JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
30 September 2003 *

In Joined Cases T-191/98 and T-212/98 to T-214/98,

Atlantic Container Line AB, established in Gothenburg (Sweden),

Cho Yang Shipping Co. Ltd, established in Seoul (South Korea),

DSR-Senator Lines GmbH, established in Bremen (Germany),

Hanjin Shipping Co. Ltd, established in Seoul (South Korea),

Hapag-Lloyd AG, established in Hamburg (Germany),

Hyundai Merchant Marine Co. Ltd, established in Seoul (South Korea),

A.P. Møller-Mærsk Line, established in Copenhagen (Denmark),

Mediterranean Shipping Co. SA, established in Geneva (Switzerland),

Orient Overseas Container Line (UK) Ltd, established in London (United Kingdom),

Polish Ocean Lines (POL), established in Gdynia (Poland),

P & O Nedlloyd BV, established in London (United Kingdom),

* Language of the case: English.

Sea-Land Service Inc., established in Jersey City, New Jersey (United States of America),

Neptune Orient Lines Ltd, established in Singapore (Singapore),

Nippon Yusen Kaisha, established in Tokyo (Japan),

Transportación Marítima Mexicana SA de CV, established in Mexico City (Mexico),

Tecomar SA de CV, established in Mexico City (Mexico),

represented by J. Pheasant, N. Bromfield, M. Levitt, D. Waelbroeck, U. Zinsmeister, A. Bentley, C. Thomas, A. Nourry, M. Van Kerckhove, P. Ruttley and A. Merckx, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by R. Lyal, acting as Agent, and J. Flynn, Barrister, with an address for service in Luxembourg,

defendant,

supported by

European Council of Transport Users ASBL, represented by M. Clough QC, Solicitor-Advocate, with an address for service in Luxembourg,

intervener,

APPLICATION for the annulment of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement) (OJ 1999 L 95, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 26 and 27 March 2003,

gives the following

Judgment

Legal background

1 Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), initially applied to all activities covered by the EEC Treaty. However, in view of the common transport policy and the distinctive features of the transport sector, it proved necessary to lay down rules governing competition different from those applicable for other sectors of the economy, and the Council therefore adopted Regulation No 141 of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291).

2 On 19 July 1968 the Council adopted Regulation (EEC) No 1017/68 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302).

3 In accordance with Article 2 of Regulation No 1017/68, agreements, decisions and concerted practices which, for the three modes of transport just mentioned, are liable to affect trade between Member States and which have as their object or

effect the prevention, restriction or distortion of competition within the common market are prohibited. The prohibition applies inter alia to agreements, decisions and concerted practices which consist in:

(a) directly or indirectly fixing transport rates and conditions or any other trading conditions;

(b) limiting or controlling the supply of transport, markets, technical development or investment;

(c) sharing transport markets;

(d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) making the conclusion of contracts subject to acceptance by the other parties of additional obligations which, by their nature or according to commercial usage, have no connection with the provision of transport services.

4 Article 5 of Regulation No 1017/68 provides for the exemption of agreements, decisions and concerted practices which contribute towards improving the quality of transport services, or promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject

to considerable temporal fluctuation, or increasing productivity, or furthering technical or economic progress, if the interests of transport users are taken into account and provided that they do not impose on transport undertakings any restrictions not essential to the attainment of those objectives and do not make it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

5 On 22 December 1986 the Council adopted Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4).

6 Article 3 of Regulation No 4056/86 provides that:

'Agreements, decisions and concerted practices of all or part of the members of one or more liner conferences are hereby exempted from the prohibition in Article 85(1) of the Treaty, subject to the condition imposed by Article 4 of this Regulation, when they have as their objective the fixing of rates and conditions of carriage, and, as the case may be, one or more of the following objectives:

(a) the coordination of shipping timetables, sailing dates or dates of calls;

(b) the determination of the frequency of sailings or calls;

(c) the coordination or allocation of sailings or calls among members of the conference;

(d) the regulation of the carrying capacity offered by each member;

(e) the allocation of cargo or revenue among members.'

7 A 'liner conference' is defined in Article 1(3)(b) of Regulation No 4056/86 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 under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services'.

8 The eighth recital in the preamble to Regulation No 4056/86 states in this connection that:

'... provision should be made for block exemption of liner conferences;... liner conferences have a stabilising effect, assuring shippers of reliable services;... they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users;... such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income;... in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport;... 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'.

9 In order to prevent liner conferences engaging in practices incompatible with Article 85(3) of the Treaty (now Article 81(3) EC) and, in particular, restricting competition in a way that is not indispensable for attaining the objectives which justify any exemption granted, Regulation No 4056/86 attaches a number of conditions and obligations to block exemption. Article 4 provides that exemption is granted subject to the absolute condition that the agreement in question does not cause detriment to certain ports, transport users or carriers as a result of the application of differential terms, failing which the agreement, or the relevant part of it, will be automatically void. Article 5 of Regulation No 4056/86 attaches obligations to exemption which relate, inter alia, to loyalty agreements, services not covered by freight charges and the availability of tariffs.

10 Furthermore, the 13th recital in the preamble states that 'there can be no exemption if the conditions set out in Article 85(3) are not satisfied;... the Commission must therefore have power to take... appropriate measures where an agreement or concerted practice proves, owing to special circumstances, to have certain effects incompatible' with that article.

11 To that end, Article 7 of Regulation No 4056/86 introduces a mechanism for monitoring exempt agreements. It provides as follows:

'1. *Breach of an obligation*

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Section II:

— address recommendations to the persons concerned;

— in the event of failure by such persons to observe those recommendations and depending upon the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out or requires them to perform specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption according to Article 11(4) or withdraws the benefit of the block exemption which they enjoyed.

2. *Effects incompatible with Article 85(3)*

(a) Where, owing to special circumstances as described below, agreements, decisions and concerted practices which qualify for the exemption provided for in Articles 3 and 6 have nevertheless effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, the Commission, on receipt of a complaint or on its own initiative, under the conditions laid down in Section II, shall take the measures described in (c) below. The severity of these measures must be in proportion to the gravity of the situation.

(b) Special circumstances are, inter alia, created by:

(i) acts of conferences or a change of market conditions in a given trade resulting in the absence or elimination of actual or potential competition such as restrictive practices whereby the trade is not available to competition; or

(ii) acts of conferences which may prevent technical or economic progress or user participation in the benefits;

(iii) acts of third countries which:

— prevent the operation of outsiders in a trade,

— impose unfair tariffs on conference members,

— impose arrangements which otherwise impede technical or economic progress (cargo-sharing, limitations on types of vessels).

(c) (i) If actual or potential competition is absent or may be eliminated as a result of action by a third country, the Commission shall enter into consultations with the competent authorities of the third country concerned, followed if necessary by negotiations under directives to be given by the Council, in order to remedy the situation.

If the special circumstances result in the absence or elimination of actual or potential competition contrary to Article 85(3)(b) of the Treaty the Commission shall withdraw the benefit of the block exemption. At the same time it shall rule on whether and, if so, under what additional conditions and obligations an individual exemption should be granted to the relevant conference agreement with a view, inter alia, to obtaining access to the market for non-conference lines.

(ii) If, as a result of special circumstances as set out in (b), there are effects other than those referred to in (i) hereof, the Commission shall take one or more of the measures described in paragraph 1.'

12 Article 8 of Regulation No 4056/86 provides:

'1. The abuse of a dominant position within the meaning of Article 86 of the [EC] Treaty (now Article 82 EC) shall be prohibited, no prior decision to that effect being required.

2. Where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case the conduct of conferences benefiting from the exemption laid down in Article 3 nevertheless has effects which are incompatible with Article 86 of the Treaty, it may withdraw the benefit of the block exemption and take, pursuant to Article 10, all appropriate measures for the purpose of bringing to an end infringements of Article 86 of the Treaty.

3. Before taking a decision under paragraph 2, the Commission may address to the conference concerned recommendations for termination of the infringement.'

13 Article 9(1) of Regulation No 4056/86 provides that where the application of that regulation is liable to conflict with the law of certain third countries, which would compromise important Community trading and shipping interests, the Commission must at the earliest opportunity undertake consultations with the competent authorities of the third countries aimed at reconciling the abovementioned interests as far as possible with Community law. Under Article 9(2) of the regulation, where agreements with third countries need to be negotiated, the Commission is to make recommendations to the Council, which is to authorise the Commission to open the necessary negotiations. The Commission must conduct those negotiations in consultation with the Advisory Committee on agreements and dominant positions in maritime transport, in the framework of such directives as the Council may issue to it.

14 The first paragraph of Article 10 of Regulation No 4056/86 provides:

'Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85(1) or 86 of the Treaty or to enforce Article 7 of this Regulation.'

15 Article 15(3) of the same regulation provides that an Advisory Committee on agreements and dominant positions in maritime transport is to be consulted prior to the taking of any decision following upon a procedure under Article 10.

16 As regards individual application of Article 85(3) of the Treaty, the 18th recital in the preamble to Regulation No 4056/86 states that 'in view of the special characteristics of maritime transport, it is primarily the responsibility of undertakings to see to it that their agreements, decisions and concerted practices conform to the rules on competition, and consequently their notification to the Commission need not be made compulsory.'

17 Thus, Article 11(4) of Regulation No 4056/86 provides:

'If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 85(1) and of Article 85(3) of the Treaty, it shall issue a decision applying Article 85(3). Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.'

18 However, under Article 12(1) of Regulation No 4056/86, undertakings may submit applications to the Commission seeking application of Article 85(3) of the Treaty in respect of agreements, decisions and concerted practices falling within Article 85(1) of the Treaty to which they are parties. Those applications will be considered in accordance with the opposition procedure laid down by that provision.

19 Under Article 19 of Regulation No 4056/86:

'2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to one million ECU, or a sum in excess thereof

but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:

(a) they infringe Article 85(1) or Article 86 of the Treaty, or do not comply with an obligation imposed under Article 7 of this Regulation;

(b) they commit a breach of any obligation imposed pursuant to Article 5 or to Article 13(1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

...

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

The fines provided for in paragraph 2(a) shall not be imposed in respect of acts taking place after notification to the Commission and before its Decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification.

However, this provision shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified.'

20 Article 23(1) of Regulation No 4056/86 provides that before taking a decision the Commission is to give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection. Commission Regulation No 4260/88 of 16 December 1988 on the communications, complaints and applications and the hearings provided for by Council Regulation No 4056/86 (OJ 1988 L 376, p. 1), which was in force at the time of the facts in the present case, sets out the procedural requirements governing such hearings.

Facts

I — *The Transatlantic Agreement ('TAA')*

21 All but one of the applicants in this action are shipping companies which were party to the TAA.

22 The TAA was an agreement relating to transatlantic liner services between northern Europe and the United States of America which was notified to the Commission on 28 August 1992 and came into force on 31 August 1992.

23 The TAA set, amongst other things, the rates applicable to maritime transport and 'intermodal' transport. In the case of maritime transport there were at least two rate levels. The rates applicable to intermodal transport included, in addition to maritime transport, the inland haulage of goods to or from the coast, from or to a point inland. The rates applicable to intermodal transport thus covered both the maritime and the inland part. The TAA also contained provisions governing other aspects of container liner transport, in particular the chartering of 'slots' or space, equipment exchange, the fixing of rates for cargo-handling activities in port and the joint management of maritime transport capacity.

24 On 19 October 1994 the Commission issued Decision 94/980/EC relating to a proceeding pursuant to Article 85 of the Treaty (IV/34.446 — Trans-Atlantic Agreement) (OJ 1994 L 376, p. 1).

25 Decision 94/980 ('the TAA decision') states that the agreements fixing prices, capacity non-utilisation in maritime transport and the price of inland container transport in or via the Community as part of intermodal transport operations infringe Article 85(1) of the Treaty (Article 1 of the TAA decision).

26 As regards the application of Article 85(3) of the Treaty, the TAA decision concludes that the block exemption laid down by Article 3 of Regulation No 4056/86 in respect of certain liner conference agreements does not apply to the provisions of the TAA agreement, on the ground that the TAA is not a liner conference applying 'uniform or common freight rates' within the meaning of Article 1(3)(b) of Regulation No 4056/86 because it establishes at least two maritime rate levels. In any event, even if the TAA were a liner conference, the Commission considers that the TAA provisions as to capacity non-utilisation and price fixing in respect of inland transport services provided as part of intermodal transport operations could not qualify for block exemption because freezing

transport capacity cannot be regarded as 'the regulation of the carrying capacity offered by each member' within the meaning of Article 3(d) of Regulation No 4056/86 and price fixing for inland transport services, even as part of intermodal transport, does not fall within the scope of Regulation No 4056/86, which applies only to port-to-port maritime transport. Furthermore, the Commission refuses to grant individual exemption for those provisions under Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68 (Article 2 of the TAA decision).

27 Article 4 of the TAA decision prohibits the parties to whom it is addressed from engaging in price-fixing activities whose object or effect is the same as or comparable to that of the provisions of the TAA.

28 Lastly, Article 5 of the TAA decision requires the undertakings to which it is addressed 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.

29 By order of 10 March 1995 the President of the Court of First Instance granted the application for suspension of the operation of Articles 1, 2, 3 and 4 of the TAA decision until delivery of the judgment of the Court of First Instance in the main action, in so far as those articles prohibited the TAA parties from jointly exercising rate-making authority in respect of the inland parts within the Community of through intermodal transport services (order of the President of the Court of First Instance of 10 March 1995 in Case T-395/94 R *Atlantic Container Line and Others* v *Commission* [1995] ECR II-595). The Commission's appeal against that order was dismissed by order of the President of the Court of Justice of 19 July 1995 (Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165).

30 By judgment of 28 February 2002, the Court of First Instance dismissed the application to annul the TAA decision subject to Article 5 thereof (Case T-395/94 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-875, 'the *TAA* judgment'). No appeal was lodged against that judgment.

II — *The Trans-Atlantic Conference Agreement ('TACA')*

31 Following discussions between the parties to the TAA and the Commission, that agreement was amended and replaced by the TACA.

32 Like the TAA, the TACA covers eastbound and westbound shipping routes between ports in northern Europe and points served by them on the one hand, and ports in the United States of America and points served by them on the other.

33 It is not in dispute that the TACA contains provisions identical to those of the TAA on the fixing of prices for inland transport services provided within the Community. The TACA also contains a number of rules concerning other aspects of transport, in particular as regards the conclusion of service contracts and the remuneration of freight forwarders.

TACA notifications

34 On 5 July 1994 the TACA was notified to the Commission pursuant to Article 12(1) of Regulation No 4056/86 with a view to obtaining exemption

under Article 85(3) of the Treaty and Article 53(3) of the Agreement on the European Economic Area ('EEA').

35 The original parties to the TACA were the following 15 shipping companies: A.P. Møller-Mærsk Line ('Mærsk'), Atlantic Container Line AB ('ACL'), Hapag-Lloyd AG ('Hapag-Lloyd'), Nedlloyd Lijnen BV ('Nedlloyd'), P&O Containers Ltd ('P&O'), Sea-Land Service, Inc. ('Sea-Land'), Mediterranean Shipping Co. ('MSC'), Orient Overseas Container Line (UK) Ltd ('OOCL'), Polish Ocean Lines ('POL'), DSR-Senator Lines GmbH ('DSR-Senator'), Cho Yang Shipping Co. Ltd ('Cho Yang'), Neptune Orient Lines Ltd ('NOL'), Nippon Yusen Kaisha ('NYK'), Transportación Marítima Mexicana SA de CV ('TMM') and Tecomar SA de CV ('Tecomar'). Hanjin Shipping Co. Ltd ('Hanjin') subsequently became a party to the TACA on 31 August 1994. Hyundai Merchant Marine Co. Ltd ('Hyundai') became a party to the TACA on 11 September 1995. Hyundai is the only one of those shipping companies never to have been a party to the TAA.

36 By letter of 15 July 1994 the Commission informed the TACA parties that, pursuant to Article 4(8) of Regulation No 4260/88, it also intended to examine the application for individual exemption under Regulation No 1017/68, on the ground that some of the activities notified fell outside the scope of Regulation No 4056/86.

37 The TACA came into force on 24 October 1994. As a result of successive amendments, several new versions of that agreement were notified to the Commission after 5 July 1994.

38 On 29 November 1995, following various discussions and exchanges of correspondence with the Commission, the TACA parties notified the European Inland Equipment Interchange Arrangement ('the EIEIA'), a cooperation agreement in respect of the inland part of through intermodal transport.

39 On 10 January 1997 the TACA parties notified to the Commission a 'hub and spoke' system of cooperation with a view to obtaining exemption for the collective fixing of prices for all inland transport services.

40 The TACA gave rise to two separate procedures: the procedure withdrawing immunity from fines and the procedure for infringement of Articles 85 and 86 of the Treaty. These proceedings concern the latter procedure.

Administrative procedure withdrawing immunity from fines

41 On 21 June 1995 the Commission adopted a statement of objections addressed to the TACA parties (with the exception of Hyundai, which was not a party to the TACA at that time), stating that it was disposed to adopt a decision withdrawing immunity from the fines which might result from the notification of the TACA in respect of the agreement between the parties to fix prices for inland transport services supplied within the territory of the Community.

42 On 1 March 1996 the Commission addressed a supplementary statement of objections to the TACA parties in which it stated that the EIEIA in no way altered its assessment of 21 June 1995.

43 On 26 November 1996 the Commission adopted Decision C (96) 3414 (final) relating to a proceeding pursuant to Article 85 of the Treaty (IV/35.134 — Trans-Atlantic Conference Agreement, unpublished, 'the decision withdrawing

immunity') by which it withdrew from the TACA parties immunity from fines in respect of the TACA provisions fixing inland rates, given that, according to the Commission's preliminary opinion, those provisions did not satisfy the requirements of Article 85(3) of the Treaty, Article 5 of Regulation No 1017/68 and Article 53(3) of the EEA Agreement.

