capacity-sharing agreements referred to above enable operators who withdraw ships to maintain a commercial operation and hence their market share irrespective of any CMP. This argument put forward by the TAA is therefore not valid.

(238) In the light of the above considerations, there is no evidence that the TAA (and in particular the CMP)

([100]) TAA notification, 28 August 1992, p. 3.

([101]) TAA letter to the Commission, 14 August 1992, and TAA notification, 28 August 1992, Annex 2.

([102]) See Commissions's *Twelfth Report on Competition Policy*, 1982, p. 44.

([103]) The notified TAA agreement provides for the possibility of such capacity exchange or chartering agreements (see recital 24). However, the TAA has not notified, in accordance with the procedural rules in force, any specific agreement on the rationalization of capacities through such capacity exchanges or chartering.

has been a necessary means of rationalizing the trade through the physical withdrawal of capacities.

(239) With regard to the other arguments in support of the CMP concerning eastbound/westbound imbalances, seasonal fluctuations and cyclical excess capacities, account should be taken of the facts set out below.

3. Eastbound/westbound imbalances

(240) The TAA argues that the application of the CMP to the westbound sector alone is justified by an imbalance of the order of 10 % in 1991 (see recitals 93 and 94). However, as we have seen, this sort of imbalance was usual in liner shipping and was indeed fairly limited in scale compared to historical patterns and other trades. It does not in itself justify supply-limiting arrangements that may exceed 20 %.

(241) As has been noted, moreover, the imbalance has been diminishing since 1992 and disappeared in 1993 (see recital 95). Indeed, the imbalance has been reversed, with westbound volumes exceeding eastbound volumes by 14 and 37 % in the second and third quarters of 1993 respectively.

(242) It is difficult in such circumstances to understand the economic point of the CMP in the westbound sector alone. The emergence of an imbalance to the disadvantage of the eastbound sector in 1993 did not lead to the introduction of a CMP to deal with it. The argument that the CMP is justified by an imbalance in the eastbound and westbound sectors thus seems weak in respect of 1991 and 1992 and unfounded in the case of 1993.

4. Seasonal fluctuations

(243) If the CMP was intended to deal with seasonal fluctuations in demand, fluctuations that could not — according to the TAA — be matched by corresponding fluctuations in installed capacities, then the proportion of excess capacities maintained should follow the seasonal trend in demand.

(244) According to the TAA, demand is traditionally weakest in the first quarter and strongest in the fourth quarter in the westbound sector. However, the proportion of excess capacities maintained initially by the TAA (as communicated to the Commission when the TAA was notified on 28 August 1992) was as follows in the successive three-monthly periods following entry into force of the agreement:

— first period: [. . .]

— second period: [. . .]

— third period: [. . .]

— fourth period: [. . .]

— fifth period: [. . .]

— sixth period: [. . .]

— seventh period: [. . .]

— eighth period: [. . .].

(245) The initial capacity management programme was therefore in no way intended to follow seasonal fluctuations in demand.

(246) The TAA subsequently revised the capacity management programme, perhaps because volumes had been rising and real capacity cuts had taken place. On 16 June 1993 the TAA supplied the following programme ([104]):

— first period: [. . .]

— second period: [. . .]

— third period: [. . .]

— fourth period: [. . .]

— fifth period: [. . .]

— sixth period: [. . .]

— seventh period: [. . .]

— eighth period:. [. . .]

(247) This programme does not seek to keep pace with developments of a seasonal nature either. It is clear, therefore, that the TAA is not an instrument designed to deal with seasonal fluctuations in demand.

5. Cyclical excess capacities

(248) In point 87, it was stated that the trend since 1990 has been for a reduction in supply (–2,4 % westbound between 1990 and 1992). Between 1 September 1992 and 1 January 1994, some members of the TAA, acting independently of the agreement proper, withdrew or rationalized capacity of their own, and total TAA capacity fell by approximately [. . .] as a result ([105]).

(249) As far as the Commission is aware, overall capacities in the transatlantic sector fell several percentage points between 1991 and 1993.

(250) On the demand side, volumes in the westbound sector grew by 9,1 % between 1991 and 1992 and

([104]) TAA reply of 16 June 1993 to a request for information, Annex 3.

([105]) TAA reply, 17 March 1994, point 2.36 (Article 85).

by 11% between 1992 and 1993, giving an increase of around 20% over the period 1991 to 1993.

(251) Thus while westbound transatlantic trade dipped in 1991, volumes climbed back in 1992, and in 1993 reached their highest level for more than seven years ([106]). The TAA has not explained how this situation can be described as one of cyclical excess capacity.

(252) In addition, the TAA states that there was 30% excess capacity in 1991. With volumes increasing by 20% between 1991 and 1993, and capacities falling at the same time, the Commission fails to see how the excess capacity in the trade in 1993 can be described as cyclical.

(253) It has not been shown, therefore, that the CMP is an instrument designed to deal with cyclical excess capacities.

6. Conclusion regarding the CMP

(254) In the light of these various aspects, the CMP as it operates today does not appear to be a specific means of dealing with a crisis caused by an imbalance in EB/WB trades and excess capacities in the WB sector, or even of allowing a rationalization of the trade to be carried out, but rather as a tool intended to maintain unused capacities artificially and to raise artificially the level of freight rates in the westbound sector.

(255) This is indeed what the Drewry Report anticipated in 1992: assuming that the CMP would be maintained in the westbound sector, it forecast the following trend for average rates:

(in US $/TEU)

Year	Westbound	Eastbound
1992	700	800
1993	850	875
1994	1 100	925

Source: Drewry, December 1992, p. 117.

(256) Implementing the capacity management programme (CMP) in the westbound sector alone does not thus seem justified in the light of the economic facts of the trade. It allows shipping prices from Europe to the United States to be artificially increased and imposes extra costs on European firms exporting to the United States.

(257) Some of the arguments put forward by the TAA to justify the CMP might possibly apply to the trade from the United States to Europe in 1993, but they certainly do not apply to the trade from Europe to the United States.

E. *The European fleet*

(258) One of the arguments put forward by the TAA members in support of their agreement is the defence of the European fleet: they contend that the first shipowners to suffer from any prohibition of the TAA by the Commission would be the Europeans.

(259) The proportion of the world liner fleet belonging to European shipping lines has been declining significantly for many years, while the share held by Asian companies has been growing rapidly. Of the 20 largest world shipping lines in 1992, six were European, accounting for 27,6% of capacities, whereas nine were Asian shipping lines, accounting for 48,2% of capacities operated ([107]).

(260) In the transatlantic trade, European companies have kept a slightly larger share of the market: in 1992 Community shipping lines accounted for about [...] of the volume of the TAA ([108]), equivalent to about [...] of the total volume of the transatlantic trade. If the non-Community European shipping lines are included, European shipping lines as a whole accounted for some [...] of the volume of the TAA in 1992, equivalent to about [...] of the total volume of the transatlantic trade.

(261) Thus, the European shipping lines are in a relatively better position in the north Atlantic than in the rest of the world. The main advantage which the TAA procures for the European shipping lines is the increase in rates which has been imposed and, as a result, the reduction or elimination of the losses suffered in 1992 in this market. However, even if the Community lines are able to derive benefit from the rate increases introduced by the TAA, they do not benefit any more or any less than the non-Community members, which now account for 10 out of the 15 members of the TAA and about [...] of TAA capacity. It should be

([106]) TAA reply of 17 March 1994, Table 8, p. 26 (Article 85).

([107]) *Containerisation International,* August 1992, p. 38.

([108]) See TAA reply to a request for information, 15 July 1993, Tables 9 and 10.

noted in this respect that, since the TAA entered into force, four new shipping lines, all non-Community, have joined it.

(262) The shipping lines which benefit most from the situation created by the TAA are the few independents, which have increased their market shares while at the same time increasing their rates. The main shipping lines of that kind are Evergreen (Taiwan) and, to a lesser extent, Lykes (United States) Atlantic Cargo (Sweden) and ICL (United States) (See point 448).

(263) The effect of the TAA on Community shipping lines is fairly complex: it has helped to restrict or eliminate their losses in this market; on the other hand, it has benefited the non-Community shipping lines which are party to the agreement in the same way, and it has brought even bigger benefits to the non-Community lines operating in the Atlantic which are not party to it (see recital 262). The Community lines have lost market share since the agreement came into force. Lastly, the aim of the TAA is not to restructure the trade in such a way as to ensure the long term competitiveness of the European fleet. The increase in rates and the capacity freeze have produced a temporary improvement in the profitability of European lines in the Atlantic, without enabling them better to control costs or securing any lasting improvement in their competitive position, particularly in the case of those which might be suffering from some lack of competitiveness. It is difficult to view the TAA, as it currently operates, as an effective and durable means of protecting or defending the European fleet.

IV. THE COMPLAINTS

(264) The Commission has received complaints from the following parties:

— Port of [. . .] Authority (13 October 1992),

— [. . .], Union Professionelle [. . .] pour l'Importation de denrées alimentaires (13 October 1992),

— the Committee of North Sea Port Forwarding Agents (19 October 1992), supported by the Fédération Française des Organisateurs Commissionnaires de Transport (FFOCT) (19 March 1993),

— the European Shippers' Councils (ESC) (4 November 1992), supported by a letter from the German Shippers' Council (DSVK) on 26 November 1992,

— [. . .] (30 November 1992),

— the French Shippers' Council (CNUT) (18 December 1992),

— the British Shippers' Council (BSC) (21 December 1992), supported by letters from the Irish Exporters' Association on 1 and 9 February 1993,

— the Spanish Shippers' Council (16 March 1993),

— the forwarding agent [. . .] (19 April 1993),

— BIFA, British International Freight Association (28 April 1993),

— Clecat, Comité de Liaison Européen des Commissionaires et Auxiliaires de Transport (25 May 1993),

— The National Industrial Transportation League (19 July 1993).

(265) The Port of [. . .] Authority has complained about the introduction of range additionals (see point 200) in relation to the Danish ports of [. . .].

(266) The Committee of North Sea Port Forwarding Agents, Clecat and the FFOCT complain that the agreed rates include port charges and inland freight although no exemption pursuant to Article 85 (3) of the Treaty applies to such matters.

(267) [. . .], a medium-sized forwarding company, complains that the TAA applies discriminatory conditions to it compared with the conditions granted to the largest forwarding agents (rates 30 to 40 % more expensive).

(268) The British International Freight Association complains of discriminatory conditions applied by the TAA against United Kingdom forwarding agents and considers such practices to be an abuse of a dominant position.

(269) The ESC argues that the TAA is not a conference and does not meet the requirements of Article 85 (3) of the Treaty. It asked the Commission on 6 January 1993 to take interim measures against the TAA. The DSVK complains about rate fixing with respect to inland transport and about the capacity management programme, which artifically reduces capacity without reducing costs.

(270) [. . .] complains of a refusal to negotiate on the part of the TAA, the imposition of tariffs which cannot be economically justified, the sudden large increases in tariffs which have jeopardized the

exports of [. . .] to the United States, and a deliberate suspension of capacity amounting to a refusal to deal.

(271) On 16 March 1993 the Spanish Shippers' Council wrote to the Commission asking that the exemption requested by the members of the TAA should not be granted. It pointed out that such an exemption would grant a monopoly to those lines and would be an obstacle to obtaining sea and inland transport services under normal market conditions.

(272) The National Industrial Transportation League (NITL) is an association of shippers operating in the United States, comprises more than 1 200 members and represents shippers directly affected by the TAA in the eastbound and westbound sectors.

(273) The NITL considers that the TAA is an anti-competitive and particularly discriminatory agreement which has caused and is continuing to cause substantial harm to shippers. The agreement has in particular imposed unreasonable and unjustifiable rate increases, has without reason restricted the scope for concluding contracts between shippers and shipowners that would allow sound commercial relations, and has led to unreasonable discrimination against small shippers.

(274) The CNUT (the French Shippers' Council) complains on the following grounds:

1. abuse of a dominant position, demonstrated by the sudden large increases in tariffs (for certain goods up to 175 %) and by the imposition of unfair trading conditions, in breach of Articles 85 and 86 of the Treaty;

2. artificial limitation of the supply of transport, in breach of Articles 85 und 86 of the Treaty;

3. artificial sharing of the market between the members of the agreement, in breach of Article 86 of the Treaty;

4. discrimination between shippers, in breach of Articles 85 and 86 of the Treaty;

5. fixing of common tariffs for inland haulage, in breach of Articles 85 and 86 of the EC Treaty and Regulations (EEC) No 1017/68 and (EEC) No 4056/86;

6. an agreement with the members of the conference operating between Canada and Europe.

(275) The CNUT requests the adoption of interim measures pursuant to Articles 10 and 11 of Regulation (EEC) No 4056/86.