44 By judgment of 28 February 2002, the Court of First Instance held that the TACA parties' action challenging that decision was inadmissible (Case T-18/97 *Atlantic Container Line and Others* v *Commission* [2002] ECR II-1125). No appeal was lodged against that judgment.

Administrative procedure for infringement of Articles 85 and 86 of the Treaty

45 On 24 May 1996 the Commission addressed a statement of objections on the merits to the TACA parties, adopted on the basis of Regulations Nos 17, 1017/68 and 4056/86. In that statement the Commission declared, inter alia, that it considered that the TACA fell within the prohibition in Article 85(1) of the Treaty and that it contained a number of elements which did not fall within the scope of Article 85(3) of the Treaty. The Commission stated that it was disposed to adopt a decision finding the TACA parties to be in breach of Article 85(1) and requiring them to bring to an end the practices which fell outside the scope of Article 85(3). The statement of objections also indicated that the TACA parties had abused their dominant position, contrary to Article 86 of the Treaty, and that the Commission intended to impose fines on them in that regard. Lastly, the statement of objections announced that the Commission was disposed to withdraw the benefit of the block exemption laid down by Regulation No 4056/86 pursuant to Articles 7 and/or 8 of that regulation.

46 On 6 September 1996 the applicants replied to the Commission's statement of objections of 24 May 1996. The TACA parties set out their position orally at a hearing on 25 October 1996.

47 A supplementary statement of objections was adopted by the Commission on 11 April 1997 in which it stated that, notwithstanding the notification of the 'hub and spoke' system, it remained disposed to adopt a decision prohibiting, inter alia, the practice of fixing prices for carrier haulage services supplied within the Community which fall outside the scope of the TACA 'hub and spoke' system.

48 On 16 September 1998 the Commission adopted Decision 1999/243/EC relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement, OJ 1999 L 95, p. 1, 'the contested decision'). In adopting that decision the Commission followed the procedures laid down by Regulations Nos 17, 1017/68 and 4056/86.

49 The Commission concluded in the contested decision that certain provisions of the TACA were contrary to Article 85(1) of the Treaty, Article 53(1) of the EEA Agreement and Article 2 of Regulation No 1017/68 and that the conditions for the grant of individual exemption laid down by Article 85(3) of the Treaty, Article 53(3) of the EEA Agreement and Article 5 of Regulation No 1017/68 were not fulfilled. The Commission further concluded that the applicants had infringed the provisions of Article 86 of the Treaty and Article 54 of the EEA Agreement and, on that ground, imposed fines on all of the applicants.

The contested decision

I — *The relevant provisions of the TACA*

50 The relevant provisions of the TACA which are the subject of the contested decision concern the fixing of transport rates, the conclusion of service contracts and the remuneration of freight forwarders.

The collective fixing of transport rates

51 The contested decision states that the TACA members collectively fix a five-part tariff showing separate rates for each of the following services: inland transport to the port, cargo handling in the port (transfer from the inland transport mode to the vessel), maritime transport (transport from one port to another), cargo handling in the port of destination (transfer from the vessel to the inland transport mode) and inland transport from the port of destination to the place of final destination (paragraph 96).

52 The contested decision further states that:

— the common tariff contains a matrix of prices for the carriage of cargo between defined points: 26 classes of cargo are defined and a rate is specified for each class (paragraph 13);

— the tariff is published by the TACA and is available to all shippers (paragraph 13);

— the conference tariff sets out a number of different rates: standard rates, time/volume rates ('TVRs') and loyalty contract rates (paragraph 103);

— under US law, any member of a conference has the right to depart from the conference tariff in respect of a particular class of goods, provided that the other members of the conference are notified (paragraph 104).

Service contracts

53 Service contracts are contracts by which a shipper undertakes to provide a minimum quantity of cargo to be transported by the conference (conference service contracts) or by an individual carrier (individual service contracts) over a fixed period of time and the carrier or the conference commits to a certain rate or rate schedule as well as a defined service level (paragraph 110).

54 Individual service contracts are referred to as being 'joint' where they are entered into by several individual carriers. It is not in dispute that the term 'joint service contracts' in the contested decision covers both conference service contracts and individual joint service contracts.

55 It is common ground between the parties that, on the transatlantic trade, some 50% to 60% of cargo travels under service contracts (paragraph 122).

56 In the contested decision, the Commission states that the TACA sought to regulate the negotiation and the conclusion of both conference and individual service contracts.

57 First, as regards conference service contracts (or 'TACA service contracts'), Article 14(3) of the TACA provides that these must be negotiated on behalf of the TACA parties by the TACA secretariat. Service contracts negotiated by the TACA secretariat are then put to the TACA voting procedure. Any TACA party which does not wish to participate in that service contract may take unilateral action, the scope of which is limited in accordance with Article 14(2)(j) of the TACA (paragraphs 132 to 148).

58 The contested decision states that Article 14(2) of the TACA also imposes a number of binding 'guidelines' concerning the content of service contracts and the circumstances in which they may be concluded (paragraph 149). The relevant restrictions relate to the following matters:

— duration: under Article 14(2)(a) of the TACA, service contracts must be concluded for a maximum period of one calendar year; that period was subsequently increased to two and then three years (paragraphs 17(f) and 491);

— conditional clauses (or 'contingency clauses'): under Article 14(2)(c) of the TACA, there is a prohibition on the inclusion in service contracts of any clause providing for a reduction in the rate payable under those service contracts by reference to terms agreed with other shippers under other arrangements (paragraphs 17(g) and 489);

— multiple contracts: under Article 14(2)(c) of the TACA, none of the parties to it may participate, individually or with any other party to the TACA, in more than one service contract at a time with any particular shipper in respect of cargo to be carried on the trade (paragraphs 17(f) and 493);

— the level of liquidated damages for non-performance of the contract: under Article 14(2)(d) of the TACA, the TACA parties agree on the level of liquidated damages included in service contracts entered into by them (paragraph 495); according to the contested decision, the level of liquidated damages has been set by the TACA parties at USD 250 per Twenty Foot Equivalent Unit ('TEU') (paragraph 226);

— confidentiality: the contested decision states that the TACA parties require the disclosure to each other of the terms of all service contracts to which they are party and make this information available to carriers which become party to the TACA (paragraph 496).

59 Second, the TACA prohibited the conclusion of individual service contracts until 1995. The TACA permitted such contracts in 1994 and 1995. The contested decision states:

> '32 On 9 March 1995, the TACA parties informed the Commission that the FMC [the US Federal Maritime Commission] had imposed a further condition on the TACA parties. This condition required the TACA parties to amend the TACA so as to allow the various signatories to enter into 1996 service contracts without having received the approval of the other TACA parties, provided that those contracts complied with the provisions of Article 14(2) of the TACA.'

Remuneration of freight forwarders

60 Under Article 5(1)(c) of the TACA, the TACA parties agree on the amounts, levels or rates of brokerage and freight forwarder remuneration including the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers (paragraph 164).

II — *The definition of the relevant market*

61 The contested decision states, on the basis of the analysis set out in paragraphs 60 to 84, that the market for maritime transport services to which the TACA relates is that for scheduled containerised liner shipping between ports in northern Europe and ports in the United States and Canada.

62 At paragraph 519, the Commission states in relation to the application of Article 86 of the Treaty:

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

III — *Legal assessment*

63 The contested decision finds that the TACA's rules and practices in question fall within Article 85 and Article 86 of the Treaty.

Application of Article 85 of the Treaty

64 With regard to the application of Article 85 of the Treaty, the Commission states that the following aspects of the TACA have the object or effect of restricting or distorting competition within the meaning of paragraph 1 thereof:

— the price agreement between the parties relating to maritime transport (paragraphs 379 and 380);

— the price agreement between the parties relating to inland transport services supplied within the territory of the Community to shippers in combination with other services as part of an intermodal transport operation for the carriage of containerised cargo ('carrier haulage services') between northern Europe and the United States of America (paragraphs 379 and 380);

— the agreement between the parties as to the conditions under which they may enter into service contracts with shippers (paragraphs 379, 380 and 442 to 448); and

— the agreement between the parties relating to the fixing of maximum levels of freight forwarder compensation (paragraphs 379, 380 and 505 to 508).

65 The Commission considers, by contrast, that it is unclear at this stage whether the equipment interchange agreement set out in the EIEIA affects competition to any appreciable degree. The applicability of Article 85 of the Treaty to that agreement is therefore not addressed in the contested decision (paragraphs 384, 399 and 426).

66 As regards the grant of an exemption, the Commission concludes that with the exception of the agreement relating to the price of maritime transport, the other agreements restricting competition do not fall within the block exemption provided for by Article 3 of Regulation No 4056/86 (paragraphs 397 to 399). As regards the possibility of individual exemption, the Commission considers that none of the agreements concerned fulfils the conditions laid down by Article 85(3) of the Treaty and Article 5 of Regulation No 1017/68 (paragraphs 409 to 441).

Application of Article 86 of the Treaty

67 As regards the application of Article 86 of the Treaty, the contested decision finds that the TACA members hold a collective dominant position on the relevant market (paragraphs 519 to 576) and that they abused that collective dominant position between 1994 and 1996, first, by entering into an agreement to place restrictions on the availability and content of service contracts ('the first abuse') and secondly by altering the competitive structure of the market so as to reinforce the TACA's dominant position ('the second abuse') (paragraphs 550 to 576).

68 As regards the first abuse (paragraphs 551 to 558), the Commission considers that this arose, 'in particular, in relation to the terms imposed by the TACA parties... concerning contingency clauses, the duration of service contracts, the ban on multiple contracts and liquidated damages' and to the prohibition of individual service contracts in 1995 (paragraphs 556 and 557).

69 As regards the second abuse (paragraphs 559 to 567), the Commission states that 'the intention of the TACA parties was... to ensure that if a potential competitor wished to enter the market it would only do [so] after it had become a party of the TACA' (paragraph 562). The steps taken by the TACA parties to induce potential competitors to enter the market as parties to the TACA include also, according to the contested decision, specific steps in favour of Hanjin (disclosure of confidential information and the allocation of market share) and Hyundai (immediate access to service contracts), the conclusion of a large number of dual-rate service contracts and the fact that the former structured TAA members did not compete for certain service contracts with non-vessel operating common carriers ('NVOCCs').

Fines

70 The contested decision imposes fines on each of the TACA parties for their infringement of Article 86 of the Treaty. No fine is imposed for the infringement of Article 85 of the Treaty.

71 The contested decision states that the duration of those two infringements covers part of 1994 and the whole of 1995 and 1996 (paragraphs 592 and 594).

The operative part

72 The operative part of the contested decision provides as follows:

'*Article 1*

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty, Article 53(1) of the EEA Agreement and Article 2 of Regulation (EEC) No 1017/68 by agreeing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America. The conditions of Article 85(3) of the EC Treaty, Article 53(3) of the EEA Agreement and of Article 5 of Regulation (EEC) No 1017/68 are not fulfilled.

Article 2

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by fixing the amounts, levels or rates of brokerage and freight forwarder remuneration, the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

Article 3

The undertakings listed in Annex I have infringed the provisions of Article 85(1) of the EC Treaty and Article 53(1) of the EEA Agreement by agreeing the terms and conditions on and under which they may enter into service contracts with shippers. The conditions of Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

Article 4

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 1, 2 and 3 and are hereby required to refrain in future from any agreement or concerted practice having the same or a similar object or effect to the agreements referred to in Articles 1, 2 and 3.

Article 5

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by altering the competitive structure of the market so as to reinforce the dominant position of the Transatlantic Conference Agreement.

Article 6

The undertakings listed in Annex I have infringed the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement by placing restrictions on the availability and contents of service contracts.

Article 7

The undertakings listed in Annex I are hereby required to put an end forthwith to the infringements referred to in Articles 5 and 6 and are hereby required to refrain in future from any action having the same or a similar object or effect to the infringements referred to in Articles 5 and 6.

Article 8

In respect of the infringement of the provisions of Article 86 of the EC Treaty and Article 54 of the EEA Agreement referred to in Articles 5 and 6, the following fines are imposed:

A.P. Møller-Mærsk Line	ECU 27 500 000
Atlantic Container Line AB	ECU 6 880 000
Hapag Lloyd Container Linie GmbH	ECU 20 630 000
P&O Nedlloyd Container Line Limited	ECU 41 260 000
Sea-Land Service, Inc.	ECU 27 500 000
Mediterranean Shipping Co.	ECU 13 750 000
Orient Overseas Container Line (UK) Ltd	ECU 20 630 000
Polish Ocean Lines	ECU 6 880 000
DSR-Senator Lines	ECU 13 750 000
Cho Yang Shipping Co., Ltd	ECU 13 750 000
Neptune Orient Lines Ltd	ECU 13 750 000
Nippon Yusen Kaisha	ECU 20 630 000
Transportación Marítima Mexicana SA de CV/Tecomar SA de CV	ECU 6 880 000
Hanjin Shipping Co. Ltd	ECU 20 630 000
Hyundai Merchant Marine Co. Ltd	ECU 18 560 000

Article 9

The undertakings listed in Annex I are hereby required, within a period of two months of the date of notification of this decision, to inform customers with whom they have concluded joint service contracts that those customers are entitled to renegotiate the terms of those contracts or to terminate them forthwith.

Article 10

The fines imposed under Article 8 shall be paid, in ECU, within three months of the date of notification of this Decision, into bank account No 310-0933000-43 of the European Commission, Banque Bruxelles Lambert, Agence Européenne, Rond-Point Schuman 5, B-1040 Brussels.

After expiry of that period, interest shall be automatically payable on the fine at the rate charged by the European Central Bank for transactions in ECU on the first working day of the month in which this Decision is adopted, plus 3.5 percentage points, namely 7.5%.

Article 11

This Decision is addressed to the undertakings listed in Annex I.

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

Procedure

73 By application lodged at the Registry of the Court of First Instance on 7 December 1998, 12 of the 17 shipping companies to whom the contested decision was

addressed, namely ACL, Cho Yang, DSR-Senator, Hanjin, Hapag-Lloyd, Hyundai, Mærsk, MSC, OOCL, POL, P&O Nedlloyd (P&O Nedlloyd is the result of the merger in January 1997 of Nedlloyd and P&O, to both of which the contested decision had been addressed when it was adopted) and Sea-Land, lodged an application at the Registry of the Court of First Instance for annulment of that decision pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC). That application was registered as Case T-191/98 *Atlantic Container Line and Others* v *Commission*.

74 By separate application lodged on 29 December 1998, NOL brought an action for annulment of the contested decision. That application was registered as Case T-212/98 *Neptune Orient Lines* v *Commission*. On the same day NYK also lodged an application for annulment of the contested decision, which was registered as Case T-213/98 *Nippon Yusen Kaisha* v *Commission*. Finally, on 30 December 1998, TMM and Tecomar also lodged an application for annulment of the contested decision, which was registered as Case T-214/98 *Transportación Marítima Mexicana and Tecomar* v *Commission*.

75 On 18 January 1999, on the initiative of the Registrar, the Judge Rapporteur, Judge Jaeger, held an informal meeting with the applicants at which they were requested to put their applications, which run to about 2 000 pages (excluding annexes), in order, to consider the possibility of summarising them, to sort the relevant documents contained in approximately 100 loose-leaf files annexed to the applications and to resolve the confidentiality issues arising in respect of some of those documents. Only some of those confidentiality issues were able to be resolved at that meeting.

76 By order of 22 February 1999 the President of the Third Chamber of the Court of First Instance ordered that Cases T-191/98, T-212/98, T-213/98 and T-214/98 be joined for the purposes of the written and the oral procedure and judgment.

77 On 21 June 1999 the European Council of Transport Users ASBL (the 'ECTU', comprising the European Shippers' Council, 'ESC') sought leave to intervene in support of the form of order sought by the Commission in Cases T-191/98, T-212/98, T-213/98 and T-214/98.

78 By order of 21 July 1999, the President of the Court of First Instance dismissed the application lodged by DSR-Senator to suspend enforcement of the contested decision (Case T-191/98 R *DSR-Senator Lines* v *Commission* [1999] ECR II-2531). The appeal lodged against that order was dismissed by the President of the Court of Justice on 14 December 1999 (Case C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733).

79 On 17 August 1999 the applicants requested that certain documents be treated as confidential vis-à-vis the intervener. That request was further particularised in a fax of 23 August 1999. The Commission raised various objections to that request by letters of 10 September and 8 October 1999.

80 By order of 15 November 1999, the President of the Third Chamber of the Court of First Instance granted the ECTU leave to intervene and granted in part the application for confidentiality. In addition confidentiality was provisionally accorded to certain appendices to the application in Case T-191/98.

81 By letter of 8 December 1999 the applicants informed the Registrar that they intended to withdraw from the case-file all but one of the appendices referred to in the order of 15 November 1999. By letter of 10 December 1999 the applicants further requested confidentiality in respect of certain information contained in the rejoinder and the annexes thereto. By letter of 17 January 2000 the Commission objected to that request.

82 By order of 14 March 2000 the President of the Third Chamber of the Court of First Instance granted in part the applicants' request for confidentiality in respect of certain information contained in the application and the rejoinder.

83 By order of 28 June 2000, the President of the Court of First Instance dismissed the application to suspend enforcement of the contested decision lodged by Cho Yang (Case T-191/98 R II *Cho Yang Shipping* v *Commission* [2000] ECR II-2551). The appeal lodged against that order was dismissed by the President of the Court of Justice on 15 December 2000 (Case C-361/00 P(R) *Cho Yang Shipping* v *Commission* [2000] ECR I-11657).

84 On 27 September 2000 in the covering letter accompanying its observations on the ECTU's statement in intervention, the applicant in Case T-213/98 requested that the Court of First Instance accord confidentiality to certain figures set out in its observations. That request was repeated in a letter of 20 October 2000. The Commission objected to the request in a letter of 17 November 2000. By order of 20 June 2002 the President of the Third Chamber of the Court of First Instance granted the applicant's request.

85 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to produce certain documents and answer written questions. The parties complied with those requests within the prescribed time-limit.

86 The oral arguments of the parties and their answers to the oral questions were heard at the hearing on 26 and 27 March 2003.