(276) The BSC complains that the TAA infringes Articles 85 and 86 of the EEC Treaty, inasmuch as the TAA:

1. limits, controls or shares the supply of sea and inland transport, technical development and investment to the detriment of shippers;

2. directly or indirectly fixes, and unfairly imposes, transport and other rates and conditions or any other trading conditions in respect of such services;

3. applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (in particular the limit of 250 TEU mentioned in recital 13).

(277) Consequently, the BSC asks the Commission to adopt interim measures against the TAA and to require the TAA members to terminate the TAA agreement pursuant to Article 11 (1) of Regulation (EEC) No 4056/86.

(278) Through the BSC, the following firms have sent the Commission submissions in support of their complaint:

[. . .].

(279) Through the CNUT, the following firms have sent the Commission submissions in support of their complaint:

[. . .].

(280) The DSVK attached to its letter of 26 November 1992 the views of the following firms regarding the TAA:

[. . .].

(281) Without entering into the details of the lengthy complaints lodged by the French and British shippers, particular mention should be made of the way business relations had developed between the complaining shippers and the shipowners who are members of the TAA. Many shippers emphasize the very great difficulties encountered in negotiating service contracts for 1993, and their need to be able to negotiate directly with the shipowners of their choice.

(282) The fact that the TAA has made it impossible to deal directly and individually with the shipowners and to maintain appropriate business relations between supplier and customer thus appears to be the reason for a large number of protests, particularly among European firms exporting to the United States.

PART IV: LEGAL ASSESSMENT

I. ASSESSMENT IN THE LIGHT OF ARTICLE 85 (1)

(283) The TAA consists of several connected elements:

(a) agreements on slot and space charters and on equipment exchange;

(b) price agreements on inland transport;

(c) price agreements on port activities;

(d) price agreements on maritime transport;

(e) capacity non-utilization agreements for maritime transport (as defined in recitals 16 to 22).

(284) This Commission Decision deals with elements (d) and (e), and with element (b) in so far as it concerns the Community, that is to say the agreements on prices and capacity non-utilization for maritime transport and the price agreements on the inland transport of containers in or through the Community.

A. *Price-fixing agreements in respect of maritime transport*

(285) Liner shipping companies are undertakings within the meaning of Article 85 (1) of the Treaty. The price-fixing agreements in respect of maritime transport between the shipping companies which are members of the TAA are agreements between undertakings within the meaning of Article 85 (1).

(286) These agreements, which are described at recitals 11 to 15, have as their object or effect the restriction of competition within the common market. In particular, they allow the members of the TAA to restrict competition between themselves with regard to tariffs, freight rates and general transport conditions. Such agreements are caught by Article 85 (1) (a) of the Treaty.

(287) According to Article 85 (1), agreements or restrictive practices must be capable of affecting trade between Member States if they are to fall within the scope of that provision.

The case-law of the Court of Justice in Case C-41/90, Höfner and Elser v. Macrotron ([109]) and of the Court of First Instance in Case T-65/89, BPB Industries and British Gypsum v. Commission ([110]) shows that it is not necessary in that connection to establish the existence of an actual effect on trade between Member States. The condition as to effect on trade is to be deemed fulfilled where intra-Community trade has been at least potentially affected to a significant extent.

(288) The price agreements are capable of appreciably affecting trade between Member States in the following ways.

(289) The TAA covers shipping lines operating in several Member States and restricts competition between those lines in respect of the services and prices each of them offers, thereby reducing shippers' choice. Owing to the agreements, European shippers may find little advantage in shipping their goods via a different country from the one in which they are situated, using the services of transport operators outside their own country, because of the artificial determination of trading conditions inherent in the TAA. Moreover, the elimination or reduction of competition in respect of the services or prices of the shipping lines is capable of reducing to a significant extent the benefits to be derived by the more efficient shipowners. This may in turn affect the normal interplay of gains and losses of market share which would have taken place in the absence of the TAA. This restriction of competition between shipowners operating in several Member States influences and affects trade in maritime transport services within the European Community through the maintenance or artificial exchange of shares of the Community market in services.

(290) The restriction of competition between shipping lines and the reduction of shippers' choice also influences competition between ports in different Member States, by artificially extending or diminishing their catchment areas ([111]).

(291) The collectively agreed definition of the different ports served by the members of the TAA as base ports or auxiliary ports impairs competition between the ports and causes deflections of trade in services, making the use of more distant ports more economical than that of closer ports (see recital 200).

(292) In particular, the changes made by the TAA to the classification of the Irish, Scottish and Scandinavian ports alter their economic attractiveness and are capable of resulting in

([109]) [1991] ECR I, p. 1979 paragraphs 32 and 33.

([110]) [1993] ECR II, p. 389, paragraph 134.

([111]) See sixth recital to Regulation (EEC) No 4056/86.

deflections of transport services towards ports in other Member States.

(293) All the abovementioned restrictions of competition in trade in transport services between Member States modify the pattern of trade in goods, which transit as a result through different ports and Member States from those which would have been used in the absence of such restrictions, and hence affect trade in related services linked to the transport of those goods.

(294) These restrictions are also capable of having an indirect effect on trade in goods: although the market for the provision of transport services must be distinguished from the market for the goods transported, it is not possible to separate them completely from each other. The costs and means of transport have an appreciable impact on trade in goods. Consequently, restrictions of competition in the provision of transport services must be analysed not only by reference to the effects they have on the market for the services in question, but also by reference to their indirect effects on trade in the goods transported.

(295) For these reasons, an effect on trade between Member States results at the very least from the price agreements within the TAA. The transport rates fixed by the TAA can account for a substantial part of the final price of goods transported by members of the agreement, which are marketed throughout the world, including the Community. For example, a change in the price charged for the transport of an article being imported by some Member States may affect the competitiveness of that article by comparison with competing goods originating in other Member States, and thus alter trade flows in such goods inside the Community. Similarly, a change in the price charged for the transport of an article being exported from a Member State out of Europe may affect the competitiveness of that article on its export market, and so induce exporters to look for new outlets in other Community Member States. Consequently, the fixing of prices for the transport of goods is sufficient in itself to affect the competitiveness of goods which are to be exported or imported.

(296) The Commission considers that this kind of effect, even where it is indirect, falls within the scope of Article 85 (1) of the EC Treaty. This follows from the judgment of the Court of Justice in Case 136/86, BNIC v. Aubert ([112]), which concerned an agreement in respect of a semi-finished product which is not normally sent out of the region in which it is produced but which constitutes the raw material for another product which is marketed throughout the Community. The Court held that the agreement was capable of affecting trade between Member States. In the present case, the Commission considers that the transport rates must be analysed in the same way.

([112]) [1987] ECR, p. 4789, paragraph 18.

B. *Capacity non-utilization in respect of maritime transport*

(297) The maritime transport capacity non-utilization agreements (as described at recitals 16 to 22) concluded between the members of the TAA in respect of their maritime transport activities are agreements between undertakings within the meaning of Article 85 (1) of the Treaty.

(298) These agreements have as their object and effect the restriction of competition, because they allow the limitation or control of production within the meaning of Article 85 (1) (b). In particular, they allow members of the TAA to restrict substantially the competitive capacity of each one of them vis-à-vis the others by limiting the volume that each one offers to the market.

(299) The agreements are capable of affecting trade between Member States to an appreciable extent in several ways:

(300) By limiting the capacity offered by each member of the TAA in the east-west direction (westbound sector), they may modify or reduce the volume of transport services between Europe and the United States. The reduction in the volume of services sold by a shipping line in one or more Member States other than that in which it has its principal place of business affects trade in services between Member States.

(301) They may also change the supply of services available out of each port and artificially transfer transport services from one Community port to another. They are therefore capable of affecting trade in transport services between Member States.

(302) As explained above (recital 294), these effects on trade in transport services also have a direct effect on the pattern of trade in goods and hence on trade in related services linked to the transport of those goods.

(303) Since, moreover, the main effect of the capacity non-utilization agreements in respect of maritime transport is to bring about a general increase in freight rates, the same considerations as are set out

at recitals 294 and 296 apply. Consequently, the agreements are capable of affecting trade between Member States to an appreciable extent.

C. *Price-fixing agreements in respect of inland haulage*

(304) The TAA European inland tariff agreements are agreements within the scope of Article 1 of Regulation (EEC) No 1017/68.

(305) The liner shipping companies which are members of the TAA are undertakings within the meaning of Article 2 of Regulation (EEC) No 1017/68, which reproduces the terms of Article 85 (1) of the Treaty.

(306) Directly fixing rates and conditions of the inland element of multimodal transport services is a restriction of competition within the meaning of Article 2 of Regulation (EEC) No 1017/68.

(307) The price agreements on the inland element of transport services offered by TAA members are capable of affecting trade between Member States to an appreciable extent.

(308) By fixing the rates to be charged by its members from their own different ports of operation to any given inland point within the Community and vice versa, the TAA agreement on the rates for the inland element in Europe affects competition between ports and influences the routing of cargo between different Member States.

(309) Similarly, these price agreements change the nature of the relationship between shipowners and inland transport undertakings, so that they can influence the commercial behaviour of inland transport undertakings operating in different Member States, and are thus liable to affect trade in inland transport services between Member States.

(310) The collective fixing of inland transport tariffs, irrespective of the ports served by the different shipping lines which are members of the TAA, alters the natural catchment areas of the ports falling within the TAA's scope by neutralizing the economic advantage that a shorter distance from a given port may confer.

(311) Consequently, inland transport services between Member States are affected owing to the fact that the natural itineraries determined by the shortest distance from a port served by a transport undertaking to an inland point and vice versa, or other transport conditions, are less relevant than previously.

(312) Moreover, the argument in recitals 294 and 296 with regard to price-fixing agreements in maritime transport can be applied by analog to price-fixing agreements in inland transport in order to show that the latter are capable of affecting trade between Member States.

D. *Conclusion regarding Article 85 (1)*

(313) The Commission considers that the TAA agreement, in so far as it includes agreements to fix prices for maritime and inland transport, and to limit the utilization of capacity in maritime transport, is an agreement restrictive of competition falling within the scope of Article 85 (1) of the EC Treaty.

II. ARTICLE 85(3) OF THE TREATY

(314) In order to determine whether the TAA is capable of falling within the scope of Article 85(3) of the Treaty, a two-stage analysis must be carried out: it must first be determined whether the agreement as it now stands is covered by the block exemption for liner conferences provided by Article 3 of Regulation (EEC) No 4056/86 or by any other block exemption; if not, it must then be determined whether the agreement qualifies for individual exemption.

A. *Block exemptions*

(315) Article 3 of Regulation (EEC) No 4056/86 grants block exemption to the agreements of members of one or more liner conferences having as their objective the fixing of rates and conditions of carriage and, as the case may be, one or more of the objectives listed at points (a) to (e) of that provision.

(316) Article 1(3)(b) of the Regulation defines a liner conference as 'a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate on uniform or common freight rates and any other agreed conditions with respect to the provision of liner services'.

(317) For the members of the TAA, 'the legislative intent was, through the adoption of Regulation (EEC) No 4056/86, to allow normal conference practices to

continue unregulated where the trade was open and there were no artificial restraints justifying intervention under the safeguard mechanisms of Article 7' ([113]) (italics added for emphasis).

(318) This being so, according to the members of the TAA the assessment should cover the compliance of the organization of the trades with the Council's political objectives as understood by the TAA members, and not the compliance of the formal agreement with the wording of Regulation (EEC) No 4056/86 ([114]). The Commission cannot accept this interpretation. It considers that it is necessary to verify whether the agreement falls within the scope formally defined by the Council in Article 3 of Regulation (EEC) No 4056/86, given that an exemption from a general principle, such as the prohibition of restrictive agreements provided for in Article 85(1), must not be interpreted broadly in the way TAA members would wish ([115]).

(319) The TAA is not a liner conference agreement exempted by Article 3 of Regulation No 4056/86, the main reasons being that:

— it establishes at least two rate levels,

— it provides for non-utilization of capacity.

1. Price fixing in respect of maritime transport

(320) The definition of exempted liner conferences is given in Article 1(3)(b) of Regulation (EEC) No 4056/86, where it is said that the members of such conferences 'operate under uniform or common freight rates'.

(a) *Regulation (EEC) No 4056/86 and the Unctad Code of Conduct*

(321) The definition of liner conference given in Regulation (EEC) No 4056/86 has been taken word for word from the Unctad Code of Conduct for Liner Conferences ([116]). The link between the adoption of Regulation (EEC) No 4056/86 and possible ratification or accession to the Unctad Code of Conduct is made quite clear in the third recital to Council Regulation (EEC) No 954/79 of 15 May 1979 concerning the ratification by Member States of, or their accession to, the United Nations Convention on a Code of Conduct for Liner Conferences ([117]) and the third recital to Regulation (EEC) No 4056/86. In the Commission's view the Code is an important factor to be borne in mind in interpreting the concept of an exempted liner conference under Community law.

The Unctad Code refers to traditional liner conferences and their most common practices ([118]). It does not refer to all the occasional practices engaged in now or at any time in the past by any of the many liner conferences in existence throughout the world ([119]), and accordingly, contrary to what the TAA contends, it does not cover all the commercial principles applied by the shipping lines which are members of these conferences. In particular, it does not cover the setting of minimum, maximum or differentiated tariffs to which the TAA refers in its reply dated 17 March 1994. The main acknowledged feature of these conferences, i.e. their essential characteristic, is that all their members agree to quote the same freight rates for the maritime transport of the same product on a regular service.

(322) This uniformity in the freight rates charged by the members of a liner conference is essential if there is

([113]) TAA reply to the statement of objections (interim measures), 24 May 1993, p. 72, point 2.32.

([114]) TAA reply to the statement of objections (interim measures), 24 May 1993, p. 68, point 2.26.

([115]) See the opinion of Advocate-General Van Gerven in Case C-234/89 Delimitis, [1991] ECR I, p. 955, point 5 and p. 960, point 10.

([116]) See the amended proposal for Regulation (EEC) No 4056/86, in OJ No C 212, 23. 8. 1985, p. 2, and the Commission's Fifteenth Report on Competition Policy (1985), point 34, p. 45, for the alignment of the definition of liner conference in the Regulation on that in the Code of Conduct, and Article 1(3)(b)of the Regulation, and the Code of Conduct, Annex I.

([117]) OJ No L 121, 17. 5. 1979, p. 1.

([118]) Juda, Lawrence, The Unctad Liner Code: *United States Maritime Policy at the Crossroads*, Westview Press Inc., Boulder, Colorado, 1983, p. 15.

'The definition of "liner conference" as finally approved in the wording of the Code clearly *limits the conception of liner conference to its traditional meaning, leaving independent non-conference operators outside of that definition* and thus beyond the purview of the Code which is a Code of Conduct for Liner Conferences. Another indicator of the fact that Code framers envisaged a continued role for independent liner shipping is implicit in the text of Article 18 of the Code which treats fighting ships and states:

Members of a conference shall not use fighting ships in the conference trade for the purpose of excluding, preventing or reducing competition by driving a shipping line not a member of the conference out of the said trade.

Further, the diplomatic conference which adopted the Unctad Code also adopted a resolution, albeit non-binding in nature, which resolves that shippers should not be deprived by the Liner Code of the option of utilizing non-conference lines so long as those lines adhere to the principle of "fair competition on a commercial basis".'

([119]) According to Croner's World Directory of Freight Conferences, there were more than 270 conferences in existence in May 1989. This figure is subject to frequent variation.

to be a 'conference' within the meaning of the Code and consequently of Regulation (EEC) No 4056/86.

The requirement is generally in the literature on liner conferences, as will be seen from the following extracts:

— 'The purpose of a shipping conference is the self-regulation of price competition primarily through the establishment of *uniform freight rates* and terms and conditions of service between the member shipping lines' ([120]).

— 'The first and foremost item in the conference contract is the agreement to charge *uniform freight rates* [. . .]' ([121]).

— 'Liner conferences or rings [. . .] consist of groups of liner shipping companies who have combined together since 1875 to exclude competition in the trade in which they operate [. . .] They charge *uniform freight rates*, they distribute sailings [. . .]' ([122]).

— 'We have [. . .] given some account of the agreements and understanding existing between the lines carrying from the United Kingdom and the continent under which the *same rates are charged* on similar articles' ([123]).

— 'The guarantee of uniform rates lies chiefly in the fact that the conference system is based on an agreement among the lines to charge the *same* rate of freight' ([124]).

(323) The same requirement ist clearly set out in Article 13(2) of the Unctad Code, which states:

'Conference tariffs should be drawn up simply and clearly, containing as few classes/categories as possible depending on the (necessities of each trade, and *specifying a freight rate for each) commodity* and, where appropriate, for each class/category' ([125]) (italics added for emphasis).

(324) Liner conferences enjoy a far-reaching block exemption because of the belief that they play a stabilizing role ([126]). This stabilization, according to the Unctad Code, is provided by common prices, that is so say that the level of freight rates for a regular service is uniform within the conference ([127]). This level then provides assistance for shippers, who are assured of a maritime transport service at the same price whatever the shipowner.

(325) In order to qualify for exemption of some of their activities, liner conferences must set the same level of rates for each of their members (even if those rates differ widely from one type of cargo to another) without distinction or discrimination. The phrase 'uniform or common' does not admit of the interpretation that, in order to fall within the block exemption for liner conferences, it is sufficient for a group of carriers to set freight rates (hence tariff structures) which vary from one member to another, but which are discussed in a joint structure. In order that shippers might secure the stabilization benefits envisaged, rates must be *common*, not only *established in common.* This condition is not fulfilled by the TAA.

(326) 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

([120]) Fawcett, F. Conger and Nolan, David C., 'United States Ocean Shipping: the History Development and Decline of the Conference Antitrust Exemption', in *Northwestern Journal of International Law and Business,* Volume I, 1979, p. 538.

([121]) Herman, Amos, *Shipping Conferences,* Lloyds of London Press Ltd, London, 1984, p.23.

([122]) Shah M. J., an overview in *Shipping Nationalism and the Future of the United States Liner Industry: the Unctad Code and Bilateralism* — proceedings of a workshop, November 1983, Center Ocean Management Studies, edited by Lawrence Juda; Time Press Educational Publishing Wakefield, Rhode Island, 1984, p. 3.

([123]) Report of the Royal Commission on Shipping Rings, 1909, Majority Report, point 127, p. 41 and point 147, p. 45. See also points 111, 132, 136 and 142.

([124]) Ibid.

([125]) The words 'selon les exigences propres à un trafic, et spécifier un taux de fret' appear in the French and other language version but have been unintentionally omitted from the English version.

([126]) Stability enables shippers to avoid the effects of 'excessive and unforeseeable variations in freight rates' (document COM(81)423 final, preliminary draft of Regulation (EEC) No 4056/86, p.6), and quote c.i.f prices in safety. According to the Unctad report, United Nations Document TD/B/C/4/62/Rev. 1, p. 5, points 28 and 29:

'Conferences further argue that they provide fixed rates which are reasonably stable. In the case of most of the conferences under normal circumstances, rates are increased only on "current plus two months" notice. Stable rates fix the transport element in the c.i.f. price and shippers are able to quote prices and make contracts for future delivery without the fear that fluctuations in freight rates will introduce a speculative element'.

([127]) On this point see for example Marx, Daniel, *International Shipping Cartels,* Princeton, New Jersey, 1953, p. 117:

'The practice of making rates lower by a fixed percentage from those of other carriers *destroys stability* and is detrimental to the nation's commerce'.

far as any one commodity is concerned; the two adjectives respresent different viewpoints. 'Uniform' rates means that for the transport of a given article a shipper will be offered the same freight rate by all members of the conference. 'Common' rates means that all members of the conference are to offer the same freight rate for the transport of that particular commodity. A shipper will not be offered the same rate by all members of a conference for the transport of a given article unless they are charging identical prices.

(327) Support for the Commission's interpretation is also found in the preparatory reports for the Unctad Code, which clearly explain that the central feature of a liner conference is the common agreement among shipowners operating on a trade to charge a uniform rate for identical merchandise. For example, the 1970 report of the Unctad secretariat entitled *The Liner Conference System* states:

> 'In any conference the basic agreement between the members is to charge uniform rates ... The *agreed* rates and rules governing calculation of freight charges of a conference are given in the conference tariff' (italics added for emphasis) ([128]).

(328) The report also notes that a conference tariff consists of specific rates for various commodities ([129]) and that conferences charge uniform freight rates over a wide range of loading and unloading ports, which is claimed to be a convenience to traders ([130]). Similarly, the 1972 report of the Unctad secretariat entitled 'The Regulation of Liner Conferences (A Code of Conduct for the Liner Conference System)' states that liner conferences are 'groups of shipping lines operating on routes with basic agreements for charging uniform rates [...]' ([131]).

(329) It may be noted that in the course of the discussion which led up to the Code the Committee of European National Shipowners' Association (Censa) proposed a similar definition to its members of the Consultative Shipping Group working group on Unctad ([132]).

([128]) United Nations Document TD/B/C/4/62/Rev. 1, point 156.
([129]) Ibid., point 161.
([130]) Ibid., point 29.
([131]) United Nations Document TD/104/Rev. 1, point 6.
([132]) See Censa documents of 19 and 30 January and 5 February 1974.

(330) 'Liner conference means a group of two or more vessel-operating carriers, mainly of general cargo, which provide international ocean scheduled services on a particular route or routes within specified geographical limits, whatever the nature of the agreement or arrangement within the framework of which they operate independently, quoting *uniform freight rates* and any other conditions of carriage *in a common tariff*' (italics added for emphasis).

(331) The interpretation of the term 'uniform' advocated by the TAA, whereby 'uniform' means uniform rates *vis-à-vis* shippers only and not between shipowners, encounters a further difficulty. The document on which the TAA bases this interpretation, the 1909 Report of the Royal Commission on Shipping Rings, refers to the uniformity both between shipowners and vis-à-vis shippers, and even spells out the necessary link between these two concepts:

> 'The guarantee of uniform rates lies chiefly in the fact that the conference system is based on an agreement among the lines to charge the *same* rates of freight. Without some rule that the rates should be the *same for all* merchants alike such an agreement would be very difficult to work and conferences would be weak if the individual lines were at liberty to offer preferences at will' (italics added for emphasis) ([133]).

(332) Contrary to TAA's claim, therefore, this document does not envisage uniformity *vis-à-vis* shippers being achieved individually by each conference member, rather than collectively by the conference.

(333) The objective of the system is to ensure that the transport user will be offered the same rate by all shipowners belonging to the conference.

(b) *The conference practices cited by the TAA*

(334) In its reply to the statement of objections the TAA cites a number of practices which conferences have engaged in in the past, namely the setting of minimum, maximum or differentiated tarrifs, and

([133]) Report of the Royal Commission on Shipping Rings, 1909, point 147.

the existence in certain conferences of separate categories of member; but these do not affect the interpretation of what is meant by a 'conference' which has been set out here. These are occasional practices which are not covered by the Code of Conduct, or which the literature might consider justifiable under certain specific conditions which the TAA and its members do not meet in this case, and which in any event are not provided for in Article 3 of Regulation (EEC) No 4056/86.

(335) As regards the fact that some conferences have had more than one category of member, it must be pointed out that the 1970 report by the Unctad secretariat describes conferences most often having two categories of member, full members and associate members. Unlike full members, it says, associate members do not enjoy all the rights provided for in the conference agreement; their sailing rights are limited ([134]). They serve only part of the routes covered by the conference, but when they exercise their limited rights they are subject to the same obligations as full members. Thus they are required to charge the same conference freight rates as full members do.

(336) The 'unstructured' members of the TAA, i.e. those not represented on the Rate and Contract Committees, do not match the description of associate members in the Unctad report. They have the same sailing rights as other members of the TAA, and are not required to charge the same freight rates as other members (see recitals 133 to 144).

(337) Some conferences have set minimum or maximum rates, but these are occasional practices not contemplated in the Code of Conduct or in the preliminary Unctad reports of 1970 or 1972 — something clearly demonstrated by Article 13 (2) of the Code of Conduct, already referred to, according to which converences are to specify a freight rate for each commodity.

(338) As for the examples of differentiated rates cited by the TAA, it should be observed that traditionally a system of this kind has been set up only in specific cases where there were wide disparities in the quality of the service offered by certain conference members, with respect to the vessels used or the nature of the service itself. Such a system existed where some conference members offered a conventional break-bulk service ([135]), or where some were using steamships while others were still using sailing vessels, which were older and slower and offered a service of a different kind.

(339) There is no generally accepted justification of this kind for the TAA. All its members, structured and unstructured, provide a containerized service of broadly similar quality and frequency. Nine out of ten services provided by the TAA are weekly. The TAA members' vessels are all containerized. Indeed, many of the services offered by the TAA are provided by structured and unstructured shipowners operating jointly, so that there is no justification for any differentiation in rates or conditions between them.

(340) The TAA's situation is consequently quite different from those which existed in the individual cases it cites. The nature of the services offered by the unstructured members is not fundamentally different from that offered by the structured members.

(c) *An agreement between conference and independents*

(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

([134]) Unctad report referred to above at recitals 76 to 81, p. 12.

([135]) See for example Herman, A., *Shipping Conferences,* 1983, already referred to, p. 89;

'Continental North Atlantic Westbound Freight Conference and the North Atlantic Continental Freight Conference filed with the FMC proposed amendments to their agreements providing for the division of membership into two classes, A and AA. Class AA may quote 8,5 to 10% lower rates that those of Class A. The differentiation in rates was requested by the Conferences because of the disparity in the kind of service supplied by the two classes. Class A provides *full container service* and Class AA provides traditional, *break-bulk service*' (italics added for emphasis).

made here. Reference should be had to recital 117 et seq, which describe the recent history of the trade, the document summarizing 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.