Forms of order sought

87 The applicants claim that the Court should:

— annul the contested decision;

— in the alternative, annul or reduce the fines imposed by Article 8 of the contested decision;

— order the Commission to pay the costs;

— order the Commission to pay the costs incurred by each applicant in providing a bank guarantee in lieu of payment of the fines pending judgment by the Court.

88 The Commission, supported by the intervener, the ECTU, contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

89 In support of their application for annulment the applicants essentially raise seven groups of pleas. The first comprises those alleging infringement of the rights of the defence. The second concerns those alleging that there is no infringement of Article 85 of the Treaty. The third relates to those alleging that there is no infringement of Article 86 of the Treaty. The fourth relates to failure to comply with the procedure laid down by Regulation No 4056/86. The fifth relates to the pleas alleging various failures to state reasons. The sixth comprises the pleas on the fines. Finally, the seventh concerns infringement of the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC).

90 The Court observes at the outset that the applications lodged by the applicants, and the annexes thereto, are exceptionally long: each application comprises some 500 pages whilst the annexes make up about 100 files, and there are almost 100 different pleas. Attention must be drawn to the fact that the Court of Justice has held that the requirement for the Court of First Instance to give reasons for its decisions must not be interpreted as meaning that it is obliged to respond in detail to each argument advanced by a party, particularly if the argument is not sufficiently clear and precise and is not supported by adequate evidence (Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121, and Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81). The numerous pleas put forward by the applicants in support of their actions must be considered in the light of that case-law.

I — *The pleas alleging infringement of the rights of the defence*

91 There are essentially three separate parts to the applicants' pleas alleging infringement of the rights of the defence. The first part alleges infringement of the

right to be heard. The second part alleges infringement of the right of access to the file. The third and final part alleges infringement of the principles of sound administration, objectivity and impartiality.

Part one: infringement of the right to be heard

92 In their application, the applicants divided this part into three sections. In the first, the applicants allege that the statement of objections is invalid because it was not adopted at the conclusion of the Commission's investigation and was therefore premature. In the second, they claim that the allegation that they abusively altered the competitive structure of the market is a new complaint which is, moreover, based on fresh evidence. In the third and final section, the applicants claim that the contested decision contains new allegations of fact and law not contained in the statement of objections.

93 It is, however, apparent from consideration of the application that the present part in fact comprises two different kinds of plea concerning the Commission's conduct of the administrative procedure. First, by a plea which appears in the first part of their argument, the applicants challenge the legality of the statement of objections as such on the ground that it is premature. Second, by pleas appearing in all three parts of their argument, they criticise the presence of new allegations of fact or law in the contested decision.

A — The plea alleging that the statement of objections is unlawful because it is premature

1. Arguments of the parties

94 The applicants allege that the statement of objections which the Commission sent them on 24 May 1996 is invalid because it was not adopted at the conclusion of the Commission's investigation.

95 The applicants refer to the case-law to the effect that the statement of objections must set out clearly the facts upon which the Commission relies and its classification of those facts (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 29; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström and Others* v *Commission* ('*Woodpulp II*') [1993] ECR I-1307, paragraphs 40 to 54 and 152 to 154; and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 33). Accordingly, as the Court of First Instance held in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 51, 'regard for the rights of the defence requires that an applicant must have been put in a position to express, as it sees fit, its views on all the objections raised against it by the Commission in the statement of objections addressed to it and on the evidence which is to be used to support those objections and is mentioned by the Commission in the statement of objections or annexed to it' (see also Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-1439, paragraph 39).

96 The applicants infer from this that the Commission may not rely in its decision on evidence obtained after the adoption of the statement of objections and upon which the undertaking concerned has had no opportunity to comment. As the

Court held in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, at paragraph 15: '... in accordance with Article 19(1) of Regulation No 17 and in order to guarantee observance of the rights of the defence, it is necessary to ensure that the undertaking concerned has the right to submit its observations on conclusion of the inquiry on all the objections which the Commission intends to raise against it in its decision...'.

97 The applicants point out that in this case the Commission sent them a request for information two days before the statement of objections was issued and some 30 requests for further information after the statement of objections was issued, both during the period prescribed for replying to the statement of objections and after the response was made. According to the applicants, it follows that, contrary to the principle of sound administration and the case-law cited above, the statement of objections was sent to the addressees prematurely.

98 The applicants claim that the premature adoption of the statement of objections in the present case had the following consequences:

— the statement of objections did not state all of the factual matters regarded by the Commission as relevant to its appraisal of the TACA notification;

— the legal assessment in the statement of objections was not based on all of the factual matters regarded by the Commission as relevant to its appraisal of the notification;

— the statement of objections cannot be regarded as reflecting the Commission's position on the notification and its compatibility with Community law;

— the applicants could not effectively exercise the rights of the defence by replying to the statement of objections.

99 Therefore, the applicants claim, the statement of objections of 24 May 1996 did not fulfil the role ascribed to it, namely to provide the undertaking under investigation with an opportunity to comment on the Commission's case prior to the adoption of the final decision, in accordance with the rights of the defence.

100 The applicants observe that whilst some of the requests for further information concern matters covered by the statement of objections, others concerned entirely new matters.

101 The applicants claim that there is therefore a legal and procedural incompatibility between the position adopted by the Commission in the statement of objections and the continuation of its fact-finding after the adoption of the statement of objections. Thus, whilst the Commission claimed that it required the information requested on 11 July 1996 in order to enable it to assess the parties' application for individual exemption in its full economic and legal context, the statement of objections of 24 May 1996 stated that there was no possibility of the TACA being granted exemption (paragraph 249 of the statement of objections).

102 In response to the Commission's claims that the TACA's practices were continuously evolving, or that the applicants adopted an obstructive manner, they observe that the Commission does not specify which practices of the TACA members were taken to be continuously evolving so as to justify the requests for further information, and they deny ever having obstructed the inquiry.

103 The applicants claim that since no valid statement of objections was adopted the Commission did not validly initiate formal proceedings against them, so that the contested decision does not deal with any objections on which the applicants have been afforded an opportunity of commenting. The decision should therefore be annulled in its entirety for infringement of the rights of the defence.

104 The Commission submits that it is perfectly entitled to carry out fact-finding after issuing the statement of objections. It therefore contends that the Court should reject this plea of the applicants.

2. Findings of the Court

105 It is common ground that in the present case the Commission sent the TACA parties a request for information two days before issuing the statement of objections and about 30 further requests for information after it had been issued, including after the applicants' response to the statement of objections and the hearing before the Commission, up to March 1998.

106 In the applicants' view, those facts show that because it was premature, the statement of objections did not fulfil the role normally ascribed to it, namely to provide the undertaking under investigation with an opportunity to comment effectively on all allegations of fact and law made against it by the Commission.

107 As stated above at paragraph 93, in so far as the applicants allege by the present plea that the Commission used the responses to the requests for further information to formulate new allegations of fact or law in the contested decision without giving them the opportunity to comment thereon, this plea coincides with those alleging the presence of new allegations of fact or law in the contested decision and therefore will be considered in the section dealing with those pleas.

108 At this stage it is thus necessary to consider the present plea only in so far as it alleges that the statement of objections is unlawful because it is premature.

109 The applicants' argument in that regard rests on the premiss that before the Commission issues a statement of objections it must have completed its preparatory investigation. In order to determine the merits of this plea it is therefore necessary to consider whether the Commission is under such an obligation.

110 It is true that according to the case-law the rules necessary for the application of Articles 85 and 86 of the Treaty, introduced by the Council in Regulation No 17, Regulation No 1017/68 and Regulation No 4056/86, upon which the contested decision was based, prescribe two successive but clearly separate procedures:

first, a preparatory investigation procedure, and secondly, a procedure involving submissions by both parties initiated by the statement of objections (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 20, and *Cimenteries CBR*, cited at paragraph 95 above, paragraph 45).

111 It follows that, in principle, the statement of objections is issued after a preparatory investigation by the Commission following a notification or a complaint or on its own initiative, as the case may be, in order to assess whether the practices in question are compatible with Articles 85 and 86 of the Treaty. Only after having carried out such an investigation can the Commission be sufficiently informed, both in fact and in law, as to the lawfulness of those practices and therefore be able to decide whether or not to initiate the infringement procedure by issuing the statement of objections.

112 Contrary to the applicants' submission, it does not, however, follow that after issuing the statement of objections the Commission is prevented from continuing with its investigation, inter alia by sending requests for further information.

113 Under Article 19(1) of Regulation No 17, Article 26(1) of Regulation No 1017/68 and Article 23(1) of Regulation No 4056/86, the purpose of the statement of objections is to afford the undertakings concerned, before the Commission adopts a decision establishing an infringement of Articles 85 and 86 of the Treaty, the opportunity of making known their views on the complaints made against them. Under Article 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964 (I), p. 47), Article 4 of Regulation (EEC) No 1630/69 of the Commission of 8 August 1969 on the hearings provided for in Article 26(1) and (2) of Council Regulation No 1017/68 (OJ, English Special

Edition 1969 (II), p. 381) and Article 8 of Regulation No 4260/88, the Commission can only deal in its decision with objections upon which the recipient undertakings have been afforded the opportunity of making known their views. According to the case-law, that requirement is observed where the decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and only takes into consideration facts on which the persons concerned have had the opportunity of making known their views (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 94).

114 The statement of objections is thus a procedural measure adopted preparatory to the decision which represents the culmination of the administrative procedure (*IBM*, cited at paragraph 96 above, paragraph 21).

115 Consequently, until a final decision has been adopted, the Commission may, in view, in particular, of the written or oral observations of the parties, abandon some or even all of the objections initially made against them and thus alter its position in their favour (*IBM*, cited at paragraph 96 above, paragraph 18, and *Cimenteries CBR*, cited at paragraph 95 above, paragraph 47) or, conversely, decide to add new complaints, provided that it affords the undertakings concerned the opportunity of making known their views in that respect (Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 29; order of the Court of 5 June 2002 in Case C-217/00 P *Buzzi Unicem* v *Commission*, not published in the ECR, paragraph 65; and Case T-16/99 *Lögstör Rör* v *Commission* [2002] ECR II-1633, paragraph 168).

116 Far from being a measure recording the Commission's final assessment of the lawfulness of the practices in question, the statement of objections is, on the contrary, a purely preparatory measure setting out the Commission's provisional findings, which it may revisit in the final decision. The Commission is therefore perfectly entitled, in order in particular to take account of the arguments or other evidence put forward by the undertakings concerned, to continue with its fact-finding after the adoption of the statement of objections with a view to withdrawing certain complaints or adding others as appropriate. That is all the more so where, as in the present case, the Commission must decide whether the

arguments and evidence put forward by the addressees of the statement of objections justify the grant of an individual exemption under Article 85(3) of the Treaty in respect of the practices referred to in the statement of objections.

117 The requests for information provided for by Article 11 of Regulation No 17, Article 19 of Regulation No 1017/68 and Article 16 of Regulation No 4056/86 are manifestly appropriate measures of inquiry for that purpose. According to the first paragraph of those provisions, the Commission may obtain all necessary information from the undertakings and associations of undertakings by such requests, provided that it states the legal bases and the purpose of the request and also the penalties for supplying incorrect information, pursuant to the third paragraph of those provisions. A request for information thus enables the Commission to obtain all necessary clarification of the arguments and the evidence put forward by the undertakings concerned in their response to the statement of objections.

118 Subject to the rules on limitation, the provisions of the applicable regulations cited above do not impose any restriction on the Commission as to the timing of requests for information. In particular, provided that the information requested is relevant, those provisions do not restrict the power of the Commission to send requests for information after the statement of objections has been issued.

119 Thus, even if the Commission already has evidence, or indeed proof, of the existence of an infringement, it may legitimately take the view that it is necessary to request further information to enable it better to define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved (*Orkem*, cited at paragraph 110 above, paragraph 15). The Court has held that requests for information enable the Commission both to bring to light infringements of the competition rules (*Orkem*, cited above, paragraph 15) and to investigate putative infringements (Case T-39/90 *SEP* v *Commission* [1991] ECR II-1497, paragraph 25).

120 Accordingly, the mere fact that the Commission continues its investigation after issuing the statement of objections by sending requests for further information cannot in itself affect the validity of the statement of objections.

121 On the contrary, given the preliminary nature of the statement of objections, which reflects the adversarial nature of the administrative procedure applying the competition rules of the Treaty, the Commission must logically be able to send supplementary requests for information after issuing the statement of objections in order to be able, if necessary, to withdraw complaints or add new ones.

122 Contrary to the applicants' assertions, it is irrelevant in this regard that those requests for further information raise fresh issues not addressed in the statement of objections. It is true that that might show that when it adopted the statement of objections the Commission had not completed its administrative investigation into the practices in question. However, as stated above, since the statement of objections is a preliminary document which may be amended by the Commission, in particular so as to take account of the response to the statement of objections, there is no requirement that the Commission must have finally completed its administrative investigation by the time it adopts the statement of objections. Consequently, the Commission cannot be restricted as to the questions it seeks to raise in the requests for information sent after the statement of objections, provided however that (i) in accordance with the applicable regulations, those questions enable it to obtain information necessary for the investigation and (ii) the Commission gives the undertakings concerned the opportunity to comment on fresh matters of fact or law arising from the responses of the undertakings concerned to those questions. Those last two issues fall, however, within separate pleas which will be examined in the context of the applicants' pleas alleging infringement of the principles of sound administration, objectivity and impartiality and the presence of new allegations of fact or law in the decision.

123 The plea alleging that the statement of objections is unlawful because it is premature must therefore be rejected.

B — The pleas alleging the presence of new allegations of fact or law in the contested decision

124 By these pleas the applicants submit that they were given no opportunity to comment, first, on the case in respect of the second abuse alleging alteration of the competitive structure of the market and, second, on certain matters of fact and law on which the other allegations in the contested decision were based.

1. The purportedly new allegations of fact or law concerning the second abuse

(a) Arguments of the parties

125 The applicants allege, first, that in dealing with the second abuse of a dominant position, described in paragraphs 559 to 567 of the contested decision, the Commission changed its case from that first set out in the statement of objections.

126 The applicants claim in that regard that they were given no opportunity to comment, first, on the finding that they had induced Hanjin and Hyundai to join

the conference (paragraphs 563 to 566) and, second, as to the steps they were said to have taken for that purpose (paragraphs 561 and 563 to 565). Neither of those points appears in the statement of objections, in particular at paragraphs 107 to 115 dealing with the allegation of abusive alteration of the structure of the market. In particular, the statement of objections does not criticise the TACA parties for having taken 'measures to assist those potential competitors successfully to enter the market as parties to the TACA', as paragraph 563 of the contested decision states.

127 The applicants claim that paragraph 112 of the statement of objections refers essentially to a structural abuse based on the fact that there were four companies independent of the TACA which were not present on the transatlantic route but were linked with TACA parties on other trades, that various arrangements had 'allowed' NYK, NOL, Hanjin and Hyundai to enter the market and that the TACA's ability to neutralise potential competition was demonstrated by dual-rate service contracts and by the fact that the majority of TACA members did not participate in service contracts with NVOCCs. By contrast, in referring to measures adopted by the applicants to 'induce' Hyundai and Hanjin to join the TACA, the contested decision complains that the applicants' abuse lies essentially in their conduct.

128 Furthermore, the position adopted by the Commission in the defence differs from the positions set out in the statement of objections and in the contested decision. According to the applicants, the Commission now alleges in the defence that the abuse lies not in inducing Hanjin and Hyundai to join the conference, but in adopting a prior policy to neutralise potential competition and to prevent the emergence of actual competition. That allegation does not appear in the statement of objections. The same applies to the allegation at paragraph 557 of the defence that, in reserving business linked to service contracts with NVOCCs to independent shipping companies, the applicants induced those companies to remain in the trade as TACA members and not as independent competitors.

129 Second, the applicants claim that the fresh allegation of abuse made in the contested decision is based on evidence upon which the applicants were given no opportunity to comment, namely:

— Hanjin's letter to the TACA of 19 August 1994 requesting that it be provided with relevant conference documents and statistics (paragraphs 229 and 563);

— the minutes of the meeting of the TACA directors (TACA PWSC meeting No 95/8) on which the Commission bases the allegation that the applicants allowed Hyundai immediate access to conference service contracts (paragraphs 230 and 564);

— the letter from the Chairman of the TACA to Hanjin dated 30 January 1996 (paragraphs 292 and 561);

— the briefing paper of 15 February 1996 in which the secretariat of the conference suggests that the Chairman should 'encourage and persuade all carriers to collectively find a way to enable Hanjin to build up a market share consistent with its slot capacity in the trade' (paragraphs 239 and 564).

130 The applicants allege that none of those documents was referred to in or annexed to the statement of objections. Furthermore, the Commission gave the applicants no indication at all that it proposed to rely on those documents. The applicants claim in that respect that, contrary to the Commission's assertion, it does not

matter whether the documents in question were provided by them. In so far as those documents were used against them, the applicants claim that the Commission ought to have stated the importance it intended to attach to them. Since they were unaware of the use the Commission intended to make of those documents, they were given no reasonable opportunity to comment on their relevance in the exercise of the rights of the defence.

131 The Commission claims, first, that the contested decision did not change the position set out in the statement of objections. It stresses the fact that the statement of objections alleged that the applicants had adopted measures to neutralise potential competition (paragraphs 107 to 115, 345 and 346), in particular by the conclusion of slot-chartering agreements (paragraph 110) and service contracts (paragraph 112) with Hanjin and Hyundai.

132 The Commission claims that the use in the contested decision of the word 'inducements' does not alter the fact that what the TACA parties are found to have done is to have facilitated the entry of Hanjin and Hyundai to the trade as TACA members, precisely the criticism made in the statement of objections. All that is added in the contested decision to what was contained in the statement of objections is a matter of detail, namely that the applicants provided Hanjin with sensitive information and allowed Hyundai to participate immediately in service contracts. The other components of the second abuse, namely dual-rate service contracts and contracts with NVOCCs, are, the Commission maintains, described in the statement of objections.