(344) In its reply, the TAA refers to the fact that conferences have traditionally had two types of member, namely full members and associate members. However, unlike the unstructured members of the TAA who have greater flexibility in setting tariffs, the associate conference members had restricted rights (e.g. in terms of frequency and ports served) and were required to comply with the rules of the conference, in particular with regard to rates ([136]).

(345) Here, the effect of the two types of member within the TAA is of another kind: a certain amount of tariff flexibility is granted to shipowners who, without this flexibility, would remain independent and would exert real, effective competitive pressure on conference members ([137]). As a result of this flexibility, contrary to the features of conferences, competition from independents is considerably reduced and may be eliminated altogether.

(346) Moreover, this type of agreement between conferences and independents is not new, being known by the name of 'rate agreements', which were appraised by the United States Department of Justice in the following terms:

> 'Conference membership in these rate agreements allows conferences to meet with all major 'independent' lines to fix rates. Thus conference monopoly power can be extended, through rate agreements, to encompass most non-conference lines. [...] Such an agreement need not specify uniform rates: the parties may agree on rates which are different for different carriers, reflecting service variations or other factors' ([138]).

> 'Rate agreements typically provide for the right of independent action by agreement members. Where conferences are members of rate agreements, the lines normally agree upon a rate differential between conference and non-conference rates, rather than on uniform rates as is the case with respect to conferences' ([139]).

(347) This appraisal also shows how the objective of such price agreements is to limit the competitive pressure which would otherwise be exerted by non-conference shipowners.

(348) The TAA suggests that different freight rates agreed in common by shipowners (but not common rates) qualify for the block exemption; this would not secure a common level of prices but would allow a range, and possibly a wide range, of freight rate levels.

(349) 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 unterstanding 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

([136]) See *The Liner Conference System*, Unctad, 1970, Chapter III, p. 12: point 78:
'Associate members are subject to all the duties and obligations of full members in respect of the cargo handled in the trade covered by the conference agreements';
point 81:
'Membership of the conference [...] obliges the line to follow the conference tariff rates and the rules and regulations of the conference. Membership of the conference thus eliminates the freedom of each line to operate an individual pricing policy within the sphere of the conference.'

([137]) See the document mentioned in footnote 70.

([138]) *The Regulated Ocean Shipping Industry*, a report of the United States Department of Justice, January 1977, p. 69.

([139]) Ibid., p. 142.

incompatible with Article 85(3) of the Treaty, which provides for exemption only in specified circumstances not present in this case.

(d) *Independent rate action*

(350) The Commission takes the view that the interpretation set out here does not necessarily exclude from the scope of Regulation (EEC) No 4056/86, and of the block exemption for liner conferences, the 'open' United States conferences subject to the United States Shipping Act of 1984. That Act requires conferences serving the United States to allow their members to depart from the conference tariff by taking 'independent rate action' ('IRA', also known as 'independent action' or 'IA'). This option allows a member of a conference to quote a freight rate for a given article which is lower than that of the conference tariff, provided he gives notice, usually of 10 days.

(351) A conference offers a general level of common prices which plays a stabilizing role and provides a frame of reference for shippers. A system of differentiated rates like that of the TAA does not provide such a frame of reference of this kind; instead, there are two or even more price levels for each commodity. In practice a member of a United States conference takes independent rate action on a one-off basis in respect of a specified commodity. Such action will not as a rule result in a second general price level. It does not jeopardize the conference's stabilizing role. This is particularly so as the option has in fact been exercised only in a relatively limited and unsystematic fashion by the members of the old Neusara and Usanera conferences, which are now the structured members of the TAA ([140]).

(352) Regulation (EEC) No 4056/86 allows a departure from the common tariff for loyalty arrangements ([141]) agreed between the conference and shippers: these are exempted by Article 6, subject to the conditions in Article 5(2). Where shippers undertake to remain loyal to the conference, by contract or in some other way, such arrangements allow members of the conference to offer them freight rates which are more advantageous than those offered to shippers who have no such agreement with the conference. These rates are applied in a uniform fashion to qualifying shippers having the same goods transported by members of the conference ([142]).

(353) Like independent rate action, therefore, this option of departing from the common tariff is in practice open to all members of a conference in the same way. Equal treatment of all members of a conference is a feature not only of the tariff but also of the exceptions to it. But a system of differentiated rates for two categories of member of an agreement like the TAA is by definition not open to all the member companies, and this distinguishes it from the departures from the tariff which we have been looking at ([143]).

(354) For these reasons the Commission takes the view that the requirement of uniform rates is not in contradiction with the right of independent rate action provided for in the United States legislation

([140]) According to the information provided by the TAA in reply to the statement of objections, there were 772 cases of independent rate action by members of Neusara and Usanera in 1991. The figure for 1988 was 801. This figure is tiny in comparison with the number of cases of independent rate action in 1988 under what are known as the transpacific agreements, whose members operate between the west coast of the United States and Asia, where the figure was 69 775, and the east coast of the United States and Asia, where the figure was 28 798 (see section 18 of the Federal Maritime Commission Report on the Shipping Act of 1984, September 1989, p. 662).

([141]) Loyalty arrangements are described in Chapter 4 of the Unctad report referred to in point 327 of this Decision, at points 144 to 155, pp. 17 to 23.

([142]) The United States Shipping Act of 1984 includes a *de facto* ban on loyalty agreements in United States trades. Section 3(14) of the Act, 46 USC app. 1702(14), defines a 'loyalty contract' as follows:

> 'loyalty contract' means a contract with an ocean common carrier or conference, other than a service contract or contract based upon 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.'.

Under Section 10b (8) and (9), 46 USC app. 1709, 6(8) and (9):

> 'No common carrier, either alone or in conjunction with any other person, directly or indirectly may
> (8) offer or pay any deferred rebates;
> (9) use a loyalty contract except in conformity with the antitrust laws'.

([143]) It may be noted that the system initially provided for differentiated between structured and unstructured members even in respect of independent rate action, demonstrating more clearly again that as far as prices were concerned there were two categories of member: structured members were give advance notice of 10 days, while unstructured members had no such obligation; this was intended to maintain the price flexibility distinguishing the independents from the old conference members.
The system was changed following the Commission's letter of 27 August 1992, which explained that this was one of the reasons why the TAA could not be considered a conference within the meaning of Regulation (EEC) No 4056/86.

when that right is properly exercised ([144]). This Decision does not consider how far other agreements between shipowners for two-tier pricing might be exempted by Article 3 of Regulation (EEC) No 4056/86.

(355) The basic requirement for a conference is that the rates offered should be uniform rates, so that the conference secures to shippers the benefits which justify the grant of a block exemption and at the same time continues to be subject to effective competition from outsiders. Where as in this case, a differentiated system of rates is provided for in the agreement in order to associate non-conference shipowners with price agreements between the old conference members, the Commission takes the view that this 'rate agreement' is not a conference agreement and falls outside the scope of the exemption.

(e) *Conclusion*

(356) A number of the reasons which have just been set out for holding that the TAA is not a liner conference were explained to the members of the TAA in the Commission's letter of 27 August 1992.

(357) The history of the trade, as well as the evident intention of the TAA at its inception and in its present practice, show that this agreement is in fact an agreement between conferences and shipowners who are effectively independent.

(358) Such a price-fixing agreement is not a 'conference' within the meaning of Article 1 of Regulation (EEC) No 4056/86, and is not exempted by Article 3 of the Regulation.

2. **Capacity non-utilization**

(359) Moreover, even if the TAA were a conference agreement within the scope of Article 1 of Regulation (EEC) No 4056/86, the capacity management programme set up by TAA members would not be exempted by Article 3 of that Regulation for the following reasons.

([144]) The Commission considers that it would not be a proper exercise of this right to invoke it in an agreement in order to establish rates differentiating between two or more categories of parties to the agreement; such an agreement would not constitute a conference exempted by Regulation (EEC) No 4056/86.

(360) Firstly, Regulation (EEC) 4056/86 is concerned with the traditional, normal activities of liner conferences, as described by the Unctad Code; these alone are exempted by Article 3.

(361) When the Commission first proposed to grant a block exemption to liner conferences, it was clear in the light of the Code of Conduct and the Unctad reports already referred to that the main restrictive activity which was to be exempted was price fixing; the reference to 'capacity' concerned secondary problems related to seasonal fluctuations and port and sailings allocation, and not large-scale horizontal capacity reductions or freezes on capacity specifying a proportion to be left unused.

(362) It should be borne in mind here that the purpose of a conference is to provide regular, adequate and efficient services to shippers at common rates; that conferences have been granted a block exemption because they have a stabilizing effect on prices; and that this stabilization of prices facilitates the provision by shipowners of such a regular, efficient and reliable service (see point 389) ([145]). This principal objective is clearly stated in Article 19 of the Unctad Code of Conduct, entitled 'adequacy of service', which provides:

> 'Conferences should take necessary and appropriate measures to ensure that their member lines provide *regular, adequate and efficient services of the required frequency on the routes they serve and shall arrange such services so as to avoid as far as possible bunching and gapping of sailings.* Conferences should also take into consideration any special measures necessary in *arranging services to handle seasonal variations in cargo volumes*' (italics added for emphasis).

The purpose of capacity regulation is to allow the best coverage of the ports served by the conference over time, and not to drive up freight rates as the members may decide.

(363) An analysis of the successive proposals which led to the adoption of Regulation (EEC) No 4056/86

([145]) See the eighth recital to Regulation (EEC) No 4056/86. See also the Unctad report of 1970, referred to in recital 327 of this Decision, at points 9 to 11, p. 3.

shows that the 'regulation of the carrying capacity offered by each member' spoken of in Article 3(d) was always meant to refer to agreements aimed at improving the scheduled services on offer, and not to agreements whose main objective was to secure a substantial increase in freight rates. The capacity regulation provided for here is to be understood in the context of the traditional activities of liner conferences aimed at the provision of a regular, frequent and reliable service. It goes hand-in-hand with the determination, coordination and allocation of sailings or calls among members of the conference, on the basis of the ports they serve, and the choice of the type of vessel each of them uses to meet its conference commitments to provide a regular, reliable and adequate service, in a large geographic market: all this involves the carrying capacity offered by each member. In conjunction with one of more of the other activities listed in Article 3 of Regulation (EEC) No 4056/86, capacity regulation allows it to be determined which member of the conference is to use which stated type of vessel of a stated capacity to sail on a particular date from a particular port served by the conference, whenever this is necessary in order to provide a regular, reliable and adequate service to shippers.

(364) The explanatory memorandum to the Commission proposal of 13 October 1981 has this to say about Article 3, which deals with the exempted activities of conferences:

> 'As far as prices are concerned, account must be taken of the fact that sea transport ... is characterized by considerable fluctuations, both business and seasonal, in demand for cargo capacity';
>
> [...]
>
> 'Both the shipowners and the users try, through price agreements, to introduce some stability in ocean freights.'
>
> Rationalization agreements are the logical consequence of price agreements. In order to avoid competition extending to offers of capacity available but also ensure a proper service for 'difficult' ports, the shipowners have concluded agreements concerning calls and capacity. The most elaborate ('pooling') agreements stipulate a sharing of tonnage and even revenues, which assures a regular transport of the merchandise alongside, even of merchandise the carriage of which is the least remunerative' ([146]).

Once again, capacity regulation is placed in the context of the provision of a scheduled service by the members of the conference: it is intended to allow all goods, even the least remunerative, to be carried, and all ports, even those handling the smallest volumes of cargo, to be properly served, so that a regular service can be offered.

(365) The regulation of capacity within the meaning of Article 3(d) has thus always been understood to allow:

— capacity adjustments to facilitate the organization of conference members' sailings and calls, in order to improve the regularity, reliability and frequency of services to all the ports served,

— capacity adjustments to take account of seasonal (or short-term) fluctuations in demand, as can be seen from the second sentence of Article 19 of the Unctad Code and from the Commission proposal of 13 October 1981 already referred to.

(366) This Article does not in any way contemplate a freeze on the use of capacity whose main purpose is to increase freight rates. A freeze of that kind is in any event not a traditional activity of liner conferences. In its reply to the statement of objections the TAA cites a number of historical examples, but these include no case of a detailed mechanism for a capacity freeze similar to the CMP set up here: they are all mechanisms designed to adjust capacity by limiting the number of sailings or by establishing pools.

Capacity regulation is exempted by Article 3(d) where it consists in temporary adjustments in the amount of physical capacity available, such as the withdrawal of a vessel or a reduction in the frequency of a service to meet a seasonal reduction in demand. Article 3(d) does not exempt capacity non-utlilization agreements such as the TAA because their only effect is to raise the level of prices and they do not involve any improvement of the services offered.

([146]) Commission proposal of 13 October 1981. For explanatory memorandum see COM(81) 423 final. (OJ No C 282, 5. 11. 1981, p. 4).

(367) Secondly, the interpretation of Article 3 of Regulation (EEC) No 4056/86 ought to be compatible with Article 85(3) of the Treaty. A Community regulation should always be interpreted, if possible, in a way which does not cast doubt on its compatibility with the Treaty. If Article 3 were understood to exempt liner conferences which make unlimited capacity reductions, or which limit capacity utilization by freezing a proportion of available capacity, without any appropriate safeguards and in conjunction with price fixing, it would be difficult to consider it compatible with Article 85(3). It would mean that liner conferences were entitled to make structural changes in the volume of supply and the level of prices without reference to demand, and to alter freight rates without reference to supply and demand mechanisms.

(368) That interpretation is not reasonable or compatible with Article 85(3). Such restrictions have never been regarded as meeting the conditions of Article 85(3) in any sector of activity, and the Commission considers that the TAA parties have not demonstrated that the special features of maritime transport are such as to justify the systematic granting of exemption for such restrictions on competition contrary to current competition law practice in other sectors (see the Commission's Twelfth Report on Competition Policy, cited in footnote 102).

(369) Furthermore, the exempted activities listed from (a) to (e) in Article 3 are authorized only in so far as they are incidental to the price-fixing operations of conferences (there must be price-fixing before the block exemption will apply). They are not authorized where they are intended to change freight rates substantially and not merely to stabilize or adjust them.

(370) The phrase in point (d) of Article 3 ('the regulation of the carrying offered by each member'), and the corresponding recital, must be interpreted as permitting activities which are secondary to price fixing, like the other exempted activities listed from (a) to (c) in Article 3, such as one-off capacity adjustments to accompany changes in timetables, sailings or calls among liner conference members or seasonal fluctuations in demand [147], which are all incidental to the main activity. Point (d) should not be interpreted as something quite different in nature from the other points listed in the same Article.

But in the present case, as we have seen in recitals 240 to 257, the CMP is not a capacity-regulating tool with these objectives, nor is it even intended to deal with eastbound/westbound imbalances or with seasonal or cyclical fluctuations (as is maintained by the TAA), but is a tool intended primarily for suspending unused capacity so that it can be artificially maintained, and the trade and prices for European exports artificially increased. Such a capacity management tool cannot be regarded as falling within the scope of Article 3(d) of Regulation (EEC) No 4056/86.

3. Price fixing on inland haulage

(371) The TAA members have referred to Article 3 of Regulation (EEC) No 4056/86 as being a provision authorizing them to fix collectively prices for inland haulage.

(372) Since it is not a liner conference, the TAA cannot claim the benefit of the exemption granted to liner conferences. Moreover, liner conferences themselves are not authorized by the block exemption which they enjoy to allow their members to fix inland rates collectively.

(373) As far as the applicability of Article 3 of Regulation (EEC) No 4056/86 is concerned, the Commission considers that the scope of the block exemption cannot be wider than the scope of Regulation (EEC) No 4056/86 itself. According to Article 1(2) of the Regulation, 'it shall apply only to international maritime transport services from or to one or more Community ports' (emphasis added). It is clear from this provision that inland transport in the form of multimodal door-to-door transport or otherwise is not covered by the Regulation, which has only a maritime scope, and thus does not fall under the block exemption in Article 3.

(374) The block exemption in Article 3 refers exclusively to port-to-port rates. The title of Article 3 of Regulation (EEC) No 4056/86 is clear in this respect: *'Exemption for agreements* between carriers *concerning the operation of scheduled maritime transport services.'*

(375) This is borne out by the 11th recital of the Regulation on maritime transport, which states

[147] See Article 19 of the Unctad Code of Conduct, which expressly refers to such fluctuations.

clearly that 'in the case of inland transports organized by carriers ([148]) the latter continue to be subject to Regulation (EEC) No 1017/68.' This recital also shows that, in respect of multimodal door-to-door transport, only the maritime part falls within the scope of Regulation (EEC) No 4056/86.

(376) The TAA's argument that it can be inferred from Article 5(3) and (4) of Regulation (EEC) No 4056/86 that the block exemption applies also to multimodal transport organized by liner conferences ([149]) is not convincing. This argument originates in a misinterpretation of the nature of the obligations imposed by Article 5(3) and (4). These two provisions do not refer to the conference tariff, but to the conditions offered by the individual lines. This in no way means that Article 3 of the Regulation authorizes prices to be fixed for the inland element of multimodal transport services: it merely requires individual shipping lines wishing to benefit from the block exemption to permit 'merchant haulage' and to publish the terms and conditions relating to 'carrier haulage'.

Article 5 thus contains obligations which, as its title indicates, attach to the block exemption, but it contains no explicit or implied extension to the block exemption granted by Article 3.

(377) These findings are also borne out by the fact that the European Parliament proposed an amendment to Article 3 of the draft version of the Regulation on maritime transport in which it was specified that 'the abovementioned exemption shall also cover intermodal transport' (i.e. maritime transport including transport prior and subsequent thereto), but the proposal was not adopted by the Council.

(378) The rejection of this amendment by the Council is confirmation of the contention that agreements fixing inland transport rates are not covered by the block exemption provided by Article 3 of Regulation (EEC) No 4056/86. However, where they fulfil the conditions laid down in Article 5 of Regulation (EEC) No 1017/68, the parties to such agreements may benefit from individual exemptions pursuant to Article 11(4) or Article 12 of that Regulation.

(379) The Commission is also of the opinion that no other exception or exemption provided by Regulation (EEC) No 1017/68 applies to the TAA agreement on inland rate fixing.

(380) As far as Article 3 of Regulation (EEC) no 1017/68 is concerned, the TAA agreement concerning inland rates is not a 'technical agreement' within the meaning of that provision. Agreements made between competitors in the same market concerning pricing are commercial agreements and do not have the sole ([150]) object and effect of achieving technical improvements or cooperation.

(381) As far as Article 4 of Regulation (EEC) No 1017/68 is concerned, the exemption contained in that provision for groups of small and medium-sized undertakings is not applicable either. In particular, the thresholds of Article 4 are not satisfied. First, some of the TAA members have no carrying of their own, as is necessary under this provision. Secondly, if hired or subcontracted capacity were taken into account, the joint capacity of TAA members would greatly exceed the limits provided for in Article 4.

4. Conclusion

(382) The Commission considers that the TAA is covered neither by the block exemption provided by Article 3 of Regulation (EEC) No 4056/86, nor by any exception or any other block exemption. Moreover, even if the present agreement were amended so that it fell within the scope of the block exemption in Article 3 of Regulation (EEC) No 4056/86, the Commission might withdraw the benefit of the block exemption from it pursuant to Article 7 of that Regulation on the ground that it eliminates competition (see recitals 427 to 461). It is therefore necessary to assess whether the TAA can benefit from an individual exemption.

([148]) In the English version the term 'shippers' is used instead of 'carriers'. This is clearly a mistake because:
1. the recital would be meaningless if 'shippers' were the correct term;
2. all the other language versions of the Regulation talk of carriers.

([149]) TAA reply, 17 March 1994, Annex 18, points 8 and 15 (Article 85).

([150]) The English version of Article 3 of Regulation (EEC) No 1017/68 has omitted the word 'sole', which is included in the original text of this Regulation and in Council Regulations (EEC) No 4056/86 (Article 2) and (EEC) No 3975/87 (Article 2) (OJ No L 374, 31. 12. 1987, p. 1).

B. *Individual exemption for maritime transport agreements*

(383) It should be pointed out first of all that, as the Court of First Instance has held in Case T-66/89, Publishers Association v. Commission [151], 'whenever an exemption pursuant to Article 85(3) of the Treaty is sought, it is incumbent on the applicant undertaking to prove that it satisfies each of the four conditions laid down therein.'

(384) It should also be pointed out that, 'where an exemption is sought pursuant to Article 85(3), it is in the first place for the undertakings concerned to present to the Commission the evidence for establishing the economic justification for an exemption and, if the Commission has objections to raise, to submit alternatives to the Commission.' In that event, 'although it is true that the Commission may give the undertakings indications as regards any possible solutions, it is not legally required to do so, still less is it bound to accept proposals which it considers to be incompatible with the conditions laid down in Article 85(3)' [152].

1. **Improvement of the production or distribution of goods or promotion of technical or economic progress**

(385) According to the TAA, the main advantage produced by the agreement in question is stability, which has been recognized by Regulation (EEC) No 4056/86 as an advantage within the meaning of the first condition of Article 85(3) of the Treaty. However, the Commission takes the view that the nature of the stability produced by the TAA is different from that envisaged in Regulation (EEC) No 4056/86, in terms of both the intended objectives and the means used.

(a) *The objectives of stability*

(386) The TAA maintains that one of the features of scheduled transport services is that the supply of transport services is constant in the short term and cannot, therefore, adjust to short-term fluctuations in demand. This, together with low short-term marginal costs, may, in the absence of anti-competitive agreements, result in particularly volatile transport prices. In this context, cooperation on tariffs between conference members enables freight rates to be stabilized [153] and rates to be kept at a constant level over a reasonably long period — typically, for around a year.

(387) The TAA further asserts that stability of rates over time is rendered possible by the achievement of a broader stability in the supply of reliable services [154]. This is why, according to the TAA, the supply of services must be an essential element of cooperation between shipowners.

(388) The Commission is unable to accept this analysis. In its view, it is possible to distinguish between regularity, reliability and price stability. Regularity is the very essence of liner services and constitutes their special feature compared with unscheduled tramp services. 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. Price stability is the maintenance of freight rates at a more or less constant level by liner conferences, in accordance with a set structure (see recital 77), over a substantial period of time. This stability can be contrasted with the volatility which the market would naturally generate in the absence of conference agreements.

(389) In the Commission's view, price stability may constitute an objective within the scope of Article 85(3) of the Treaty for the following reasons:

— stability of rates for scheduled services enables shippers to know reasonably far in advance the cost of transporting their products and therefore their selling price on the market of destination, whatever the time, vessel or conference shipowner involved,

— stability of rates enables shipowners to forecast their income more accurately and thus makes it easier to organize regular, reliable, adequate and efficient services.

(390) The Commission also recognizes that, pursuant to Regulation (EEC) No 4056/86, the organization of regular, adequate and efficient services may, in certain circumstances, and in tandem with price agreements, require additional cooperation between conference members on timetables,

[151] [1992] ECR II, p. 1995, paragraph 69.
[152] *Ibid.*, paragraph 74. See also the judgments of the Court of Justice in Joined Cases 43 and 63/82 VBVB and VBBB v. Commission [1984] ECR, p. 19 and in Case 42/84 Remia v. Commission [1985] ECR, p. 2545.

[153] On the concept of stability, see also footnote 126.
[154] TAA reply, 17 March 1994, point 2.7 (Article 85).

sailings, calls, frequencies, capacities offered or the allocation of cargo or revenue.

(391) In particular, capacity adjustments may accompany changes in timetables, routes or ports served, or seasonal or short-term changes in demand. Non-tariff cooperation of this kind is complementary to the fixing of freight rates and helps to ensure regular, reliable, adequate and efficient services.

(392) However, the stability referred to by the TAA goes much further than this. It seeks the maintenance of existing services, the survival of companies engaged in the trade, and as fas as possible the preservation of their profits, even more than stability of rates and the provision of regular, reliable adequate and efficient services. Moreover this interpretation of the concept of stability is spelled out by the TAA (although qualified by the use of the word 'excessive') as follows:

> 'The stability to which the Council of Ministers refers in the recitals of Regulation (EEC) No 4056/86 results from the elimination of the most severe consequences of extreme fluctuations in demand and rate levels, namely excessive exit from, followed by excessive entry to, a particular trade.'
>
> 'To put it another way, the cooperation between shipping lines in a liner conference (which cooperation may relate not only to prices but also capacity regulation — Regulation (EEC) No 4056/86 ninth recital) is designed to avoid (a) the exit from the trade during times of slack demand of a significant number of otherwise committed carriers and (b) the entry into the trade of a significant number of (other) carriers who do not have a history of long-term association with, or commitment to, the trade and the shippers in that trade' ([155]).

(393) The concern to preserve the existing operators is also evident from the TAA's proposed analysis of the rationalization of the trade:

> 'The *importance of maintaining market share* is such that no single operator can afford to remove capacity if it would thereby risk losing market share unless that operator is in fact prepared to leave the trade (which happens) or confident that other operators would act in a similar manner' ([156]) (italics added for emphasis).

([155]) TAA reply to the statement of objections (interim measures), 24 May 1993, p. 32, point 1.77.

([156]) TAA reply, 17 March 1994, point 2.27 (Article 85).