133 The Commission therefore rejects the applicants' argument that the abuse at issue in the contested decision lies in conduct whereas in the statement of objections it is structural. The Commission considers it hard to imagine what a structural abuse might be. In the present case the abuse consisted in the adoption of a policy of neutralising competition, in part by offering inducements facilitating entry to the trade as members of the conference.

134 Furthermore, the Commission denies that the defence sets out a new allegation which did not appear in the statement of objections and in the contested decision. It stresses that the measures referred to in the statement of objections to induce Hyundai and Hanjin to join the TACA were merely illustrations of the applicants' policy of neutralising competition. The argument that the contracts with NVOCCs were reserved for non-traditional conference members is not a new one. Moreover, there is no logical distinction between an inducement to enter the conference and an inducement to remain.

135 Second, as regards the four new documents used in the contested decision, the Commission points out that they were disclosed by the applicants. Consequently, the complaint that the applicants did not have an opportunity to comment on those documents is unfounded.

(b) Findings of the Court

136 By the present pleas the applicants essentially allege, first, that the Commission altered the nature of its case in respect of the second abuse recorded in the contested decision when compared with that recorded in the statement of objections and, second, that the Commission based its finding on documentary evidence upon which they were afforded no opportunity to comment.

(1) The change of case in relation to the second abuse in the contested decision

137 The applicants submit essentially that in the contested decision the Commission changed its case from that set out in the statement of objections concerning the

second abuse in that the contested decision alleged that the applicants had committed an abuse of 'conduct' by taking certain measures to induce potential competitors to join the TACA, whilst the statement of objections alleged that their abuse was purely 'structural', arising from certain structural links between the potential competitors and the TACA parties.

138 The Court has held that the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission (Case T-352/94 *Mo Och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63). Due observance of the rights of the defence in a proceeding in which sanctions such as those in question may be imposed requires that the undertakings and associations of undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views effectively on the truth and relevance of the facts and circumstances alleged and objections raised by the Commission (*Cimenteries CBR*, cited at paragraph 95 above, paragraph 39). That requirement is satisfied if the decision does not allege that those concerned have committed infringements other than those referred to in the notice of complaints and only takes into consideration facts on which they have had the opportunity of making known their views (*ACF Chemiefarma*, cited at paragraph 113 above, paragraph 94). It follows that the Commission may adopt only objections on which those undertakings and associations have had the opportunity to make known their views (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 47).

139 In assessing the merits of the present plea, it is therefore necessary to consider whether the statement of objections sets out sufficiently clearly and precisely the complaints relating to the second abuse recorded in the contested decision. To this end, it is necessary first to note the nature of the complaints made in that decision on that point and then to determine the extent to which those complaints already appear in the statement of objections.

140 It should be noted, first, that there is a dispute between the parties arising from the pleas concerning the application of Article 86 of the Treaty as to the nature of the complaints relating to the second abuse recorded in the contested decision. For the reasons set out below at paragraphs 1255 to 1257 and 1261 to 1265, however, it is apparent from Article 5 of the operative part of the contested decision and the grounds in support thereof as set out at paragraphs 559 to 567 that, by the second abuse, the Commission complains that the applicants abusively altered the competitive structure of the market so as to reinforce the TACA's dominant position by adopting certain measures intended to induce potential competitors to enter the transatlantic trade not as independent carriers but as TACA parties.

141 The contested decision distinguishes between specific measures intended to induce Hanjin and Hyundai and general measures intended to induce all potential competitors. As for the specific measures, it is apparent from paragraphs 563 and 564 of the contested decision that, in the case of Hanjin, they consisted in the disclosure of confidential information concerning the TACA and in the collective willingness to allow that shipping company to build up a market share consistent with its slot capacity on the trade and that, in the case of Hyundai, they consisted in that company's immediate participation in the TACA service contracts. As for the general measures, paragraph 565 of the contested decision indicates that they consisted in the conclusion of a large number of dual-rate service contracts and in the fact that the former structured TAA members did not compete for certain service contracts with NVOCCs.

142 Next, as regards the nature of the complaints in the statement of objections, at paragraph 340 of that statement the Commission criticised the TACA parties for abusing their dominant position 'by altering the competitive structure of the

market so as to reinforce the dominant position of the TACA'. In that regard, the Commission states at paragraph 346:

'Paragraphs 107 to 115 above demonstrate the ways in which the TACA has taken steps to neutralise potential competition. The steps in question include the accession of new parties, the agreement of the TACA parties to allow dual rate service contracts and the fact that the former structured TAA members did not compete for certain service contracts with NVOCCs. The Commission considers that such behaviour, which was not disclosed in the application for individual exemption, has damaged the competitive structure of the market and amounts to an abuse of a dominant position. The Commission considers that the purpose of the members of the TACA was to eliminate price competition by damaging the structure of the market and limiting the supply of transport. It should be noted in this context that an undertaking in a dominant position "has a special responsibility not to allow its conduct to impair genuine undistorted competition".'

143 Further, at paragraphs 107 to 115 of the statement of objections, to which paragraph 346 refers, the Commission states in particular:

'108 The Commission's general observations on the mobility of fleets, and the contestability of the liner shipping markets, are set out below at paragraphs 126 to 168. Nevertheless, it is possible to demonstrate that in the case of the TACA, potential competition in the form of mobility of fleets is unlikely to be effective. A chronology of TACA party membership shows that every significant potential competitor that has entered the transatlantic trade since the inception of the TAA has done so by joining the TAA/TACA.

Version I (28/8/92) — 11 lines	*Version II (12/3/93) — 12 lines*
ACL	NYK
Hapag Lloyd	
P & O	*Version III (31/3/93) — 13 lines*
Nedlloyd	NOL
Sealand	
Maersk	*Version IV (7/4/93) — 15 lines*
MSC	TMM
OOCL	Tecomar
POL	
DSR-Senator	*Version V (26/8/94) — 16 lines*
Cho Yang	Hanjin
	Version VI (31/8/95) — 17 lines
	Hyundai

109 It is especially significant that not one of the four Asian carriers which has entered the trade since 1992 (NYK, NOL, Hanjin and Hyundai) has done so as an independent carrier operating in competition to the TACA parties. Furthermore, various arrangements with TACA parties have allowed each of these carriers to enter and obtain a foothold in the market without facing the competition normally to be expected in such circumstances.

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

11 September 1995 that Hyundai, as part of its arrangements to enter the trade on a slot charter basis, agreed not to introduce its own tonnage on the trade for a three year period.

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

112 This ability to neutralise potential competition has come about in part by the practice of the TACA to offer shippers service contracts which contain a dual rate price structure and by the fact that the majority of the TACA parties do not compete to participate in service contracts with NVOCCs (see paragraphs 88 to 93 above). In relation to dual rate tariffs and the elimination of competition, this has substantially the same effects as those described in the TAA decision at paragraphs 341 to 343.'

144 Lastly, at paragraphs 113 to 115 the statement of objections mentions too that four potential competitors (APL, Mitsui, Yangming and K Line) are linked to the TACA on other trades and that the potential competition from the Canadian ports is limited.

145 In the light of the passages in the statement of objections cited above, it should be noted as a preliminary point that, like Article 5 of the operative part of the contested decision, paragraph 340 of the statement of objections states that the abuse alleged against the TACA parties consists in having altered the competitive structure of the market so as to reinforce the dominant position of the TACA.

146 Next, again like the contested decision, the statement of objections alleges that the TACA parties altered the competitive structure of the market by adopting certain measures intended to induce potential competitors to enter the transatlantic trade not as independent carriers but as TACA parties. Paragraph 346 of the statement of objections states, with reference to paragraphs 107 to 115, that the TACA took steps to neutralise potential competition, including the accession of new members, dual-rate service contracts and not competing for certain service contracts with NVOCCs. With regard to the accession of new members, it is apparent from paragraphs 109 and 110 of the statement of objections that the Commission expressly alleges that the TACA parties entered into arrangements with potential competitors enabling them to ensure that they 'did not enter the transatlantic trade as independent lines but as parties to the TACA'. Furthermore, with regard to the two other practices in question, paragraph 112 of the statement of objections emphasises that they enabled the TACA to neutralise potential competition, referring in that regard, in particular, to paragraph 341 of the TAA decision, in which the Commission found that 'the real purpose of the introduction of differentiated [tariff] 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, notably in terms of price.'

147 Lastly, like paragraphs 563 to 565 of the contested decision the statement of objections distinguishes, as is apparent from the foregoing, between specific measures addressed to Hanjin and Hyundai and general measures addressed to all potential competitors. It is apparent from a combined reading of paragraphs 109, 110 and 346 of the statement of objections that, as in paragraphs 563 and 564 of the contested decision, the Commission finds that specific measures were addressed to Hanjin and Hyundai to enable them to enter the relevant market. Furthermore, it is apparent from paragraphs 112 and 346 of the statement of objections that the Commission finds, as in paragraph 565 of the contested decision, that measures were addressed by the TACA to all potential competitors

in order to neutralise potential competition both in the form of the conclusion of dual-rate service contracts and in the fact that the majority of the former structured TAA members did not compete for certain service contracts with NVOCCs.

148 In those circumstances, the applicants were able, upon reading the statement of objections, to comprehend that the Commission was alleging that they had altered the competitive structure of the market by adopting measures to induce potential competitors to join the TACA.

149 None of the arguments put forward by the applicants is capable of undermining that conclusion.

150 As regards, first, the allegedly structural nature of the abuse recorded in the statement of objections, having regard to the passages of the statement of objections cited above the applicants cannot seriously argue, as they did at length at the hearing, that the statement of objections criticised them merely for the 'objective fact' that they were structurally linked to the potential competitors and not for certain conduct towards the latter. Since the statement of objections finds that the potential competitors were induced to join the TACA by the conclusion of certain agreements with the TACA parties, the dual-rate service contracts offered by the TACA and the fact that the majority of the TACA parties did not compete for certain service contracts with NVOCCs, it clearly criticises them for certain conduct, since all the contested measures involve the TACA parties.

151 Furthermore, that the abuse is one of conduct appears expressly from the wording of the passages from the statement of objections cited above. Thus, paragraph 346 of the statement of objections expressly sets out the various steps taken by the TACA. Moreover, the same paragraph continues by noting that such steps constitute behaviour amounting to an abuse of a dominant position. Next, paragraph 109 of the statement of objections, concerning the accession of new members to the TACA, refers to arrangements 'with TACA' allowing new members to enter the trade without facing the competition normally to be expected in such circumstances. Finally, paragraph 112 of the statement of objections, in relation to dual-rate service contracts and the fact that the majority of former structured TAA members did not compete for certain service contracts with NVOCCs, expressly states that these are 'practices of the TACA' reflecting its ability to neutralise potential competition.

152 It is irrelevant in this regard that the contested decision, in finding the second abuse, no longer refers to certain structural links between the TACA parties and the potential competitors identified in the statement of objections. According to the case-law, the decision is not necessarily required to be an exact replica of the statement of objections (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 68). Thus, as long as it does not alter the nature of its case, the Commission may alter its assessment and withdraw certain complaints if necessary, in particular in the light of the responses to the statement of objections (see, to that effect, Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969, paragraphs 34 and 36, and *CB and Europay*, cited at paragraph 138 above, paragraphs 49 to 52). In the present case, the Commission was therefore perfectly entitled to withdraw its allegations as to the structural links between the TACA parties and potential competitors since that withdrawal did not result in the alteration of the nature of the case, the fact that the abuse was one of conduct being apparent from other evidence set out clearly and precisely in the statement of objections.

153 Second, as to whether the steps in question served as inducements, it is true that, as the applicants point out in their written pleadings, the Commission does not

expressly state in the passages of the statement of objections cited above that the TACA parties took steps to 'induce' potential competitors, to use the terminology of the contested decision. However, since it is apparent from the statement of objections that the Commission alleges that the applicants took steps to enable potential competitors, including Hanjin and Hyundai, to join the conference rather than enter the transatlantic trade as independent competitors, it impliedly, though necessarily, finds that the TACA parties induced those potential competitors to act in that way.

154 That finding is further apparent from the express wording of the statement of objections. Thus paragraph 109 of that statement refers to arrangements with the TACA which 'have allowed' new members to enter the transatlantic trade. More particularly, paragraph 110 of the statement of objections states that by the conclusion of slot-chartering agreements the TAA/TACA 'has been able' to ensure that Hyundai and Hanjin do not enter the market as independent lines. Similarly, in relation to dual-rate service contracts and the fact that the majority of former structured TAA members did not compete for certain service contracts with NVOCCs, paragraph 112 of the statement of objections states that those practices constitute the TACA's 'ability' to neutralise potential competition. In those terms the statement of objections, like the contested decision, manifestly criticises the TACA parties precisely for having adopted measures to induce potential competitors to join the TACA rather than enter the trade in question as independent competitors.

155 Third, as regards the fact that the specific measures addressed to Hanjin and Hyundai relied on in the contested decision no longer consist in the conclusion of certain agreements, but in the disclosure of confidential information to Hanjin on the TACA, the collective willingness of the TACA to enable Hanjin to build up a market share consistent with its slot capacity and in the fact that Hyundai obtained immediate access to service contracts, it suffices to state that that fact does not entail any alteration of the nature of the complaints alleged against the

applicants, since the Commission continues to allege that the TACA parties induced potential competitors, including Hanjin and Hyundai, to enter the market in question by joining the TACA rather than as independent competitors. At most, that fact raises the separate question whether the applicants ought to have been given the opportunity to comment on that new evidence intended to support the complaint in the statement of objections, which is the subject of a separate plea considered below at paragraphs 159 to 188.

156 In the light of the foregoing, it must therefore be concluded that the complaints relating to the second abuse recorded in the contested decision were already set out clearly and precisely in the statement of objections, so that the applicants were in a position, upon notification of the statement of objections, to understand the extent of those complaints. Therefore, it cannot be held that there was an infringement of the rights of the defence in that regard.

157 As for the allegation, in relation to the nature of the second abuse, that the Commission's position in the defence differs from that set out in the statement of objections and in the contested decision, it suffices to observe that, even if that were true, it does not affect the assessment of the legality of the contested decision. Even if the Commission ventured in the pleadings it lodged with the Court to alter the nature of the abuse alleged in the contested decision, the review of legality carried out by the Court in the context of the present action for annulment on the basis of Article 173 of the Treaty concerns solely the allegation of abuse as set out in the contested decision and not as set out in the defence lodged by the Commission. Consequently, the applicants' argument on that point must be rejected without its being necessary to decide whether in the defence the Commission did in fact alter the position it set out in the contested decision, as alleged.

158 For those reasons, the applicants' plea alleging infringement of the rights of the defence in relation to the nature of the case in respect of the second abuse recorded in the contested decision must be rejected.

(2) The documentary evidence relied upon in support of the second abuse recorded in the contested decision

159 In assessing the merits of the applicants' plea alleging infringement of the rights of the defence with regard to the documentary evidence relied upon in support of the second abuse, it must be observed at the outset that the documents upon which the applicants allege they were not afforded the opportunity to comment, namely the minutes of the meeting of 5 October 1995 of the TACA directors (PWSC 95/8, 'the PWSC 95/8 minutes'), Hanjin's letter to the TACA of 19 August 1994 ('Hanjin's letter of 19 August 1994'), the letter from Mr Rakkenes, the Chairman of the TACA and ACL, to Mr Rhee of Hanjin dated 30 January 1996 ('the TACA letter of 30 January 1996') and the TACA briefing paper of 15 February 1996 are reproduced, at least in part, in the section of the contested decision setting out the facts, at paragraphs 229, 230, 239 and 292, and then in the section containing the legal assessment in relation to Article 86, at paragraphs 561, 563 and 564.

160 It is apparent from paragraphs 561, 563 and 564 of the contested decision that those documents were used by the Commission for the purposes of the finding of the second abuse in support of the complaint, at paragraph 562, that 'the intention of the TACA parties was... to ensure that if a potential competitor wished to enter the market it would only do [so] after it had become a party of the TACA'.

161 Thus:

— the PWSC 95/8 minutes are cited to show that the immediate access to service contracts was a powerful inducement to Hyundai to enter the transatlantic trade as a TACA member (paragraphs 230 and 564 of the contested decision);

— Hanjin's letter of 19 August 1994 is cited to show that the disclosure of confidential information was a powerful inducement to Hanjin to enter the transatlantic trade as a TACA party and not as an independent carrier (paragraphs 229 and 563 of the contested decision);

— the TACA letter of 30 January 1996 is cited to show that the TACA intended to help potential competitors to enter the market as TACA members (paragraphs 292, 561 and 562) and

— the TACA briefing paper of 15 February 1996 is cited to show that the TACA's willingness to enable Hanjin to build up a market share consistent with its slot capacity in the trade reduced the commercial risks inherent in the entry to a new market and, accordingly, was a factor inducing Hanjin to enter the transatlantic trade as a TACA party (paragraphs 239 and 564 of the contested decision).

162 According to the case-law, regard for the rights of the defence requires that the undertaking concerned shall have been able to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25). Consequently, in principle only the documents cited or mentioned in the statement of objections are admissible evidence as against the addressee of the statement of objections (*AKZO*, cited at paragraph 95 above, paragraph 21; Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 55; and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 34). Moreover, as far as the documents appended to the statement of objections but not mentioned therein are concerned, they may, according to the case-law, be used in the decision as against the addressee of the

statement of objections only if that person could reasonably infer from the statement of objections the conclusions which the Commission intended to draw from them (*Shell*, cited above, paragraph 56, and *ICI*, cited above, paragraph 35).

163 In the present case, none of the documents in question is cited or mentioned in the statement of objections dated 24 May 1996, nor were they appended thereto. The Commission expressly confirmed this to be the case in reply to a question from the Court.