(394) This stability is not such as to guarantee reliable, regular, adequate and efficient services, but stability understood as a guarantee of the maintenance on the trade of all the TAA members, even the least efficient ([157]), well beyond what is envisaged by the eighth recital of Regulation (EEC) No 4056/86.

(b) *The means used*

(395) Article 85(3) necessarily means that the stability contemplated in Regulation (EEC) No 4056/86 and achieved by exempted conferences, must reflect a balance between restictive price agreements and the maintenance of real and effective competition.

(396) The stability envisaged by the TAA severely limits real and effective competition by integrating most independents into the TAA and leaving a substantial proportion of capacity unused.

(397) The difference between stability within the meaning of Regulation (EEC) No 4056/86 and the stability understood by the TAA will also be clear from an analysis of the real objectives of the CMP. According to the TAA ([158]) cooperation on both rates and capacities is needed in order to maintain stability, particularly in the event of serious overcapacity. The objectives of the CMP are said to be:

— to allow the trade to be rationalized by a physical withdrawal of capacity,

— to regulate remaining overcapacity associated with the eastbound/westbound imbalance and with seasonal and cyclical fluctuations in demand.

(398) However, an analysis of the economic data for the trade (see recitals 222 to 257) shows that the CMP does not address either of these objectives:

(399) — As far as the rationalization of the trade is concerned, the Commission takes the view,

([157]) This objective of protecting the weakest lines had already been put forward by the shipping lines and disputed by the 1970 Unctad report (point 33).
'From the point of view of the conference shipping lines, it is claimed that ... The conference system also prevents elimination of weaker shipping lines, which could happen in the face of free competition, although it is difficult to see *why this is an advantage to anyone but the weaker lines*' (italics added for emphasis).

([158]) TAA reply, 17 March 1994, point 4.58, p. 85 (Article 85).

explained at recital 231, that the purpose of the TAA is not to rationalize the trade by physical withdrawal of capacity. On the contrary, it considers that the CMP as established is intended to maintain overcapacity.

(400) — With regard to the regulation of remaining excess capacity, the CMP does not address any of the alleged objectives:

— the CMP is not an instrument for suspending capacity which changes in line with seasonal variations in demand. It is therefore not indispensable to the regulation of excess capacity associated with seasonal variations in demand (see recital 247),

— the CMP is not intended to regulate cyclical excess capacity: from the movement of supply and demand over several years and in the light of the analysis in recitals 248 to 253, it is clear that westbound Atlantic trade was no longer suffering from cyclical overcapacity in 1993. The CMP is not, therefore, indispensable to the management of this type of excess capacity,

— in 1993, westbound volumes exceeded eastbound volumes by some 10%. But the CMP was intended to suspend capacity only in the westbound sector. If there is a problem of eastbound/westbound imbalance, it is in the eastbound sector. Accordingly, the conclusion must be that the CMP is not associated with the problems of eastbound/westbound imbalance.

(401) The CMP is thus a tool for maintaining excess capacity, and artifically raising freight rates in the westbound sector (see recital 256).

(402) The TAA accordingly serves the objective of maintaining operators in being and preserving the service of all its members, and not the objective of stability within the meaning of Regulation (EEC) No 4056/86 or an economic objective within the scope of Article 85(3) of the Treaty.

(403) Thus, in terms of both objectives and means, the form of stability imposed by the TAA is essentially different from that achieved by the system of exempt conferences.

(c) *Conclusion regarding the first test of Article 85(3)*

(404) The form of stability referred to by the TAA i.e. the stability of TAA services and operators resulting from the integration of most independents and the non-utilization of a substantial proportion of capacity, does not constitute an advantage within the meaning of the first test of Article 85(3) of the Treaty, for the reasons set out below.

(405) First, it enables the less efficient TAA operators to remain in the trade artificially. This means that prices remain higher than they would otherwise be.

(406) Next, the TAA generates no additional benefit over and above those of a conference organization, either in terms of the efficiency or the adequacy of the services offered. The TAA does nothing to help maintain services of sufficient quality and reliability for shippers.

(407) Quite the reverse: the inclusion of the independents in the TAA has caused an excessive restriction of competition which brings no additional benefit from the technical or economic point of view compared with the traditional conference system.

(408) The agreement on the non-utilization of existing capacity arranged by the TAA is not a solution capable of promoting the efficiency of transport services as it does not bring about any overall costs benefit or any true rationalization of the supply of services.

(409) For all of those reasons, the Commission considers that the TAA does not contribute to improving technical or economic progress or to improving production or distribution of maritime transport services on the transatlantic trade.

(410) Lastly, 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 limits the opportunities for direct cooperation and partnership in the medium or long term between suppliers and clients.

2. **Consumers' fair share of the benefit**

(411) The TAA is aimed at keeping the operator in being, which is a form of stability different from that secured by exempted conferences. The TAA does not pursue any objective within the scope of Article 85(3) of the Treaty. It also has negative implications for users.

(412) In the short and medium term, the TAA has imposed severe limitations on the use of capacity, and this has led to substantial increases in prices and freight rates. This is demonstrated, first, by the increases implemented on 1 January 1993, which, in comparison with 1992, are in the order of [. . .] on a vast range of products, and secondly by the increases announced by the TAA in its business plan for 1994. Such increases are directly contrary to the interests of shippers, who are obliged to pass them on in their selling prices or their profit margins. Thus the main objective of the TAA is not one which brings any benefit to consumers.

(413) The Commission has received a large number of complaints from shippers and forwarding agents, which are described at recitals 262 to 282; these also clearly show that contrary to the TAA's contentions shippers and forwarding agents do not feel that the TAA allows them a fair share of the resulting benefit.

(414) Moreover, neither the non-utilization agreement nor the consequent increases are accompanied by any advantages in terms of quality of service. The TAA, which has permitted such a considerable and rapid increase in freight rates, cannot be regarded as allowing consumers a fair share of the benefit.

(415) In the longer term, the TAA and particularly the CMP prevent the use of part of existing capacity but do not eliminate it. This action does not reduce transport costs and makes clients carry the burden of unutilized capacity and strategic decisions taken by the shipowners as to the number of vessels used on the transatlantic trade.

(416) It may be pointed out here that if a capacity non-utilization agreement were to continue to apply on a particular trade for a long time it might well induce some shipowners to invest beyond what was necessary for the anticipated demand without having to run all the associated risks. A capacity non-utilization agreement protects them in some measure from the consequences of excess supply on their profitability.

(417) Capacity regulation could benefit shippers only if capacity were really withdrawn from the transatlantic trade, leading to a reduction in costs and prices. However, the purpose of the TAA is not genuine capacity reductions but the ongoing maintenance of overcapacity and the raising of prices.

(418) In the light of this evidence, the Commission considers that the TAA does not allow its clients, the shippers and forwarding agents who are the parties complaning about the agreement, a fair share of the benefit within the meaning of Article 85 (3).

3. Indispensability of the restrictions

(419) If the objective of the members of the TAA is to bring about the stability contemplated by Regulation (EEC) No 4056/86 in the trades ([159]), then the parties to the TAA have not demonstrated why agreements of the kind provided for in Article 3 of that Regulation (liner conferences) are not sufficient for that purpose.

(420) The TAA capacity agreements which, in addition to price agreements, significantly limit the supply of a service, can in no case be considered indispensable to achieving the objectives set out in Regulation (EEC) No 4056/86.

(421) In any event, as we have seen at recitals 222 to 257, the CMP does not in fact address any of the objectives cited by the TAA. The Commission accordingly takes the view that the CMP, and therefore the TAA, are not indispensable to any of the alleged objectives of the agreement.

(422) No capacity management machinery similar to the CMP has been introduced in the United States-Europe (eastbound) sector, where volumes are smaller than those on the Europe-United States (westbound) trade. If no capacity management seems necessary to the TAA members in the eastbound sector, it is difficult to understand the indispensability of such a mechanism in the westbound sector, where volumes are now larger.

(423) Nor does capacity management in the form of a CMP appear necessary for the stability of tariffs over time, even in a period of very considerable excess capacity (which is not the case here) since, according to information provided by the TAA, utilization rates in the eastbound transatlantic trade between 1985 and 1988 were extremely low (between 40 and 50 %) a sign of considerable excess capacity, whereas freight rates during the same period were very stable (around US $ 1 000 per TEU) ([160]). During that period, there was no need for a capacity agreement in order to keep rates stable.

([159]) On the concept of stablility, see recitals 388 and 389 and footnote 126.

([160]) See TAA reply to the statement of objections, 17 March 1994, Tables 1 and 2.

(424) The TAA members also assert in their notification of the agreement that there is excess capacity in the westbound direction, and they state this might cause certain shipowners to withdraw, leading to an inevitable lowering of the quality of service. Such a consequence is not proven inasmuch as the trade has experienced in less than a year the withdrawal of the vessels of POL and OOCL without there ensuing any substantial lowering in the quality of service.

(425) The TAA seeks to illustrate the risk of a reduction in the quality of service by citing the cessation of direct calls at Vancouver and Seattle, which it maintains was linked to the withdrawal of CGM. But the TAA has not explained how the ending of direct calls at Vancouver and Seattle represents a lowering of the quality of service which would justify agreements as restrictive as the TAA covering the whole transatlantic trade, and which cannot be attributed to the tendency for the large containerized liner services to concentrate on a small number of ports ([161]). Nor has the TAA explained what equivalent decline in the quality of service might have been brought about by the absence of the TAA and its replacement by an exempted conference. Lastly, the TAA has not explained why such a risk, supposing it existed, would justify a capacity freeze applying only in the direction with the larger volume, at a time when demand is growing.

(426) For all these reasons, the Commission considers that the restrictions of competition of the TAA go well beyond those which would be strictly necessary and indispensable to achieving the objectives of stability sought by its members.

4. Possibility of eliminating competition in respect of a substantial part of the services in question

(427) The Commission considers that the TAA affords its members the possibility of eliminating competition in the direct transatlantic market in respect of a substantial part of the transport services in question.

(a) *Elimination of competition inside the TAA*

(428) First, the Commission considers that the TAA affords its members the possibility of eliminating competition between themselves. The TAA members establish in common the capacity offered by each of them on the market; they fix tariffs in common; independent action by one of them must be notified 10 days in advance to the other members, thus allowing the others to follow or the independent action to be withdrawn; service contracts must be negotiated in common for most members, and may be negotiated in common by all members.

(429) The rate flexibility allowed to unstructured members, which results in the absence of uniform or common rates within the meaning of Regulation (EEC) no 4056/86, means that they need not comply with conference rules. But it does not represent effective competition on rates, because flexibility is agreed by all TAA members, the degree of flexibility is decided by mutual agreement between the parties (see recital 140), and the competitive conduct of the unstructured members is considerably restricted by the agreement. In addition, the commercial independence of unstructured members is eliminated in relation to the supply of capacity.

(430) In its reply dated 17 March 1994, the TAA states that the TAA secretariat has no role in negotiations or decision-making, but simply carries out administrative duties and transmits information. The fact remains that the TAA's decisions and negotiations on prices and service contracts, which are often handled and transmitted by the secretariat to clients, are decisions and negotiations common to the TAA members, and not the responsibility of individual lines.

(431) The fact that service contract negotiations are often conducted via the secretariat for the benefit of TAA members shows the degree of commercial integration within this agreement.

(432) The role of the secretariat is clear, too, from TAA responses to a request for information ([162]):

> 'Such duties and functions (of the secretariat) expressly include the conduct of service contract negotiations [. . .] the TAA parties who are not members of the contract Committee have [. . .] directed the secretariat to administer, negotiate, agree and execute contracts on their behalf for 1994.'

(433) The TAA also relies on the opportunities for independent action to demonstrate the existence of price competition between its members. In addition

([161]) See for example the disappearance of calls in a number of ports in northern Europe.

([162]) TAA reply, 29 October 1993.

to the restrictions on the possibility of independent action described at recital 11, the Commission takes the view that the impact of this possibility has traditonally been marginal in the transatlantic trade ([163]). The TAA has not shown that the impact has in fact been substantial in volume terms in 1993, nor that it was clearly different from what has been observed in this trade in the past. Accordingly, the creation of genuine price competition using this device is not proven.

(434) The TAA points out that its members are in competition over the quality of their services, i.e. frequencies, reliability, ports served, journey times, multimodal transport, specialized equipment, maintenance and condition of containers, documentation, customer support, etc.

(435) However, on the market for containerized liner transport such as is provided by the TAA members quality of service is of secondary importance compared to price. In addition, the competitive impact of a quality of service above that of other members is largely negated by the restrictions on supply which the TAA members have imposed on themselves through the CMP. The effect of the CMP and the small influence of the quality of maritime services ([164]) is also clear from observations made by the TAA ([165]), to the effect that when a TAA member reaches his quotas under the CMP, it is much more likely that he will subcontract the carriage to another TAA member rather than exceed his quotas and pay the corresponding fine. Thus, according to the TAA itself, the quality of service is not sufficiently important to prevent a cargo from being switched from one TAA service to another TAA service. This is not real, effective competition between TAA members.