164 Three of the documents in question were disclosed by the applicants in response to requests for information sent by the Commission after the hearing of 25 October 1996, and, therefore, after the statement of objections. Thus Hanjin's letter of 19 August 1994, the TACA letter of 30 January 1996 and the TACA briefing paper of 15 February 1996 were sent by letter of 24 December 1996 in response to a request for information of 15 November 1996. The TACA letter of 30 January 1996 was also sent subsequently by letter of 7 February 1997 in response to a request for information of 24 January 1997. Although an extract of the PWSC 95/8 minutes was sent by the applicants by letter of 9 May 1996 in response to a request for information of 8 March 1996, so that the Commission was in possession of that extract when it issued the statement of objections, it is not in dispute that a full copy of those minutes was provided by the applicants after that statement was issued, by letter of 4 June 1996 in response to a request for information of 22 May 1996.

165 Whilst there is nothing to prevent the Commission from using new documents which it considers support its argument and which were obtained after the statement of objections was issued, the Commission must afford the undertakings concerned the opportunity of making known their views in that respect (*AEG*,

cited at paragraph 115 above, paragraph 29; *Buzzi Unicem*, cited at paragraph 115 above, paragraph 65; *Lögstör Rör*, cited at paragraph 115 above, paragraph 168).

166 It is not in dispute that, in the present case, the Commission did not expressly give the applicants the opportunity of making known their views on the four documents in question before using them in support of its complaints in the contested decision. In particular, it is not in dispute that the Commission did not inform the applicants of its intention to use those documents in support of its complaints and, therefore, that it did not inform the applicants of how it intended to use those documents or request the applicants to provide explanations as to their probative value.

167 As was stated above at paragraph 156, it is true that the statement of objections already set out the complaint that the applicants induced Hanjin and Hyundai to enter the transatlantic trade as TACA parties rather than as independent undertakings. Paragraphs 109 and 110 of the statement of objections were based in this respect on the slot-chartering agreements entered into by those two lines with the TACA parties. According to the Commission, those agreements enabled Hanjin and Hyundai to enter the market without having to face the competition which they would normally have had to face. The applicants were therefore in a position, in their response to the statement of objections, to reply to the Commission's complaint in that regard.

168 However, to the extent that, following the applicants' explanations in relation to paragraphs 192 to 206 of the statement of objections, the Commission chose to base this complaint no longer on the slot-chartering arrangements but on three of the four documents in question, namely the PWSC 95/8 minutes, Hanjin's letter of 19 August 1994 and the TACA briefing paper of 15 February 1996, it should, in principle, have allowed the applicants to comment on the relevance and probative value of those documents in support of that complaint. Whilst the Commission is perfectly entitled to redraft and supplement its arguments both of fact and of law in support of the complaints (*Irish Sugar*, cited at paragraph 152

above, paragraph 34), it cannot substitute three sources of evidence for one other, which it withdraws, without giving the undertakings concerned the opportunity to comment in a situation where, without those new sources of evidence, the complaint would not be made out.

169 The same is true of the complaint that the TACA induced potential competitors to join the TACA. It is true that that complaint appeared in the statement of objections, so that the applicants had the opportunity to make known their views in that regard. However, since the Commission abandoned certain evidence set out in the statement of objections and replaced it with one of the four documents in question, namely the TACA letter of 30 January 1996, it should, if it intended to rely on that evidence in support of the complaint, have given the applicants the opportunity to comment on its probative value in support of that complaint.

170 However, all the documents in question were provided by the applicants themselves and they all consist of written material generated either by the TACA itself or by the parties thereto, so that the content of those documents must be deemed to have been known to the applicants.

171 In those circumstances, it is apparent from the case-law that the documents in question must be regarded as evidence which may not be relied upon as against the applicants unless it is shown that the latter must have known the risk that the Commission might use the documents as evidence against them (*Shell*, cited at paragraph 162 above, paragraph 59). It is necessary to ascertain in that regard whether the applicants could reasonably infer the conclusions which the Commission intended to draw from them (see, to that effect, *Shell*, cited above, paragraph 56, and *ICI*, cited at paragraph 162 above, paragraph 35). It is apparent from the case-law that it is not the documents as such which are important but the conclusions which the Commission drew from them. If certain documents were not mentioned in the statement of objections, the undertaking

concerned was entitled to consider that they were of no importance for the purposes of the case. By not informing an undertaking that certain documents would be used in the decision, the Commission prevents it from putting forward at the appropriate time its view of the probative value of such documents (see to that effect *AEG*, cited at paragraph 115 above, paragraph 27, and *AKZO*, cited at paragraph 95 above, paragraph 21).

172 It is true that the Court of First Instance has already held that the rights of the defence are not infringed by the Commission's failure to disclose to an applicant a document which might contain exculpatory evidence where that document emanates from that applicant or was manifestly in its possession during the administrative procedure (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 248). However, that can in no circumstances apply to inculpatory documents. Whilst it is for the applicants to put forward upon their own initiative any exculpatory document, it is the Commission which bears the burden of proving infringements and must adduce evidence sufficient to establish the facts constituting the infringement (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79).

173 In order to ascertain whether the applicants could reasonably infer the conclusions which the Commission drew from the four documents in question in the contested decision, it is necessary to take account not only of the content of the statement of objections but also of subsequent circumstances from which such conclusions could be inferred — in the present case, the terms of the requests for information which led to the disclosure of the documents in question and the content of those documents.

174 First, as regards the contents of the statement of objections, whilst paragraph 109 thereof alleges that the TACA implemented certain arrangements enabling, inter

alia, Hanjin and Hyundai to enter the market without having to face the competition which those lines would normally have had to face, paragraph 110 merely states that Hanjin and Hyundai had been able to enter the market on a slot charter basis. On the other hand, the statement of objections is silent in that regard as to the TACA's having given Hyundai immediate access to service contracts or disclosed confidential information to Hanjin or as to its being willing to build up a market share for it compatible with its slot capacity on the trade.

175 In that context it must be held that the statement of objections did not contain any indication that immediate access to service contracts, the disclosure of confidential information and the willingness to build up a market share compatible with slot capacity on the trade were capable of amounting to measures which induced Hanjin and Hyundai to join the TACA.

176 Second, as regards the terms of the requests for information which led to the production of the documents in question, in the case of the PWSC 95/8 minutes, the extract of that document cited at paragraphs 230 and 564 of the contested decision was disclosed in response to a request for information of 8 March 1996, by which the Commission sought, inter alia, the disclosure of any document of the TACA or of one of the parties thereto concerning '(a) the issue of sharing vessels or space between TACA parties, on the one hand, and independent, non-conference carriers in the transatlantic trade on the other, (b) Hyundai's decision to join the TACA... in order to assist us to assess... [the] application for individual exemption of the TACA in its full economic and legal context'.

177 The express terms of the request for information in question make it plain that its purpose was to enable the Commission not to find any infringement of Article 86 of the Treaty but to consider the possibility of granting an individual exemption

under Article 85(3) of the Treaty. It is apparent in that regard from the wording of that request that the question of Hyundai's joining the TACA was raised in the context of the Commission's assessment of the issue of slot-chartering arrangements between the TACA parties and the independent shipping lines. It is not in dispute that Hyundai joined the TACA in 1995 on the basis of such an arrangement. It appears in that context that the disclosure by TACA of information concerning Hyundai's accession was intended to enable the Commission to assess the internal competition within the TACA, having regard to the requirement, for the grant of an individual exemption under Article 85(3) of the Treaty, that the agreement in question must not permit the elimination of competition.

178 It is not in dispute that after the TACA sent its response to that request for information on 9 May 1996 the Commission, by a request for information of 22 May 1996, requested the TACA, 'in the light of that reply', to disclose 'complete copies of the Minutes of the TACA Principals' Meetings held on 31 August 1995 and 5 October 1995'. Given the express reference to the TACA's reply to the previous request for information, and in the absence of any evidence to the contrary in the request for information of 22 May 1996, the latter request must have had the same purpose as the former, namely to enable the Commission to assess the internal competition within the TACA in the context of considering the conditions for granting an individual exemption laid down by Article 85(3) of the Treaty.

179 In those circumstances, it is not apparent from the wording of the requests for information which led to the disclosure of the PWSC 95/8 minutes that the Commission intended to use that document in support of the complaint that the TACA parties had infringed Article 86 of the Treaty, inter alia by inducing Hyundai to join the TACA. A fortiori it is not apparent from the wording of the requests for information in question that the Commission intended to use the document in question to support the finding that the TACA's giving Hyundai immediate access to service contracts served as an inducement to that shipping line to join the TACA.

180 Next, Hanjin's letter of 19 August 1994, the TACA letter of 30 January 1996 and the TACA briefing paper of 15 February 1996 were disclosed to the Commission in response to a request for information of 15 November 1996, by which the Commission sought the disclosure of any agreement between the TACA parties on Hanjin's accession to the TACA, and any document relating to independent action, TVRs, individual service contracts and other service contracts concluded by Hanjin 'in order to assist us to assess... [the] application for individual exemption of the TACA in its full economic and legal context and in particular to assist us in our examination of your client's reply to the statement of objections (in particular paragraphs 195 to 200 and 216 to 217)'.

181 It is thus apparent, again from the express terms of the request for information in question, that its purpose was to enable the Commission not to find any infringement of Article 86 of the Treaty but to consider the possibility of granting an individual exemption under Article 85(3) of the Treaty. At paragraphs 195 to 200, 216 and 217 of their response to the statement of objections, to which the request for information referred in stating its purpose, the TACA parties presented the Commission with certain evidence intended to show that Hanjin's entry to the transatlantic trade increased internal price competition within the TACA, given Hanjin's initiatives in relation to independent action, TVRs and individual service contracts. It is apparent from paragraphs 192 to 194 of the response to the statement of objections and from the title of that part of the response, 'Price competition within vessel sharing agreements (VSAs)', that the TACA parties sought by that evidence, by reference in particular to Hanjin's situation on the trade in question, to rebut the Commission's argument at paragraphs 106, 235 and 238 of the statement of objections that the slot-chartering arrangements entered into between the TACA parties and the independent shipping lines, in particular the one to which Hanjin was a party, had the effect of restricting price competition between the parties to such agreements and therefore between the conference members. At paragraphs 235 to 238 of the statement of objections the Commission considers whether the conditions for the withdrawal of block exemption laid down by Article 7 of Regulation No 4056/86, where the effects of an exempted conference are incompatible with Article 85(3) of the Treaty, in particular the lack of potential external competition, are met in the present case. It appears in that context that

by asking the TACA parties to disclose to it any agreement entered into between them concerning the accession of Hanjin and any document concerning price initiatives by Hanjin, the Commission's request for information sought to ascertain whether the TACA continued to qualify for block exemption under Regulation No 4056/86 and/or individual exemption, having regard in particular to the requirement in Article 85(3) of the Treaty that competition not be eliminated.

182 It is not in dispute that the TACA letter of 30 January 1996 was also disclosed in response to a request for information of 24 January 1997. According to the wording of that request, the Commission sought in the light of the TACA letter of 30 January 1996 previously disclosed to obtain copies of the correspondence between Mr Rhee and Mr Rakkenes concerning the TACA's pricing practices and the correspondence between Mr Rakkenes and the TACA or its members or any other document relating to 'pricing malpractices' which were the subject of the letter in question, in order to assess the TACA's response to the statement of objections 'and, in particular, their comments concerning the degree of internal competition within the TACA'. It is therefore apparent from the express wording of that request that, in common with the request of 15 November 1996, its sole purpose was to enable the Commission to assess whether the TACA qualified for individual exemption under Article 85(3) of the Treaty and, in particular, whether the requirement under Article 85(3) of the Treaty that competition not be eliminated was met.

183 In those circumstances, it must be held that it is not apparent from the wording of the requests for information which led to the disclosure of Hanjin's letter of 19 August 1994, the TACA letter of 30 January 1996 and the TACA briefing note of 15 February 1996 that the Commission intended to use those documents in support of the complaint that the TACA parties had infringed Article 86 of the Treaty, in the case of the first and the third of those documents, by inducing Hanjin to join the TACA, and in the case of the second of those documents, by inducing potential competitors to join the TACA. A fortiori it is not apparent from the wording of the requests for information in question that the Commission intended to use those documents to support the finding, first, that the disclosure of confidential information and the willingness to build up a market share compatible with slot capacity on the trade were measures which

induced Hanjin to join the TACA and, second, that the TACA had always intended to help potential competitors to enter the market as TACA members.

184 Third and finally, with regard to the content of the documents in question, for the reasons set out below at paragraphs 1279 to 1304 and 1311 to 1326, on the assessment of the merits of the pleas relating to the allegation of abuse of a dominant position, the conclusions which the Commission drew from those documents in the contested decision are not made out to the requisite legal standard by that content.

185 Clearly the applicants cannot be criticised for not having been able to draw from the content of the documents which they disclosed to the Commission conclusions which prove to be erroneous.

186 It follows from all the foregoing that neither the content of the statement of objections nor the terms of the requests for information which led to the production of the documents in question nor the content thereof enabled the applicants reasonably to infer the conclusions which the Commission drew from them to the detriment of the applicants in the contested decision.

187 In those circumstances it must be held that by relying on the four documents in question in support of the second abuse alleged against the applicants in the contested decision the Commission infringed the rights of the defence. Therefore those documents must be excluded as inculpatory evidence.

188 However, it is apparent from the case-law that, far from entailing the annulment of the entire decision, the exclusion of those documents is significant only if the objection made by the Commission in that respect could be proved only by

reference to those documents (Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, paragraph 71, and *Cimenteries CBR*, cited at paragraph 172 above, paragraph 364). That question falls within the assessment of the pleas concerning the merits of the Commission's findings in support of the allegation of abuse of a dominant position arising from the alteration of the structure of the market, which will be considered in the context of the third group of pleas concerning the allegation of infringement of Article 86 of the Treaty.

2. The purportedly new allegations of fact or law other than those relating to the second abuse

189 The applicants also allege that the Commission based allegations other than those relating to the second abuse on points of fact or law upon which they were not given the opportunity to comment.

190 They submit, first, in that regard that the contested decision contains new allegations concerning the lawfulness of joint service contracts, the fact that the TACA parties held a collective position and the fact that that position was a dominant one. Next, at the hearing, they submitted in response to a question from the Court on that point that the contested decision contains new allegations which arise from evidence disclosed in response to certain requests for information after the statement of objections was issued.

(a) Preliminary observations

191 According to the case-law, the decision is not necessarily required to be an exact replica of the statement of objections (*Van Landewyck*, cited at paragraph 152

above, paragraph 68). The Commission must be permitted in its decision to take account of the responses of the undertakings concerned to the statement of objections. It must be able not only to accept or reject the arguments of the undertakings concerned, but also to carry out its own assessment of the facts put forward by those undertakings in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains (*ACF Chemiefarma*, cited at paragraph 113 above, paragraph 92; Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 437 and 438; and *Irish Sugar*, cited at paragraph 152 above, paragraphs 34 and 36). Thus it is only if the final decision alleges that the undertakings concerned have committed infringements other than those referred to in the statement of objections or takes into consideration different facts that there will be an infringement of the rights of the defence (*ACF Chemiefarma*, cited at paragraph 113 above, paragraphs 26 and 94; and *CB and Europay*, cited at paragraph 138 above, paragraphs 49 to 52). That is not the case where the alleged differences between the statement of objections and the final decision do not concern any conduct other than that in respect of which the undertakings concerned had already submitted observations and are therefore unrelated to any new complaint (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* ('*PVC II*'), [1999] ECR II-931, paragraph 103).

192 In asserting that there was an infringement of the rights of the defence with regard to the complaints made in the contested decision, it is not sufficient for the undertakings concerned to point to the mere existence of differences between the statement of objections and the contested decision without explaining precisely and specifically why each of those differences constitutes, in the circumstances, a new complaint upon which they were not given the opportunity to comment (see, to that effect, *Irish Sugar*, cited at paragraph 152 above, paragraph 33). According to the case-law, an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case, since it depends essentially on the objections raised by the Commission in order to prove the infringement which the undertakings concerned are alleged to have committed (Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraph 70).

193 Furthermore, in order to determine whether the differences alleged are new complaints upon which the undertakings concerned should have been given the opportunity to comment, it is necessary to distinguish between differences which directly affect the legal assessments set out in the contested decision and those which affect the presentation of the facts therein.

194 In the first case, according to the case-law cited above, an infringement of the right to be heard can only be made out if the alleged differences between the statement of objections and the contested decision show that the latter contains allegations of fact or law which did not already appear in the statement of objections. On the other hand, if it is apparent from an examination of the statement of objections that the supposed new allegations of fact or law are in fact merely the restatement, redrafting or development, as the case may be, of a point already made in the statement of objections so as to respond to the observations of the undertakings concerned in their response to the statement of objections, there is no infringement of the right to be heard (*ACF Chemiefarma*, cited at paragraph 113 above, paragraph 92, *Suiker Unie*, cited at paragraph 191 above, paragraphs 437 and 438, and *Irish Sugar*, cited at paragraph 152 above, paragraphs 34 and 36).

195 In the second case, mere differences in the presentation of the facts between the statement of objections and the contested decision do not in principle show that the undertakings concerned have not had an opportunity to comment on the complaints made against them unless in the course of its legal assessment the Commission refers to them expressly, or even impliedly but obviously, in such a way that the factual matters in question may be regarded as the necessary basis for the legal assessment. The evidence mentioned in the contested decision in order to describe a fact or conduct but not used subsequently in order to make a finding of an infringement cannot be regarded as incriminating evidence against the undertakings in question (*Cimenteries CBR*, cited at paragraph 172 above, paragraph 387).

196 Finally, in any event, even if the decision contains new allegations of fact or law on which the undertakings concerned have not been given the opportunity to comment, the defect will only entail the annulment of the decision in that respect if the allegations concerned cannot be substantiated to the requisite legal standard on the basis of other evidence in the decision on which the undertakings concerned were given the opportunity to comment (Case T-86/95 *Compagnie générale maritime and Others* v *Commission* ('*FEFC*') [2002] ECR II-1011, paragraph 447).