(436) Contrary to statements by the TAA, the absence of competition between the TAA members is also clear from the trend in their respective market shares: over a 15-month period, despite considerable changes in the price of transport and changes to existing capacity, there is no substantial shift in the respective positions of shipowners in the TAA.

(437) In the light of these facts, it is clear that the TAA affords its members the opportunity of eliminating competition between themselves.

(b) *Substantial part of the relevant market*

(438) Second, the TAA members account for a substantial part of the relevant market. It is enough to refer to the TAA market shares (recital 147) to be convinced of this. The TAA members contest the definition of the market proposed by the Commission, but they have not disputed that they account for a substantial part of the market, as they estimate their market share at about 50 % ([166]), even under their own definition of the market ([167]).

(439) On the relevant market (recital 27), the members of the TAA held a market share of the order of 75 % in 1991 and 1992. In 1993 the TAA's market shares were between 65 and 70 % (on the basis of the data referred to in points 146 and 147, 67,5 % westbound and 70,4 % eastbound).

(440) In 1992 and 1993, therefore, the TAA accounted for a substantial share of the relevant market.

(441) It must consequently be concluded that the TAA does afford its members the possibility of eliminating competition in respect of a substantial part of the services in question within the meaning of Article 85 (3)(b) of the Treaty.

(c) *Competition outside the TAA*

(442) From the following facts it is clear that the scope for competition from outside the TAA is not such as to prevent the members of the TAA from eliminating competition in respect of a substantial part of the relevant market.

— On the direct transatlantic trade

(443) The competition from Evergreen, the main independent company which is not a member of the TAA, must be assessed in the light of three factors:

— Evergreen's participation in the Eurocorde agreements (see recital 151),

([163]) According to the information provided by the TAA in reply to the statement of objections, there were 772 cases of independent rate action by members of Neusara and Usanera in 1991. The figure for 1988 was 801. This figure is tiny in comparison with the number of cases of independent rate action in 1988 under what are known as the transpacific agreements, whose members operate between the west coast of the United States and Asia, where the figure was 69 775, and the east coast of the United States and Asia, where the figure was 28 798 (see Section 18 of the Federal Maritime Commission Report on the Shipping Act of 1984, September 1989, p. 662).

([164]) This analysis relates exclusively to these services.

([165]) TAA reply, 17 March 1994, footnote 9, p. 37.

([166]) TAA reply, 17 March 1994, point 3.113, p. 66 (Article 85).

([167]) See the record of the TAA hearing, 28 and 29 April 1994, p. 98.

— Evergreen's low penetration of certain market segments (see recital 153),

— Evergreen's 'follow-my leader' strategy (see recitals 154, 155 and 215).

(444) In addition, Evergreen has not added new capacity to the trade in 1993, and appears to have saturated its capacity on the westbound sector ([168]), as it has not always been able to accept cargoes from shippers who have approached it.

(445) These factors lead the Commission to consider that Evergreen, whether deliberately or as a result of incapacity, exerted only very limited competitive pressure on the TAA in 1993.

(446) In 1993 the other competitors on the direct transatlantic trade (Lykes, Atlantic Cargo, ICL) had smaller market shares and much more limited resources than Evergreen, and were not able to supply services sufficient in volume and frequency to exert real competitive pressure on the TAA.

(447) Moreover, the largest of these other independents (Lykes) is, like Evergreen, a member of the Eurocorde agreements and has also taken part in at least one preparatory meeting with a view to the formation of the TAA.

(448) The increases imposed on 1 January 1993 resulted in the immediate loss of part of the westbound trade, which switched to the few independents. The market share of the latter increased appreciably as early as the first quarter of 1993 on the direct transatlantic westbound trade (Evergreen 14,1 %, Lykes 7,1 %, Atlantic Cargo 3,9 %, ICL 2,6 %) and the TAA lost nearly 10 percentage points, bringing its share of the westbound trade down to 69,3 % ([169]).

(449) However, during 1993 those market shares remained stable, producing the following result for 1993 as a whole: Evergreen 13,1 %, Lykes 5,4 %, Atlantic Cargo 3,7 %, and ICL 2,5 % ([170]). The TAA share remained stable too.

([168]) To show that Evergreen did not saturate its capacity in 1993, the TAA merely refers to a statement made in 1994 by an Evergreen representative, in a newspaper distributed in the United States, which appears to concern the eastbound sector rather than the westbound sector under discussion here.

([169]) FMC Statistics, 19 July 1993.

([170]) TAA reply, 17 March 1994, point 3.38.

(450) During 1993, despite the increase in volumes transported, these independent companies did not bring any significant new capacity to the trade.

— Via the Canadian ports

(451) The trade between northern Europe and ports in Canada offers only very limited competition to the agreement, for the following reasons:

— this trade offers potential competition only in respect of a limited part of North America, and certainly not over all the territory covered by the TAA in the United States (see recital 62),

— the two leading lines which are independent of the TAA are members of the Canada conference, and the four other members of that conference are also members of the TAA (see recital 159),

— that conference has also followed the TAA's price policy by revising its tariff schedule and increasing rates,

— there is a certain degree of collusion between it and the TAA members (see recital 218).

(452) The increase in the trade passing through Canadian ports (+ 19 % from 1992 to 1993) is not significantly different from the general increase in westbound volumes (of the order of 11 %), and does not represent a significant volume compared to the transatlantic trade via ports in the United States.

Nor did the shipping lines in this trade which are outside the TAA increase their capacity significantly during 1993.

— Conclusion regarding independents

(453) In addition, since the entry into force of the new TAA tariffs, it has been noticeable that the independent lines present on the market have revised their tariff schedules and increased prices in parallel with the TAA.

(454) It is clear, therefore, that the independent lines, after having profited from the very rapid price increases implemented by the TAA to saturate their capacity, have no longer been able to cope with the new demands during 1993. Either in collusion with the TAA, or due to incapacity owing to their weak position in relation to the

TAA market share, these companies have not sought to engange in real competition with the TAA and have been obliged to pursue a 'follow-my-leader' strategy.

(455) Thus, the Commission takes the view that the competition facing the TAA from the other lines on the market has not offset the possibility created by the TAA of eliminating competition on a substantial part of the relevant market.

— Competition from other quarters

(456) For the reasons set out in recitals 64 and 66, the Commission considers that the trade through the Mediterranean is not able to generate effective actual or potential competition on the market in question. Furthermore, of the eight members of the Seusa conference which operates in the Mediterranean and the Member States, four are also members of the TAA, and the Seusa has followed the TAA in revising its tariff schedule and increasing rates (see recital 219).

The small size of shifts in trade from the north European ports to the Mediterranean ports following increases imposed by the members of the TAA (see recital 220) also demonstrates the low degree of substitutability between the two categories of service.

(457) The Commission considers that, on the transatlantic trade, tramp transport and conventional or specialized transport are not able to generate effective competition for the very large majority of goods and customers of containerized maritime liner transport (see recital 58).

(458) In sea transport it is generally considered that potential competition provides an important source of competition and one of the safeguards allowing a block exemption to be granted to liner conferences (see the eighth recital to Regulation (EEC) No 4056/86). This source of competition has been analysed in detail at recitals 165 to 188, and only the most important conclusions will be taken up again here.

(459) The Commission takes the view that there is a certain degree of potential competition, given the possible entry into the trade of a number of large containerized maritime liner transport operators present on other trades, but that this potential competition is limited here because of the special features of the transatlantic trade and the special features of the agreement in question (see recital 184). Potential competition is also limited by the fact that most potential competitors are party to agreements with TAA members in respect of other trades (see recitals 177 and 178 and Annex II). Lastly, the Commission considers that the existing degree of potential competition has not been such as to exert real pressure on the TAA members since the agreement entered into force.

(460) Finally, the many statements by shippers to the effect that they have had to accept non-negotiable proposals ('take it or leave it') from the TAA are evidence of the lack of effective competition throughout the relevant market.

(461) For all these reasons, the Commission considers that the TAA is an agreement which affords its members the possibility of eliminating competition over a substantial part of the services in question.

C. *Individual exemption for inland haulage price fixing*

(462) In order to determine whether the fixing in common of the rates for the inland element of multimodal transport services by TAA members can qualify for individual exemption, the four conditions of Article 85 (3), as set out in Article 5 of Regulation (EEC) No 1017/68, must be examined.

1. **Technical or economic progress**

(463) According to Article 5 of Regulation (EEC) No 1017/68, the first condition to be fulfilled if the prohibition in Article 2 of the Regulation is not to apply, is that the agreement, decision or concerted practice 'contributes towards:

— improving the quality of transport services, or

— promoting greater continuity in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation, or

— increasing the productivity of undertakings, or

— furthering technical or economic progress.'

Improvement in the quality of transport services

(464) The TAA inland rate-fixing agreements do not seem to improve the quality of transport services, nor do they contribute indirectly to its improvement. Each of the lines participating in the TAA European inland tariff offers its own inland transport arrangements for shippers. Quality varies according to the carrier, but inland rates are uniform, for the most part. This means that the TAA members have little incentive to improve the inland services they offer to shippers.

(465) Improvements to the quality of services which may be prompted by client demand are not prompted by price-fixing activities within the agreement but by direct negotiation between the individual lines and their clients.

Promotion of continuity and stability in markets with considerable temporal fluctuation — Increase in the productivity of undertakings — Improvement in the production or distribution of services

(466) The TAA collective inland rate-fixing activities do not promote continuity and stability in the inland transport market where they apply. TAA individual members usually subcontract their inland transport operations to road hauliers and railways, acting as intermediaries in the inland transport services market. They buy inland transport services at different prices from inland transport undertakings, and resell them to shippers at a uniform rate. TAA thus does not promote continuity or stability in inland transport markets.

(467) Furthermore, there is no evidence that the specific segment of the inland transport market in which the TAA members operate as buyers and sellers at the same time is subject to considerable temporal fluctuation.

(468) For the reasons set out in recitals 464 and 466, it seems that no increase in productivity in the inland transport market can be achieved by TAA member lines, taking into account the fact that their activities in this market are, for the most part, those of intermediaries between the real providers of the service and transport users (although under private law they may act as principals, issuing their own bills of lading and assuming liability for such operations). In respect of the few that directly provide inland transport services through subsidiaries, there is no evidence that their participation in the TAA European inland tariff promotes productivity, either.

(469) As to improvement in the production or distribution of inland transport services, it has not been shown that TAA members' rate fixing produces an improvement in the production of services, which are simply bought at different prices from road hauliers and railways by individual shipping lines, to be resold at a price common to all lines. This practice does not increase the production of such services.

(470) Regarding distribution, since each member line offers its own individual inland transport arrangements, there is no evidence that, as the agreement now stands, better distribution is achieved by means of collective price fixing.

(471) In their reply on these aspects of their agreements, the TAA members refer the Commission to the arguments put forward by the members of the Far Eastern Freight Conference (FEFC) in the DSVK/FEFC case under investigation by the Commission. According to this argument, inland rate-fixing agreements are intended to ensure the stability of multimodal transport, in conjunction with conference price agreements for the maritime element as exempted by Regulation (EEC) No 4056/86.

(472) Such an argument cannot be regarded as valid here in so far as the TAA agreements on maritime transport are not agreements exempted pursuant to Article 3 of Regulation (EEC) No 4056/86.

(473) Accordingly, even if the inland rate-fixing agreements have the same objectives as the TAA agreements on the maritime element of multimodal transport services, they cannot be regarded as meeting the first condition of Article 85(3) of the Treaty or the first condition of Article 5 of Regulation (EEC) No 1017/68.

Conclusion

(474) Accordingly, there is no technical or economic progress which stems from the TAA agreements on a common European inland tariff.

(475) Quite the reverse: price fixing between the members of the TAA for inland transport is likely to discourage the new investment which would normally be expected where there is competition.

(476) The reduction or elimination of competition between the members of the TAA is likely to prevent any shipowner from using new equipment or technology to lower prices to clients so as to gain market share, and this may well lead him to invest less.

(477) Thus the joint fixing of prices by the members of the TAA for the inland segment of a multimodal transport operation fails to satisfy the first test of Article 5 of Regulation (EEC) No 1017/68.

2. **Fair share of the benefit**

(478) The Commission is of the opinion that transport users are not allowed a fair share of the benefit resulting from the TAA inland rate-fixing agreements.

(479) It must be borne in mind that European, British, French and German transport users, grouped together respectively in the European Shippers' Councils (ESC), the British Shippers' Council (BSC), the French Shippers' Council (CNUT) and the German Shippers' Council (DSVK), have complained specifically about this aspect of the TAA agreement.

(480) Forwarding agents have, through their representative organizations (Committee of North Sea Ports Forwarding Agents, Clecat and FFOCT), complained that the agreed rates include inland freight, although no block exemption pursuant to Article 85(3) applies to such matters.