197 It is in the light of those principles that the applicants' arguments should be considered.

(b) The new allegations of fact or law concerning the lawfulness of joint service contracts, the fact that the TACA parties held a collective position and the fact that that position was a dominant one

(1) Arguments of the parties

198 The applicants criticise the Commission for having based certain allegations in the contested decision on matters of fact or of law upon which they did not have an opportunity to comment. The allegations concern the compatibility of conference service contracts with Regulation No 4056/86 and Article 85(1) and (3) of the Treaty, the possibility of considering the applicants' position collectively and the actual holding of a collective dominant position by the applicants.

199 According to the applicants, the contested decision contains new findings of fact with regard to those allegations, including new construction of, or inferences from, facts and new findings of law which do not appear in the statement of objections.

200 The Commission points out that, according to the case-law, the final decision need not be a copy of the statement of objections (*Van Landewyck*, cited at paragraph 152 above, paragraph 68). Consequently, it contends that the Court should reject the applicants' argument on this point.

(2) Findings of the Court

201 It should be noted as a preliminary point that in order to challenge the contested decision the applicants merely list in their applications the paragraphs of the contested decision which, in their view, were not already set out in the statement of objections, before going on to claim that they were not afforded the opportunity to comment on the assessments or findings made in those paragraphs.

202 It is plain that in so doing the applicants have failed to state why, in the light of the specific circumstances of the present case, the alleged differences between the contested decision and the statement of objections constitute new complaints, with the result that the rights of the defence were infringed. At most the listing in the application shows that the contested decision is not an exact replica of the statement of objections as regards the aspects of that decision in issue. According to the case-law, the contested decision need not necessarily be an exact replica of the statement of objections as the Commission can change its argument in support of the complaints. Therefore, in order to prove an infringement of the rights of the defence, as stated at paragraph 192 above, the burden is on the

applicants to explain specifically how the assessments and findings in the contested decision in this case adversely affected them. In the absence of such explanations the Court can make no finding of infringement of the rights of the defence.

203 Even though this ground suffices for the applicants' arguments alleging that the Commission made new assessments or findings in the contested decision to be rejected, it must also be observed that in any event the examination of the differences alleged by the applicants does not reveal any infringement of the rights of the defence.

(i) The allegations concerning the lawfulness of joint service contracts

204 The applicants claim that several findings in the contested decision relating to joint service contracts are based on points of fact not referred to in the statement of objections.

205 First, in relation to the application of Regulation No 4056/86 to joint service contracts, the applicants submit first that the differences between the tariff and contractual arrangements set out at paragraphs 104 to 108 of the contested decision do not appear in the statement of objections.

206 Contrary to the applicants' submissions, however, two of the alleged differences, namely the right of members of an exempted conference under US law to take independent action on tariff rates (paragraph 104 of the contested decision) and the fact that in the case of contractual arrangements, unlike in tariff

arrangements, the price is not set out in the tariff (paragraph 108), already appeared in the statement of objections in footnote 3 at paragraph 12, and in paragraphs 64 and 58. On these points therefore the applicants' complaints have no factual basis.

207 It follows that the only new point in the contested decision upon which the applicants were given no opportunity to comment is the finding, at paragraph 106, that 'carriers operating under tariff arrangements are expected to hold themselves out to the public as common carriers'.

208 Paragraph 106, like the other paragraphs in question, appears solely in the section of the contested decision setting out the facts and is purely descriptive. Furthermore, that paragraph does not, any more than the other paragraphs in question, form the necessary basis for the finding at paragraphs 454 to 462 of the contested decision that, in contrast to the tariff, joint service contracts do not fall within the meaning of uniform or common freight rates for the purposes of Article 1(3)(b) of Regulation No 4056/86 and, therefore, do not qualify for block exemption under Article 3 of that regulation. That latter finding is not based on differences between the tariff and contractual arrangements set out at paragraphs 104 to 108 of the contested decision but on other points which were set out in paragraphs 206 to 208 of the statement of objections.

209 Next, the applicants allege that the analysis of loyalty arrangements set out in paragraphs 113 to 119 of the contested decision is new in several respects when compared with the statement of objections.

210 Contrary to the applicants' submissions, however, two of the four points set out in paragraphs 113 to 119 of the contested decision, namely, first, the fact that the definition of a service contract used by the US Shipping Act does not extend to

contracts for a percentage or portion of a shipper's cargo (paragraph 113 of the contested decision) and, second, the fact that loyalty arrangements are specifically referred to in Article 5(2) of Regulation No 4056/86 (paragraph 114 of the contested decision), were already set out in the statement of objections in footnote 15 at paragraph 60 and in paragraph 211. On these points therefore the applicants' complaints have no factual basis.

211 Furthermore, a third point made in this part of the contested decision, namely the fact that the Code of the United Nations Conference on Trade and Development (Unctad) recognises no form of contract between shippers and conferences other than loyalty contracts (paragraph 115 of the contested decision) was developed so as to take account of the arguments put forward by the applicants at paragraphs 281 to 283 of the response to the statement of objections.

212 It follows that the only new point in the contested decision upon which the applicants were given no opportunity to comment is the finding at paragraph 116 of the contested decision that there are three types of loyalty arrangement and the description of each of them at paragraphs 117 to 119.

213 Like the other paragraphs in question, those paragraphs appear in the section of the contested decision setting out the facts and are purely descriptive. Furthermore, those paragraphs do not form the necessary basis for the finding, at paragraph 463 of the contested decision, that, in contrast to loyalty contracts, service contracts do not qualify for block exemption under Article 3 of Regulation No 4056/86. That finding is based not on the points referred to in paragraphs 116 to 119 but on other points which were already set out in paragraph 211 of the statement of objections which was essentially reproduced in paragraph 463 of the contested decision.

214 Second, as regards the application of Article 85 of the Treaty to joint service contracts, the applicants consider, first, that the finding at paragraph 443 of the contested decision that, essentially, joint service contracts may restrict competition where there is an express or implied agreement not to enter into individual service contracts is a new complaint.

215 However, paragraph 202 of the statement of objections states that the TACA's prohibition of individual service contracts is contrary to Article 85(1) of the Treaty. Furthermore, paragraphs 200 and 201 of the statement of objections state that joint service contracts 'of the kind entered into by the TACA parties' also fall within that provision. Paragraph 82 of the statement of objections states that the TACA prohibited individual service contracts in 1994 and 1995. In the light of those statements in the statement of objections, the applicants were perfectly able to understand the complaint alleged against them on that point.

216 In any event, in so far as the applicants complain that the Commission based its assessments in the contested decision on reasoning which does not appear in the statement of objections, it suffices to point out that such reasoning does not form part of any new complaint since it does not refer to conduct other than that upon which the undertakings had already commented.

217 Next, the applicants submit that the application of Article 85(1) of the Treaty to joint service contracts of the kind they entered into is based on two allegations of fact made for the first time at paragraph 444 of the contested decision, namely, first, the proportion of individual service contracts entered into by former members of the TAA's Contract Committee and, second, the large number of slot-chartering arrangements.

218 It is clear, however, that the sole purpose of those allegations of fact is to support the conclusion at paragraph 443 that joint service contracts may restrict competition where there is an express or implied agreement not to enter into individual service contracts. It has been held at paragraph 215 above that, in the light of the statements at paragraphs 200 to 202 of the statement of objections, the applicants were perfectly able to understand the complaint alleged against them on that point. Consequently the fact that the applicants were not given the opportunity to comment on the factual allegations set out in paragraph 444 does not undermine the conclusion in paragraph 443 that those allegations were intended to support.

219 Finally, the applicants allege that the finding, at paragraphs 500 and 501 of the contested decision, that the prohibition of independent action on service contracts does not satisfy the requirements of Article 85(3) of the Treaty is new.

220 However, paragraph 203 of the statement of objections expressly states that that prohibition is not authorised by Regulation No 4056/86, so that, in the absence of individual exemption, it is prohibited by Article 85(1) of the Treaty. That paragraph of the statement of objections is the exact equivalent of paragraph 449 of the contested decision. Whilst it is true that the statement of objections does not address the grant of an individual exemption in favour of that prohibition, it is for the applicants to adduce the evidence to justify the grant of an individual exemption under Article 85(3) of the Treaty (see, inter alia, *VBVB and VBBB*, cited at paragraph 162 above, paragraph 52).

221 Consequently, since the statement of objections expressly referred to the fact that the prohibition of independent action restricted competition within the meaning of Article 85(1) of the EC Treaty, the applicants were able to understand the nature of the complaints made against them by the Commission and therefore the

burden was on them to adduce evidence in their response to the statement of objections proving that that prohibition did qualify for individual exemption under Article 85(3) of the EC Treaty.

222 It follows from the foregoing that the applicants' complaints alleging infringement of the rights of the defence with regard to the allegations concerning the lawfulness of joint service contracts must be rejected in their entirety.

(ii) The allegations that the TACA parties held a collective position

223 The applicants submit that in finding that there was a collective dominant position, the Commission relies on several points demonstrating the absence of internal competition which were not referred to in the statement of objections.

224 First, the applicants point out that the contested decision contains fresh allegations when compared with the statement of objections in that it describes the NVOCCs (paragraphs 158 to 161), finds that the US Shipping Act requires the TACA parties to publish their tariffs (paragraphs 174 to 176), states that TVRs are discounts on the tariff (paragraph 120) and asserts that there is no independent action on service contracts (paragraph 131).

225 It should be noted in that regard that those paragraphs of the contested decision appear in the section of the contested decision setting out the facts and are purely descriptive.

226 Furthermore, as to whether those paragraphs are the necessary basis for the legal assessments concerning the collective nature of the dominant position held by the TACA parties it should be noted that, as will be set out in more detail in the course of examining the pleas concerning the application of Article 86 of the Treaty, at paragraphs 521 to 531 of the contested decision the Commission considered that the position of the TACA parties should be assessed collectively on the basis of five factors, namely the TACA tariff (paragraph 526), the enforcement provisions adopted by the TACA (paragraph 527), the annual business plan published by the TACA (paragraphs 528 and 530), the TACA secretariat (paragraphs 528 and 529) and the consortia arrangements linking certain TACA parties (paragraph 531).

227 It follows that, of the points put forward by the applicants, only the fact that US law requires the publication of the tariff contributes to the necessary basis for the legal assessment in that, according to that assessment, the Commission relies on the tariff as being an economic link between the TACA parties. On the other hand, it is clear that the other factors put forward by the applicants are purely descriptive and form no part of the economic links referred to in paragraphs 521 to 531 of the contested decision.

228 On the question of the tariff, the Commission had already stated at paragraph 318 of the statement of objections that the enforcement provisions adopted by the TACA were intended to eliminate price competition between the parties to the conference, referring in this regard to paragraphs 16 and 17 of the statement of objections, in which it pointed out that the enforcement provisions adopted by the TACA enabled it, inter alia, to impose substantial fines on its members for infringement of the collective price-fixing arrangements. In those circumstances, the applicants were perfectly able to understand the extent of the complaint made against them in this regard.

229 Accordingly, this complaint must be rejected.

230 Second, the applicants claim that the contested decision contains fresh allegations at paragraphs 177 and 178 concerning the enforcement provisions adopted by the TACA.

231 It is true that paragraph 527 of the contested decision refers to enforcement provisions for the purposes of the finding of a collective dominant position. However, as stated above, that point is expressly mentioned as an economic link between the TACA parties at paragraph 318 of the statement of objections and is the subject of a detailed description at paragraphs 16 and 17 of the statement of objections.

232 The applicants' arguments on that point must therefore be rejected.

233 Third, the applicants claim that the contested decision contains fresh allegations at paragraphs 181 to 198 concerning restrictive agreements affecting the transatlantic trade, namely the consortia arrangements.

234 It is true that consortia arrangements are referred to at paragraph 531 of the contested decision for the purposes of the finding of a collective dominant position. However, those arrangements are expressly referred to as economic links between the TACA parties at paragraph 322 of the statement of objections and are the subject of a detailed description at paragraphs 94 to 106 of the statement of objections.

235 Furthermore, in so far as the applicants allege that the Commission referred in the contested decision to more arrangements of that type at paragraphs 182, 188 (Table 4), 190 and 191, or identified, at paragraphs 181, 192, 194, 220 (Table 5) and 221, additional effects on internal competition not mentioned in the

statement of objections, the applicants' criticisms are irrelevant. Since the statement of objections expressly states that consortia arrangements reinforce the economic links between the TACA parties, the applicants were perfectly able to understand the scope of the complaint made against them by the Commission. Thus, at paragraphs 192 to 196 of their response to the statement of objections, the TACA parties put forward various arguments to show that the consortia arrangements do not restrict internal competition. In those circumstances, the applicants cannot submit that the statement of complaints was not sufficiently clear on that point.

236 Moreover, it is not true to say that, in the contested decision, the Commission identified additional restrictive effects caused by the consortia arrangements entered into by the TACA parties.

237 Thus, first, at paragraph 181 of the contested decision the Commission states in general terms that consortia arrangements are likely to reduce competitive pressure within the TACA. The same idea is set out not only in the title itself of the relevant section of the statement of objections ('VII. Other restrictive arrangements affecting the Trans-Atlantic Trade'), but also in paragraph 101 which states that those arrangements contribute to coordination and discipline between their parties. The same finding also appears at paragraph 226 of the statement of objections.

238 Next, at paragraph 193 of the contested decision the Commission states: 'thus the effect of these agreements has been to restrict intra-TACA competition, particularly by their achievement of curtailment of independent action'. The same conclusion appears at paragraph 101 of the statement of objections.

239 Furthermore, at paragraphs 220 and 221 of the contested decision, the Commission compares the transatlantic trade with other trades to demonstrate how little independent action there is on the former. Paragraph 101 and footnote 69 at paragraph 224 of the statement of objections had already made such a comparison and it is in response to the applicants' arguments in paragraphs 168 to 191 of their response to the statement of objections that the examples cited in the statement of objections were developed in the contested decision.

240 Lastly, at paragraphs 193 and 194 of the contested decision, the Commission notes that consortia arrangements, because of the extensive use of space on other TACA parties' vessels, have the effect of restricting non-price competition between the TACA parties. The same idea is expressed at paragraphs 102 and 103 of the statement of objections.

241 In any event, paragraphs 526 to 530 refer to other links between the TACA parties, on which they stated their views, which already establish to the requisite legal standard, for reasons which will be set out in the course of considering the first part of the pleas relating to the application of Article 86 of the Treaty, that the TACA parties must be considered collectively for the purposes of applying Article 86 of the Treaty.

242 In those circumstances, the applicants' arguments alleging infringement of the rights of the defence on that point must be rejected.

243 Fourth, the applicants allege that the contested decision states for the first time, at paragraphs 214 to 219, that independent action is not proof of internal competition.

244 However, the statement of objections expressly states at paragraph 223 that the reduction in the notice time before independent action can be taken is unlikely to have a significant effect on internal competition. Furthermore, paragraph 224 of the statement of objections notes that there was no significant independent action on the trade in question in 1994 and 1995. Lastly, if the Commission developed that point further in the contested decision it was in response to the information supplied by the TACA parties at paragraphs 168 to 191 of the response to the statement of objections in order to prove that independent action demonstrates the existence of significant internal competition.

245 The applicants' arguments on that point must therefore be rejected.

246 Fifth and finally, the applicants submit that the Commission relies on two items of evidence, namely a letter from POL to Hanjin of 28 December 1995 and the TACA briefing paper of 15 February 1996, which are not referred to in the statement of objections.

247 The contents of the letter from POL to Hanjin are reproduced in part at paragraph 180 of the contested decision in the section setting out the facts in order to illustrate 'the spirit of cooperation within TACA'. As for the TACA briefing paper of 15 February 1996, the applicants allege in the context of the present pleas that the Commission did not afford them the opportunity to comment on the part of that paper cited at paragraph 129 of the contested decision, which states that independent action is 'a tool of last resort'.

248 Whilst those documents are not expressly relied upon by the Commission in support of its legal assessment in paragraphs 521 to 531 of the contested decision for the purposes of concluding that there was a collective dominant position, they are capable of supporting the finding, at paragraph 528, that the tariff and the

enforcement provisions adopted by the TACA had the purpose of substantially eliminating price competition between the TACA parties.

249 However, it is apparent from the contested decision that that finding is also based upon many other factors, in particular those set out at paragraphs 199 to 222, upon which the applicants did comment. For the reasons set out below at paragraphs 697 to 712, those factors suffice to show that the tariff and the enforcement provisions adopted by the TACA had the purpose of substantially eliminating price competition between the TACA parties.

250 Therefore, the applicants' arguments on that point must be rejected.

(iii) The allegations concerning the dominant nature of the TACA parties' position

251 First, the applicants submit that the correspondence cited at paragraph 271 and the conclusions drawn from it at paragraphs 271 and 273 of the contested decision were not referred to in the statement of objections.

252 At paragraphs 265 to 273 of the contested decision the Commission examines the actual external competition from operators of shipping lines transporting containerised cargo originating in or destined for the American mid-west to or from northern Europe via Canadian ports ('the Canadian Gateway'). At paragraph 271 of the contested decision, the Commission reproduces extracts of correspondence from the Canadian conference secretariat to members of the

Joint Inland Committee of those conferences which, in its view, demonstrates in particular that the members of the Canadian conferences had detailed knowledge of the pricing practices of the TACA parties. At paragraph 273 of the contested decision the Commission concludes that for the reasons set out in the preceding paragraphs, the market share of the TACA parties for services provided through the Canadian Gateway should be aggregated with the market share of the TACA parties for direct services and not treated as a distinct competitor.

253 It is true, as the applicants claim, that the statement of objections does not refer to the extracts of the correspondence cited at paragraph 271 of the contested decision.

254 In so far as the market share of the TACA parties for cargo passing through the Canadian Gateway was taken into account in determining the applicants' share of the relevant market, paragraphs 271 to 273 of the contested decision constitute the necessary basis for the legal assessment, at paragraph 533, that the market share of the TACA parties during the relevant period gives rise to a strong presumption of a dominant position.

255 However, at paragraph 50 of the statement of objections, the Commission had already clearly stated that:

'In the TAA decision, the Commission found that containerised cargo travelling between the United States and Northern Europe via Canadian ports (the Canadian Gateway) formed part of the same market as the direct trade. The Commission continues to hold that view.'

256 Furthermore, at paragraphs 51 to 55 of the statement of objections, the Commission sets out the reasons in support of that position.

257 Next, in response to those allegations in the statement of objections, the applicants submitted at paragraphs 15 to 17 of their response to the statement of objections that the competition faced by the TACA members' direct trade services from their transport services via the Canadian Gateway was demonstrated by the price data for the two types of transport and by a shipper's invitation to tender.

258 In those circumstances, the applicants were perfectly able upon notification of the statement of objections to understand the scope of the Commission's complaint in relation to the actual external competition from cargo passing via the Canadian Gateway since the extracts of the correspondence cited at paragraph 271 of the contested decision were intended solely to support the Commission's position following the applicants' criticisms in their response to the statement of objections.

259 Therefore, the applicants' arguments on that point must be rejected.

260 Second, the applicants allege that paragraphs 207 to 213 of the contested decision contain fresh allegations concerning the TACA's discriminatory pricing practices.

261 The assessments set out in paragraphs 207 to 213 of the contested decision clearly constitute the necessary basis for the legal assessment that the TACA parties held a dominant position. At paragraph 534 of the contested decision, the Commission considered that the presumption of a dominant position arising from the

TACA parties' market share was confirmed by the fact that those parties succeeded in maintaining a discriminatory price structure.

262 However, that assessment appears in full at paragraph 326 of the statement of objections.

263 In any event, paragraphs 207 to 213 of the contested decision, far from containing fresh allegations, merely clarify the extent to which the applicants are able to discriminate on price, in particular having regard to their submissions at the hearing before the Commission. This is so at paragraphs 209 and 210 of the contested decision, which are based on the comments of Mr Jeffries, the TACA General Manager, in response to a question from the Commission at that hearing.

264 In those circumstances, the applicants cannot maintain that the Commission infringed the rights of the defence on that point.

265 Third, and finally, the applicants allege that the Commission relied, at paragraphs 324 to 328 of the contested decision, on a fresh analysis of the TACA's prices in concluding, for the purposes of Article 86 of the Treaty, that the TACA was able regularly to increase prices between 1994 and 1996.

266 The assessments set out in paragraphs 224 to 328 of the contested decision constitute the necessary basis for the legal assessment that the TACA parties held a dominant position. At paragraph 543 of the contested decision, the Commis-

sion considered that the ability of the TACA parties to impose price increases was one factor demonstrating the existence of a dominant position.

267 Paragraphs 118 and 119 of the statement of objections had already stated, on the basis of the data provided by the ESC, that the TACA had increased prices significantly between 1993 and 1995. It is true that that factor is not set out as such in the statement of objections as evidence of the existence of a dominant position but appears in the section of that statement setting out the facts to describe the effects of the TACA. However, paragraph 243 of the statement of objections expressly states, in the course of examining the possible withdrawal of the block exemption pursuant to Article 7 of Regulation No 4056/86, that the fact that the TACA was able to maintain its market share between 1994 and 1996 in spite of significantly increasing prices suggests that the actual external competition was limited. Furthermore, in their response to the statement of objections, the TACA parties set out, at paragraphs 224 to 245 of that response, detailed figures showing the TACA prices for the period from 1994 to 1996.

268 In those circumstances, the applicants were perfectly able to understand the scope of the Commission's complaints on that point since the price analysis in the decision is a direct response to the allegations they made during the administrative procedure.

269 Therefore, the Commission did not infringe the rights of the defence on that point.

270 Examination of the alleged differences between the contested decision and the statement of objections thus reveals that the contested decision does not contain any new complaints and is not based on any new points upon which the applicants were not given the opportunity to comment in the response to the

statement of objections. Consequently, the applicants' arguments on that point must be rejected in their entirety.

(c) The new allegations of fact and law arising from the applicants' responses to certain requests for information after the statement of objections was issued

(1) Arguments of the parties

271 The applicants observe that whilst some of the requests for further information after the statement of objections was issued concerned matters covered by the statement of objections, others concerned entirely new matters. That is so in the case of the requests for information sent during the period for responding to the statement of objections and those sent after the response had been made.

272 Save for the statement of objections adopted on 11 April 1997, which was concerned solely with the notification of the 'hub and spoke' system, the Commission adopted no supplementary statement of objections and provided them with no opportunity to comment on the probative value of the information given to, or on the conclusions drawn from it by, the Commission (*Sarrió*, cited at paragraph 95 above, paragraphs 36 and 41). The applicants maintain that requests for information can never properly take the place of the adoption of a statement of objections.

273 Consequently, the applicants assert that the rights of the defence were infringed on that point.

274 The Commission submits that the contested decision is not based on any information or document provided by the applicants in reply to the requests for information in question. The Court should therefore reject the applicants' arguments on that point.

(2) Findings of the Court

275 By the present argument, the applicants allege that after the statement of objections was issued the Commission sent them requests for information raising new questions not covered by that statement and that it relied on information supplied in response to those requests to adduce new documentary evidence and to make new allegations against them in the contested decision.

(i) The admissibility of the plea

276 The present argument appears in the part of the application in which the applicants allege that the Commission sent them the statement of objections prematurely. It has already been stated at paragraph 122 above that, contrary to the applicants' argument, the fact that certain requests for information raised new questions and that the information provided in response thereto was used in the contested decision, even if that were established, in no way demonstrates that the statement of objections is unlawful.

277 However, it is apparent from the terms of the application on that point that the applicants also allege that the Commission infringed the rights of the defence by using in the contested decision documents and information disclosed in response

to requests for information after the statement of objections was issued which raise new questions, without having given them the opportunity to comment on the probative value of those documents and that information. After listing and describing the contents of the requests for information sent after the statement of objections was issued and comparing the latter with certain paragraphs of the contested decision, the applicants stress not only that some of the requests for information listed raise new questions not covered by the statement of objections, but also that 'save for the statement of objections adopted on 11 April 1997, which was concerned solely with the notified hub and spoke system, the Commission adopted no supplementary or revised statement of objections and provided the applicants with no opportunity to comment on the probative value of the information provided to, or on the conclusions drawn from it, by the Commission'.

278 In so far as that plea refers at least in part to the requests for information which gave rise to the applicants' disclosure of the four documents referred to at paragraph 159 above, it coincides with the pleas alleging infringement of the rights of the defence with regard to the allegedly new matters of fact or law relating to the second abuse which must be upheld for the reasons set out at paragraphs 163 to 187 above.

279 For present purposes, it is therefore necessary to consider that plea only in so far as it seeks a declaration that the rights of the defence were infringed in the case of information other than those four documents, disclosed in response to the requests for information in question.

280 In reply to a question from the Court seeking clarification of their application on this point, the applicants stated at the hearing that the purpose of this argument was thus not only to support the plea alleging that the statement of objections was premature, but also to raise a separate plea alleging infringement of the right to be heard on certain evidence disclosed in response to requests for information which the applicants claim was used by the Commission in the contested decision.

281 Under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to proceedings before the Court of First Instance by virtue of the first paragraph of Article 53 thereof, and under Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance, the application must contain, amongst other things, the subject-matter of the dispute, the forms of order sought and a brief statement of the pleas. Those particulars must be sufficiently clear and precise to enable the defendant to prepare the defence, and the Court of First Instance to rule on the application without further information, as the case may be. In order to guarantee respect for the adversarial system, legal certainty and sound administration of justice it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order in Case T-85/92 *de Hoe* v *Commission* [1993] ECR II-523, paragraph 20; judgment in Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 29; and the order of 12 March 2003 in Case T-382/02 *Partido Latinoamericano* v *Council*, not published in the ECR, paragraph 6).

282 As a preliminary point it should be noted that, in the present case, the four applications lodged by the applicants and the annexes thereto are unusually voluminous. Whilst there is as yet no restriction on the length of the pleadings or on the number of documents which may be lodged by applicants in support of an action for annulment under Article 173 of the Treaty, the burden is nevertheless upon applicants, having regard in particular to the formal requirements set out above, to confine their application to a reasonable length and, in any event, to set out clearly the pleas they raise in support of the form of order they are seeking as distinct from the points of fact and law put forward in support of that form of order which are not in themselves pleas.

283 The present plea appears in a single paragraph of the application, in the sub-section entitled 'Factual background' of the section setting out the allegation that the statement of objections was premature. There is no corresponding paragraph in the sub-section entitled 'Submissions of law' of that section of the application. Thus, in the concluding paragraph of that section, the applicants themselves summarise that section of their application by submitting that the

Commission has committed 'a breach of essential procedural requirements in the administrative procedure leading to the adoption of the [contested] decision in that [it] did not address a valid statement of objections to [them]', thus referring to the fact that the statement of objections was premature. On the other hand, they make no reference whatsoever in that conclusion to the infringement of their right to be heard on the evidence disclosed in response to requests for information.

284 Next, no other part of the application contains the plea in question. It does not appear in any event in the list of pleas ('submissions') which the applicants themselves drew up at the start of each of the relevant sections of the application to summarise the legal arguments developed therein. Above all, it does not appear in the list of pleas summarised in the introductory part of the section of the application concerning the infringement of the right to be heard.

285 In those circumstances, it must be found that the plea is not made in accordance with the first paragraph of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance, as interpreted by the case-law, and therefore is inadmissible.

(ii) The substance of the plea

286 For the sake of completeness, it is observed that the plea is unfounded.

287 According to the case-law, whilst the Commission is entitled, after issuing the statement of objections, to make fresh allegations in support of its complaints, it must give the undertakings concerned the opportunity of making known their views in that regard (*AEG*, cited at paragraph 115 above, paragraph 29). As already stated above, the same applies where the fresh allegations in question are based on evidence disclosed by the undertakings concerned in response to requests for information sent to them by the Commission, at least where those undertakings could not reasonably infer the conclusions which the Commission intended to draw from it (*Shell*, cited at paragraph 162 above, paragraph 56).

288 However, in the present case, in so far as the present plea may be inferred from the application, it appears merely to compare the subject of each request for information after the statement of objections was issued with the paragraphs of the contested decision relating to that subject in order to allege that the evidence disclosed in response to some of those requests for information, namely those raising new questions as compared with the statement of objections, was used in the contested decision without their being given the opportunity to comment thereon. In so doing the applicants manifestly do no more than advert, in general and imprecise terms, to the possibility that some of the evidence disclosed in response to the requests for information in question engendered new complaints in the contested decision, without at any stage explaining precisely how that evidence adversely affected them.

289 Although that ground alone already suffices to justify rejecting the present plea, it should also be stated that none of the arguments put forward by the applicants demonstrates that evidence disclosed in response to the requests for information in question was used in the contested decision in infringement of the rights of the defence. Indeed, the Commission has not used in the contested decision documents or information disclosed in response to the requests for information

after the statement of objections was issued which they consider raise new questions, namely those of 22 May, 11 July, 17 July, 8 August, 12 September, and 8 November 1996 and 12 February, 13 February, 15 May, 19 June and 2 October 1997.

The request for information of 22 May 1996

290 As the applicants rightly state, it is apparent from the request for information of 22 May 1996 that its purpose was to elicit information concerning the meetings of the TACA Principals, the TACA code of conduct, Transatlantic Associated Freight Conferences and the correspondence between MSC and Hyundai.

291 Apart from the PWSC 95/8 minutes discussed above in the assessment of the specific pleas concerning the second abuse, it does not appear that other evidence disclosed in response to the request for information of 22 May 1996 was used by the Commission in infringement of the rights of the defence in support of its complaints in the contested decision.

292 Therefore, the applicants' arguments on that point must be rejected.

The request for information of 11 July 1996

293 It is apparent from the request for information of 22 May 1996 that it sought information about service contracts, market conditions, the EIEIA and the extra capacity introduced on the market.

294 With regard, first, to service contracts, the applicants' responses to that request provided the Commission with detailed information concerning the TACA service contracts and individual service contracts for 1996, in particular on price, unilateral action, minimum quantity requirements and the transfer of cargo to TVRs by shippers party to service contracts.

295 The applicants submit first that the Commission used some of that information at paragraphs 127 to 155 of the contested decision.

296 Those paragraphs however, which appear in the section of the contested decision setting out the facts, merely describe the mechanism of service contracts. Since that description does not in any case constitute the necessary basis of the complaints referred to in the legal assessment of the contested decision, it cannot in itself adversely affect the applicants.

297 Next, the applicants point out that paragraphs 551 to 558 of the contested decision allege, in the context of the first abuse, that they abused their dominant position by imposing restrictions on access to and the contents of service contracts. They also point to the fact that the contested decision states, at paragraph 540, that service contracts constitute a barrier to entry for the purposes of concluding that the TACA holds a dominant position and, at paragraph 564, that the TACA abused its dominant position, in the context of the second abuse, by according Hyundai immediate access to service contracts.

298 First, in relation to the first abuse, it is not apparent from paragraphs 551 to 558 of the contested decision, which contain the Commission's legal assessment on that point, that the evidence disclosed in response to the request for information of 11 July 1996 was used in support of that complaint. The Commission's

analysis is essentially based on the terms of the TACA agreement concerning service contracts, which were notified to the Commission as possible restrictions on competition within the meaning of Article 85(1) of the Treaty, and the scope of which was clarified in response to various requests for information which are not challenged under the present complaint. Finally, it should be noted that the statement of objections already set out clearly, at paragraphs 73 to 87, 341 and 342, the abuse alleged in respect of service contracts so that the applicants were in a position to comment in that regard.

299 Next, with regard to the barriers to entry constituted by service contracts, it suffices to note that the statement of objections expressly mentions that point, at paragraph 331, amongst those establishing the existence of the TACA's dominant position. The applicants cannot therefore maintain that there was an infringement of the rights of the defence on that point.

300 Finally, as regards Hyundai's immediate access to service contracts, paragraph 564 of the contested decision shows that, as already stated above, the Commission did not use any evidence other than the PWSC 95/8 minutes in support of that complaint. It is not in dispute that that document was disclosed by the applicants not in response to the request for information of 11 July 1996, but in response to those of 9 and 22 May 1996, discussed in the above assessment of the specific pleas concerning the second abuse.

301 Second, with regard to market conditions, the applicants submit that their responses to the request for information of 11 July 1996 were used in the contested decision at paragraphs 85 to 88 on the shares of the relevant market for maritime transport, at paragraph 533 concerning the TACA's collective dominant position and at paragraphs 217 to 221 concerning internal price competition within the TACA.

302 It is true that the data on market shares mentioned in paragraphs 85 to 88 of the section of the contested decision setting out the facts led the Commission to find, at paragraph 533, that the market shares held by the TACA in 1994, 1995 and 1996 on the trade in question gave rise to a strong presumption of a dominant position. However, paragraph 325 of the statement of objections already stated that the TACA holds a dominant position having regard to its market share on the transatlantic trade. Furthermore, the data on market share disclosed in response to the request of 11 July 1996 merely update the data previously disclosed, in response to requests for information which have not been challenged.

303 As for the analysis of internal competition set out in paragraphs 217 to 222, in the course of which the Commission states that independent action on the trade in question is insignificant, it was noted above at paragraph 244 that the statement of objections already intimated at paragraphs 223 and 224 that independent action did not constitute proof of internal competition and that the contested decision did not infringe the rights of the defence on that point.

304 Third, as regards the EIEIA, the applicants point out that the Commission describes that agreement at paragraphs 35 to 46 of the contested decision and concludes, at paragraphs 425 to 436, that it does not enable an exemption to be granted for the collective fixing of inland rates.

305 Paragraphs 425 to 436 of the contested decision correspond exactly to paragraphs 269 to 277 of the statement of objections. Thus, only the documents cited by the contested decision in footnote 124 at paragraphs 430, 434 and 435 in support of the findings in relation to the EIEIA, namely the Interim Report of the

Multimodal Group and the comments of the TACA Chairman and of a member of the executive board of Hapag Lloyd, are referred to in footnote 70 at paragraph 271 and in paragraphs 275 and 276 of the statement of objections.

306 Moreover, it is apparent from paragraph 426 that the contested decision makes no finding on whether the EIEIA restricts competition, so that the applicants' responses to the request for information in question cannot be relied upon against them in this regard. It is true that the contested decision concludes that the EIEIA does not enable exemption to be granted for the collective fixing of prices for inland transport provided as part of intermodal transport. However, according to the case-law, it is for the applicants to show that an agreement meets the requirements of Article 85(3) of the Treaty (*VBVB and VBBB*, cited at paragraph 162 above, paragraph 52) and therefore to adduce all necessary evidence in support of their request. Accordingly, even if the Commission had used a document supplied in response to a request for information in order to reject their application for individual exemption, they cannot maintain that there has been an infringement of the rights of the defence. In any event it does not appear that paragraphs 425 to 436 of the contested decision use any of the evidence disclosed by the applicants in response to the request for information in question.

307 Fourth, with regard to the extra capacity introduced on the market, it suffices to state that the applicants themselves acknowledge that the contested decision does not refer expressly to the responses they gave. The applicants are content to cite paragraphs 364 and 367 which, on their own admission, merely contain a general assertion that Regulation No 4056/86 is not intended to deal with problems brought about by liner shipping operators as a result of uneconomic investment decisions.

308 On those grounds the applicants' arguments concerning the request for information of 11 July 1996 must be rejected in their entirety.

The requests for information of 17 July and 8 August 1996

309 The requests for information of 17 July and 8 August 1996 concerned potential contracts between the TACA and the UASC and APL lines with a view to their joining the TACA.

310 The applicants' responses to those requests for information were manifestly not used by the Commission in the contested decision, however. The applicants admit as much themselves in any case, since in the context of the pleas concerning the application of Article 86 of the Treaty, they complain precisely that the Commission did not take into account their responses on that point whereas in their view those responses contradict the Commission's allegation that the TACA induced potential competitors to join the TACA. Clearly, if the Commission chooses not to take account of the applicants' responses in the contested decision, that cannot be a case of infringement of the rights of the defence; it can only — if anything — be insufficient proof of the infringements alleged, which goes to the substance of the contested decision.