(481) For these reasons, the Commission considers that, as the agreement now stands, consumers do not enjoy a fair share of the benefit of agreements restricting competition in inland transport services.

3. **Indispensability of the restrictions**

(482) It has not been established that this test is satisfied with respect to an economic advantage to be obtained either by providing or by upgrading multimodal transport services.

(483) In that connection, it must be stressed that the TAA lines are for the most part not physical providers, but resellers of inland transport services, and that their inland transport operations are administered by individual lines offering those services to their customers.

(484) The restrictions do not themselves provide economic benefits; therefore they cannot be indispensable for such benefits.

(485) It may be argued that the promotion of technical or economic progress will result from the generalization of provision of multimodal transport services. This development can perfectly well come about without the granting of an individual exemption for the land activities of the TAA. This is borne out by the fact that independent operators (outside the TAA) are capable of providing good quality multimodal services on an individual basis, and even by the fact that the members of the TAA do not have to rely on the TAA structure to provide them — as they do already — on an individual basis.

(486) Moreover, freight forwarders began providing door-to-door services to shippers at the same time or even before the maritime transporters had entered the land transport market; they continue to do so although they have never been authorized to form cartels; and they will continue to do so in the future, as the shipping lines would do, without collective fixing of land rates.

(487) In its reply, the TAA asserts that the inland rate-fixing agreements are indispensable to the stability of the trade, and therefore for the supply of reliable liner services, since agreements solely on the maritime element would be incapable of ensuring the stability of multimodal transport services. The agreements on the inland element are therefore necessary to ensure the effect of the TAA agreements on the maritime element.

(488) This argument cannot be regarded as valid in that the TAA's rate and capacity agreements for the maritime sector do not meet the first condition of Article 85(3) of the Treaty. Accordingly, the TAA inland rate-fixing agreements pursue objectives which do not meet the first condition of Article 85(3) and cannot be considered indispensable within the meaning of Article 85(3) or Article 5 of Regulation (EEC) No 1017/68.

(489) Accordingly, the question whether TAA inland rate-fixing as currently practised is necessary to provide or to upgrade multimodal transport services must be answered in the negative.

4. Elimination of competition in respect of a substantial part of the market

(490) Since none of the first three conditions required for the granting of an individual exemption to the inland rate-fixing agreements is met, there is no need to examine whether or not the fourth test, relating to the elimination of competition, is satisfied.

5. Conclusion regarding Article 5 of Regulation (EEC) No 1017/68

(491) The TAA agreements on fixing the price of the inland element of multimodal transport services do not qualify for individual exemption pursuant to Article 5 of Regulation (EEC) No 1017/68 ([171]).

D. *Conclusion*

(492) Examination of the agreement has shown that the clauses in the TAA providing for price fixing in maritime and inland transport and for non-utilization of capacity do not satisfy the tests for exemption set out in Article 85(3) of the Treaty.

HAS ADOPTED THIS DECISION:

Article 1

The provisions of the TAA relating to price-fixing and capacity infringe Article 85(1) of the EC Treaty.

Article 2

Application of Article 85(3) of the EC Treaty and of Article 5 of Regulation (EEC) No 1017/68 to the provisions of the TAA referred to in Article 1 of this Decision is hereby refused.

Article 3

The undertakings to which this Decision is addressed are hereby required to bring an end forthwith to the infringements referred to in Article 1.

Article 4

The undertakings to which this Decison is addressed are hereby required to refrain in future from any agreement or concerted practice which may have the same or a similar object or effect as the agreements and practices referred to in Article 1.

Article 5

The undertakings to which this Decision is addressed 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 service contracts and other contractual relations in the context of the TAA that such customers are entitled, if they so wish, to renegotiate the terms of those contracts or to terminate them forthwith.

Article 6

This Decision is addressed to the members of the TAA, which are listed in Annex I.

Done at Brussels, 19 October 1994.

For the Commission
Karel VAN MIERT
Member of the Commission

([171]) For a general view of the question of the fixing of overland transport rates by liner conferences or groupings of shipowners see the Commission's report on the application of the competition rule to maritime transport, 8 June 1994 (SEC(94) 933 and IP(94) 508).

ANNEX I

List of members of the TAA

Sea-Land Service, Inc.
Seattleweg 7
NL-3195 ND Pernis-RT

A.P. Møller-Maersk Line
Esplanaden 50
DK-1098 København

Atlantic Container Line AB
50 Cragwood Road
South Plainfield
New Jersey 07080
USA

Hapag Lloyd
Ballindamm 25
D-20095 Hamburg 1

Nedlloyd Lijnen BV
Boompjes 40
NL-3011 XB Rotterdam

P&O Containers Limited
Beagle House
Braham Street
UK-London E1 8EP

MSC Mediterranean Shipping Company
18, chemin Rieu
CH-1208 Genève

OOCL (UK) Ltd
OOCL House
Levington Park
Bridge Road
Levington
UK-Suffolk IP10 0NE

Polish Ocean Lines
Gdynia 81-364
10 Lutego 24
Poland

DSR-Senator Lines GmbH
Martinistraße 62—66
D-28195 Bremen 1

Cho Yang Shipping Company Ltd
Cheong Ahm Building
85-3 Seosomun-Dong Chung-Ku
Seoul
Korea

NYK Line (Europe) Ltd
Beaufort House
15 St Botolph Street
UK-London EC3A 7NY

NOL (Neptune Orient Lines) Ltd
Tricom Shipping Agencies Inc.
15 Exchange Place
Jersey City
New Jersey 07302
USA

Transportación Marítima Mexicana SA de CV (TMM)
Av. de la Cúspide N° 4755
Col. Parques del Pedregal
Tlalpan 14010 México, DF
México

Tecomar SA de CV
Benjamin Franklin 232
11800 México, DF
México

ANNEX II

The TAA members refer to seven large 'independent' international shipowners capable of entering the transatlantic trade in competition with the TAA. The following table shows the agreements to which each of these seven shipping lines belongs in the other two major east-west world trades. These agreements group together at the same time a significant number of TAA members.

	Common service agreement	Conference agreement	Stabilization agreement	Other
Hanjin		TWRA	TSA EATA	FETTCSA
Yangning			TSA EATA	FETTCSA
Hyundai	with Sea-Land and Norasia on the FE trade with NYK and NOL on the transatlantic trade	TWRA	TSA EATA	
K-Line	with NOL and OOCL on the FE trade	FEFC Anera TWRA	TSA EATA	FETTCSA
NOL	with Hapag Lloyd and NYK on the FE trade with NYK and NOL on the transpacific trade	FEFC Anera	TSA EATA	FETTCSA
APL	with OOCL on the transpacific trade	Anera TWRA	TSA	
Cosco [1]				

Key:

FEFC	Far Eastern Freight Conference (Europe-Far East trade)
Anera	Asia-North America Eastbound Rate Agreement (transpacific eastbound trade)
TWRA	Transpacific Westbound Rate Agreement
TSA	Transpacific Stabilization Agreement
EATA	Europe-Asia Trade Agreement
FETTCSA	Far East Trade Tariff Charges and Surcharges Agreement (Europe-Far East trade), terminated 10 May 1994.

[1] See press cutting reproduced below.

Asian shipowners have clearly voiced their interest in stabilization agreements such as the TAA, TSA and EATA:

'Asian shipowners in stability pacts call'

'A surprise call for all independent operators to join their appropriate liner trade stabilization agreements has been made by representatives of Asian shipowners' organizations.

An unanimous recommendation that all non-participating lines should join the transpacific, transatlantic and Europe-Asia stabilization agreements has been issued by the Asian Shipowners' Forum following a meeting in Beijing [. . .].

The success of this appeal was ensured when Chinese representatives backed the call.

China's support was something of a surprise as it has previously displayed a less than enthusiastic attitude towards shipping agreements and conferences.

An addendum to a communique agreed at the forum was proposed by the Chinese delegation "recommending" that all non-participating lines join to explore ways of further strengthening the agreements' [1].

The most important Chinese shipowner is Cosco.

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[1] Lloyds List, 19 May 1994.

ANNEX III

The market: extracts from the literature

1. Due to the relatively large carrying capacity of a ship, a basic division of the total market for sea transport is between (a) markets for sea transport and less-than-full shiploads, and (b) markets for sea transport of full shiploads. Shippers of less-than-full shiploads are primarily served by shipping lines maintaining regular services between specified ports according to schedules advertised well in advance — in short, by liner shipping (Jansson and Shneerson, *Liner Shipping Economics,* Chapman and Hall 1987, p. 16).

2. ... the traditional competition between the liner and the all-purpose tramp belongs to the past. In the future, some competition between the liners and tramps will remain, and will take two forms. First, there are bulk ships that are designed to take both bulk and general cargo or containers. These are few in number and do not constitute a severe threat to the liner trade ... The other form of competition is simply that with the general increase in the volume of international trade, the borderline between general cargo and bulk will gradually shift. Some commodities that were potential liner cargo (such as sugar and rice) will become minor bulk, moving in quantities that are sufficient to fill a ship (Jansson and Shneerson, *Liner Shipping Economics,* Chapman and Hall 1987, p. 19).

3. Another way of distinguishing liner cargo from bulk cargo is by the presence or absence of packages. It is true that 'packaged cargo' is rather close to an exhaustive definition of liner cargo (Jansson and Shneerson, *Liner Shipping Economics,* Chapman and Hall 1987, p. 20).

4. As a result of the container revolution, the nature of competition between ships has fundamentally changed. The tramps which could move quite readily into liner markets have disappeared and *on developed routes the liner market is now dominated by cellular container ships* (italics added for emphasis). A similar trend is in evidence in developing countries, although with rather more reliance on flexible ships. Part of the old tramp market has been taken over by specialized semi-bulk ships (and this applies particularly to large flows of timber and vehicles, etc.), whilst much of the rest has been incorporated into the liner sector, either being containerized or in some cases carried in flexible ships in association with containers. However, although tramp competition has disappeared there is competition between ship types for the medium-sized parcels of bulk and semi-bulk cargoes, and some bulk and semi-bulk ships also provide fringe competition by carrying containers (S. Gilman, *The Competitive Dynamics of Container Shipping,* Gower 1983, p. 28).

5. What we do find critical is the provision of a regular, reliable service. It is easy to understand the reasons for this. Shippers of large consignments are in a position to charter ships for their requirement, but *most shippers who use liner services* (italics added for emphasis) do so because their consignments at any particular time are small relative to the size of ships used in the trade. For producers of consumer goods and many industrial inputs, it is important to maintain a supply of these in all markets used at all times; if shipping services operated irregularly, the costs of stockpiling at either end of the trade would be high, especially at a time of high interest rates. For suppliers of capital goods it is important to be able to give firm delivery times when tendering for a project. Important sources of trade growth are in goods not previously traded, and in the opening of new markets for goods already traded. Since consignments of such goods are usually small initially, they travel largely by liner, so that regular liner services to an area aid its development as a export market (M. G. Graham and D. O. Hughes, *Containerization in the Eighties,* Lloyds of London Press 1985, p. 45).

6. Ships are to a large extent designed for specific trades and, as a result, cannot easily be moved from one trade to another. Thus, vessels on the north Atlantic are predominantly full container vessels, whereas liners operating between the United Kingdom and India or Africa tend to be break-bulk vessels. The difference in vessel types mirrors not only the nature of the commodities transported (whether they be containerized or not), but also port infrastructure and the capabilities of the inland transport systems in the countries served (G. K. Sletmo and E. W. Williams Jr, *Liner Conferences in the Container Age,* Macmillan 1981, p. 47).

7. A full shipload in the tramp market ... might vary from perhaps 4 000 to some 30 000 tonnes. Although this is not much when compared to the trade volume of major bulk commodities, it is enormous in terms of industrial products. Industrial products are sold in a large number of markets, with the result that the flows to any one market are limited in size. The relatively high value of such products makes them expensive to store, hence producers try to minimize the time spent in transit or storage. Products of this nature, therefore, cannot economically be shipped in the quantities associated with bulk commodities except under special conditions (G. K. Sletmo and E. W. Williams Jr, *Liner Conferences in the Container Age,* Macmillan 1981, p. 48).

8. The difference between the nature of the services offered by liners and tramps may not have much significance for shippers on routes with a heavy population of tramps and a correspondingly high likelihood of finding tramp space, at the typically lower rate, whenever wanted (the expected frequence of the need for space being less for some shippers than for others). Given any one level of requirement for regularity or frequency, shippers must always consider the possibility that tramps may, in the future, be drawn elsewhere by the forces of demand, and they must evaluate this possibility in terms of the higher 'basis' liner rates, which are exacted from shippers wo are trying to use liners and tramps in combination (E. Bennathan and A. A. Walters, 'Shipping Conferences: an Economic Analysis', in *Journal of Maritime Law and Commerce,* Volume 4, 1972, p. 109).