311 Therefore the applicants' arguments on that point must be rejected.

The request for information of 12 September 1996

312 The request for information of 12 September 1996 was sent not to the TACA but to members of the Canadian conferences, to elicit information concerning the functioning of those conferences. The applicants allege that the evidence disclosed in response to that request for information was used at paragraphs 265 to 273 of the contested decision, in which the Commission concludes that the market share

of the TACA parties for services provided through the Canadian Gateway should be aggregated with the market share of the TACA parties for direct services and not treated as that of a competitor.

313 If those considerations were taken into account in determining the TACA's market share and therefore adversely affect the applicants by contributing to the finding that they held a dominant position, which the applicants do not claim, it suffices to point out that paragraphs 324 to 338 of the statement of objections explain fully why the TACA holds a dominant position. The statement of objections emphasises the TACA's market share of the relevant trade at the outset in paragraph 325. Paragraphs 51 to 53 of the statement of objections expressly state that the TACA's market share via the Canadian ports must be taken into account in determining the TACA's market share of the transatlantic trade.

314 It should also be noted that it was in response to the arguments put forward at paragraphs 9 to 26 of the response to the statement of objections, namely that the TACA parties which are members of the Canadian conferences compete with the TACA, that the Commission sent that request for information and set out its arguments in that regard at paragraphs 265 to 273 of the contested decision. According to the case-law, taking account of an argument put forward by an undertaking during the administrative procedure, without having given it the opportunity to express an opinion in that respect before the adoption of the final decision, cannot as such constitute an infringement of defence rights, especially where taking account of the argument does not alter the nature of the complaints against it (*Irish Sugar*, cited at paragraph 152 above, paragraph 34).

315 For all of these reasons, the applicants' arguments concerning the request for information of 12 September 1996 must be rejected.

The request for information of 8 November 1996

316 By the request for information of 8 November 1996, the Commission sought to obtain a copy of the service contracts relating to the transatlantic trade for 1992, 1993, 1996 and 1997.

317 It suffices to note in this regard that the applicants merely refer in the application to the purpose of that request without even comparing it with the relevant paragraphs of the contested decision or setting out other observations as to the complaints they make.

318 In those circumstances, it cannot be found that there was an infringement of the rights of the defence on that point.

The request for information of 12 February 1997

319 By the request for information of 12 February 1997, the Commission sought information concerning the costs borne by the applicants with regard to port-to-port maritime services.

320 It suffices to note in this regard that, as with the previous request for information of 8 November 1996, the applicants merely refer in the application to the purpose of that request without even comparing it with the relevant paragraphs of the contested decision or setting out other observations as to the complaints they make in that regard. It is furthermore not apparent from an examination of the contested decision that the information disclosed in response to that request was used.

321 In those circumstances, it cannot be found that there was an infringement of the rights of the defence on that point.

The request for information of 13 February 1997

322 By the request for information of 13 February 1997, the Commission sought to elicit the applicants' average revenues per TEU for the period from 1992 to 1996. The applicants submit that that data was used at paragraphs 316 to 319 of the contested decision, in which the Commission found that a number of the TACA parties were able to increase average revenue per TEU without suffering any loss in market share.

323 It is true that the data supplied in response to the request for information in question was used, as the applicants point out, at paragraphs 316 to 319 in the section of the contested decision setting out the facts. However, even if it were shown (and the applicants do not submit this) that the observations as to the applicants' average revenue per TEU support the complaint, at paragraph 543, that the TACA parties were able 'to impose regular, albeit modest, price increases' thus demonstrating, according to the Commission, that they hold a dominant position on the relevant market, it is apparent from paragraphs 307 and 308 that those observations were intended to answer the TACA parties' allegation, in their response to the statement of objections, that the service contract rates for 1996 were lower than those for 1994 and that tariff rates were reduced in August 1996.

324 In those circumstances, the applicants cannot maintain that there has been an infringement of the rights of the defence on that point.

The request for information of 15 May 1997

325 The request for information of 15 May 1997 sought information on agreements between the TACA parties, especially consortia arrangements. The applicants note that the contested decision deals with those arrangements at paragraphs 181 to 198, which refer to Annex IV of the contested decision, which lists all the agreements in force. They submit that paragraph 531 of the contested decision relies on those agreements to establish the existence of further economic links between the TACA parties justifying the assessment of their market position collectively for the purposes of Article 86 of the Treaty.

326 Paragraph 322 of the statement of objections already expressly stated, in the context of the assessment of the collective dominant position held by the TACA, that the economic links between the TACA parties are reinforced by the consortia arrangements, referring in that regard to the description of those agreements set out in paragraphs 94 to 106. Those paragraphs of the statement of objections, and Annex 2 to which they refer, correspond essentially to paragraphs 181 to 198 and Annex IV of the contested decision.

327 In those circumstances, the applicants cannot submit that they did not have an opportunity to comment on the complaint made against them in the contested decision.

The request for information of 19 June 1997

328 Since the request for information of 19 June 1997 had the same purpose as that of 13 February 1997, for the reasons set out above at paragraphs 322 to 324, the

applicants cannot maintain that there has been an infringement of the rights of the defence on that point.

The request for information of 2 October 1997

329 By the request for information of 2 October 1997, the Commission sought to obtain a copy of the TACA tariff.

330 It suffices to note in this regard that the applicants merely refer in the application to the purpose of that request without even comparing it with the relevant paragraphs of the contested decision or setting out other observations as to the complaints they make. Furthermore, since the tariff constitutes the very essence of the conference system established by the applicants in respect of which they qualify for block exemption under Article 3 of Regulation No 4056/86, it cannot as such adversely affect them.

331 Therefore, the applicants cannot maintain that there has been an infringement of the rights of the defence on that point.

(d) Conclusion

332 It follows from the foregoing that the applicants' pleas seeking to prove that there were new allegations in the contested decision can be upheld only to the extent that they allege that the Commission based the second abuse on documents on

which they were not afforded the opportunity to comment. The remainder of the applicants' pleas must be rejected.

Part two: infringement of the right of access to the file

333 In the second part of their pleas alleging infringement of the rights of the defence, the applicants advance three pleas by which they submit that the Commission has infringed their right of access to the file. The first plea alleges failure to disclose the minutes of meetings between the Commission and the complainants. The second plea alleges failure to disclose the minutes or any other record of a meeting between the member of the Commission responsible for competition matters and the ESC. Finally, the third plea alleges that the file is incomplete.

A — Preliminary observations

334 According to the case-law, the right of access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their views effectively on the conclusions reached by the Commission in its statement of objections (see, inter alia, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 89; Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75; *Cimenteries CBR*, cited at paragraph 95 above, paragraph 38; Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraph 59; Case T-221/95 *Endemol* v *Commission* [1999] ECR II-1299, paragraph 65; *Cimenteries CBR*, cited at paragraph 172 above, paragraph 142; and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 169). Access to the file is thus one of

the procedural safeguards intended to protect the rights of the defence and to ensure, in particular, that the right to be heard can be exercised effectively (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 30, and *LR AF 1998*, cited above, paragraph 169).

335 The Commission thus has an obligation to make available to the undertakings involved in proceedings under Article 85(1) or Article 86 of the Treaty all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (Case T-175/95 *BASF* v *Commission* [1999] ECR II-1581, point 45).

336 It is, however, apparent from the case-law of the Court of Justice and the Court of First Instance that, in order to determine the exact scope of the Commission's obligation and the legal consequences of an infringement thereof, a distinction must be drawn between inculpatory evidence and exculpatory evidence.

337 With regard to inculpatory evidence, observance of the rights of the defence requires, according to the case-law, that the undertaking concerned must have been able to express its views effectively on the evidence used by the Commission to support its allegation of infringement (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7; *VBVB and VBBB*, cited at paragraph 162 above, paragraph 25; and *AKZO*, cited at paragraph 95 above, paragraphs 21 and 24). In that regard the obligation to allow access to the file relates merely to the evidence ultimately relied on in the decision and not to all the complaints which the Commission may have expressed at any stage of the administrative procedure.

338 According to the case-law, if the Commission is found to have relied in the contested decision on documents that were not in the investigation file and were not communicated to the applicants, those documents should be excluded as evidence (*Cimenteries CBR*, cited at paragraph 172 above, paragraph 382). In that case it is necessary therefore to check whether the complaint made in the final decision is sufficiently made out by the other inculpatory evidence relied on to which the applicants did have access.

339 With regard to exculpatory evidence, it is apparent from the case-law that in the *inter partes* procedure laid down by the regulations on the application of Articles 85 and 86 of the Treaty, in particular Regulation No 17, Regulation No 1017/68 and Regulation No 4056/86, it cannot be for the Commission alone to decide which documents are of use for the defence of the parties involved in a proceeding for infringement of the competition rules (*Solvay*, cited at paragraph 334 above, paragraph 81). In particular, having regard to the general principle of equality of arms, it is not acceptable for the Commission alone to decide whether or not to use against the applicants documents to which they did not have access, so that they were unable to decide whether or not to use them in their defence (*Solvay*, cited at paragraph 334 above, paragraph 83, and Case T-36/91 *ICI*, cited at paragraph 192 above, paragraph 111).

340 According to the case-law, where it is established that during the administrative procedure the Commission did not disclose to the applicants documents which might have contained exculpatory evidence, there will be an infringement of the rights of the defence only if it is shown that the administrative procedure would have had a different outcome if the applicant had had access to the documents in question during that procedure (see, inter alia, Case T-7/89 *Hercules*, cited at paragraph 95 above, paragraph 56, and *Solvay*, cited at paragraph 334 above, paragraph 98). Where those documents are in the Commission's investigation file, such an infringement of the rights of the defence is unconnected with the manner in which the undertaking concerned conducted itself during the administrative procedure (*Solvay*, cited above, paragraph 96). By contrast, where the exculpatory documents in question are not in the Commission's

investigation file, an infringement of the rights of the defence may be found only if the applicant had expressly asked the Commission for access to those documents. If the applicant does not do so, his right in that respect is barred in any action for annulment brought against the final decision (*Cimenteries CBR*, cited at paragraph 172 above, paragraph 383).

341 It is in the light of those principles that the applicants' pleas under this part must be examined.

B — The plea alleging failure to disclose the minutes of the meetings between the Commission and the complainants

1. Arguments of the parties

342 The applicants submit that the Commission infringed the rights of the defence in refusing to provide them with any information regarding the occurrence or subject-matter of oral exchanges between the Commission's staff and the complainants.

343 They state that, following their request to place on the file a telephone attendance note recording a conversation between the Commission's staff and the complainants' legal advisers concerning the confidentiality of certain information contained in the statement of objections, together with any other notes recording telephone conversations with the complainants, the Commission informed them in a letter dated 7 August 1996 that no attendance note had been made of the telephone conversation in question and that, in any event, the Commission was under no obligation under the case-law to make available that type of note, which constituted a document purely internal to that institution.

344 The applicants maintain that the Commission had a duty to give them access to all documents concerning discussions between the Commission and the complainants regarding substantive or procedural matters. They consider in this context that the medium through which the Commission receives information or arguments from complainants should not determine the scope of their right to be informed about such matters. If such information or documentation was obtained in written form, the correspondence with the complainants would have been placed on the file and made available to the applicants. It is likely that such correspondence would contain exculpatory material or at least be relevant to the applicants' defence. In a letter of 21 October 1996, the Commission's Hearing Officer confirmed that the applicants would have a formal right to comment 'should the intervening parties introduce new evidence or raise new issues or facts upon which the defendants have had no previous opportunity to comment'.

345 The applicants consider that it cannot be claimed that an attendance note recording a conversation between the Commission and the complainants constitutes a non-disclosable internal document. In so far as such a note records the existence of the conversation, the contents of the complainants' comments, the contents of comments by staff of the Commission and any conclusions drawn by them from those contacts, only the last item could fall within the category of confidential internal documents. The remainder of the note would constitute a purely factual record of matters which should therefore be disclosed to the applicants.

346 The applicants consider that the judgments in Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865 and *BPB Industries and British Gypsum*, cited at paragraph 334 above, relied on by the Commission in its letter of 7 August 1996 are irrelevant since they do not address the issue whether the Commission is required to place on the file attendance notes recording conversations between its staff and the complainants.

347 Consequently, the applicants consider that the rights of the defence were infringed since the file to which they were given access was incomplete.

348 The Commission considers that it did not infringe the applicants' right of access to the file and therefore that the Court should reject the complaint.

2. Findings of the Court

349 In a letter of 7 August 1996 sent in reply to a letter from the TACA's representative of 1 August 1996, the Commission informed the latter that it had not drawn up any minutes of the discussions that it had had with the complainants during the administrative procedure, and the applicants did not contradict that.

350 Accordingly, the present plea amounts to a claim that, in competition matters, the right of access to the file for the undertakings concerned requires the Commission to draw up such minutes.

351 According to the case-law cited at paragraph 334 above, the right of access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file. There is by contrast no general duty on the part of the Commission to draw up minutes of discussions in meetings or telephone conversations with the complainants which take place in the course of the application of the Treaty's competition rules.

352 It is true that if the Commission intends to use in its decision inculpatory evidence provided orally by a complainant it must make it available to the undertakings to which the statement of objections is addressed by creating a written document to

be placed in the file (see, to that effect, *Endemol*, cited at paragraph 334 above, paragraphs 83 to 91). The practice of using information provided orally by third parties cannot be permitted to infringe the rights of the defence.

353 However, in the present case, the applicants merely require access, in a general and abstract way, to the minutes of discussions between the Commission and third parties without stating how the inculpatory evidence relied upon by the Commission in the contested decision was determined by those discussions.

354 According to the case-law, an infringement of the rights of the defence cannot be founded on a general argument but must be examined in relation to the specific circumstances of each particular case (*Solvay*, cited at paragraph 334 above, paragraph 60). As already stated at paragraph 334 above, the right of access to the file in competition cases is recognised solely so that the undertakings concerned can express their views effectively on the conclusions reached by the Commission in its statement of objections. Since the applicants have not, subject to the specific plea considered below, identified any complaint set out in the statement of objections and subsequently in the contested decision which was based on evidence provided orally by the complainants and to which they did not have access, they cannot maintain that the Commission infringed the rights of the defence on that point.

355 The only discussion mentioned by the applicants in support of the present complaint, which gave rise during the administrative procedure to the request for access contained in the letter of 1 August 1996, concerns a telephone conversation between Commission staff and the representative of the ESC which, it is not in dispute, was initiated by the applicants so that the Commission could check whether information contained in the statement of objections was

confidential. Given its purpose, such a telephone conversation manifestly does not infringe the rights of defence, a fortiori since it was initiated by the applicants themselves.

356 In those circumstances, the applicants have adduced no evidence to show that the discussions with the complainants enabled the Commission to substantiate certain complaints against them in the contested decision. Therefore, the fact that there is no minute of those discussions in the file to which the applicants had access during the administrative procedure does not amount to an infringement of the rights of the defence.

357 Contrary to the applicants' claim, it is not true that if the Commission had communicated with the complainants exclusively in writing, that correspondence would necessarily have been in the file to which they had access. Where the Commission decides on the basis of a complaint to initiate infringement proceedings, the undertakings concerned must respond not to the complaint but to the statement of objections. According to the case-law cited at paragraph 337 above, matters put forward by the complainants which are not used in the statement of objections do not constitute complaints to which the applicants have to respond. The rights of the defence cannot therefore be infringed if the applicants were not given the opportunity to respond to them.

358 Furthermore, in so far as the applicants submit that certain exculpatory evidence was not disclosed to them, whilst they refer in general terms to the possibility that such exculpatory evidence was provided to the Commission by third parties, at no time, whether during the administrative procedure or in the course of the present action, have they specified the exculpatory evidence sought or adduced the slightest indication that such evidence existed and therefore of its relevance for the purposes of the present case. In those circumstances, since according to the case-law infringements of the rights of the defence must be examined in relation to the specific circumstances of each particular case (Case T-36/91 *ICI*, cited at paragraph 192 above, paragraph 70), there can be no finding of infringement of the right of access to the file on that point (see, to that effect, *Baustahlgewebe*, cited at paragraph 334 above, paragraph 93).

359 It follows from the foregoing that the present plea alleging failure to disclose the minutes of meetings between the Commission and the complainants must be rejected.

C — The plea alleging failure to disclose the minutes or any other record of a meeting between the member of the Commission responsible for competition matters and the ESC

1. Arguments of the parties

360 The applicants allege that the Commission infringed the rights of the defence during the procedure by refusing to disclose to them the existence or subject-matter of contacts between it and the complainants and, in particular, by refusing to confirm or deny a press report of a meeting between the complainants and the member of the Commission responsible for competition matters which took place in December 1995 and at which the possibility of the TACA obtaining exemption for inland rate-fixing was reportedly discussed. The applicants consider that that meeting may have had a material influence on the Commission's position in that respect, and in particular on its decision to adopt a supplementary statement of objections on the withdrawal of immunity. It was therefore vital to their defence to know what was discussed.

361 The applicants claim that, before that meeting was held in December 1995, the Commission had admitted in principle that an agreement on equipment interchange would enable it to exempt their practice of inland transport price fixing as part of the TACA. In the Maritime Transport Report it presented to the Council on 8 June 1994, the Commission took the view that a flexible arrangement between shipowners for the exchange of containers would bring benefits for shippers and could render intermodal rate-making authority eligible for individual exemption. The Commission even invited liner conferences to

notify such arrangements to it. The applicants therefore drafted an agreement on equipment interchange, the EIEIA, with the express intention of promoting and facilitating the interchange of empty containers. The EIEIA is the kind of arrangement described in the report, and at several meetings the Commission intimated that the EIEIA could in principle, and provided that the conditions for exemption contained in Article 85(3) of the Treaty were satisfied, justify the grant of individual exemption for intermodal transport price fixing. Similarly, during the interlocutory proceedings resulting in the order of the President of the Court of First Instance of 22 November 1995 in Case T-395/94 R II *Atlantic Container Line and Others* v *Commission* [1995] ECR II-2893, the Commission, referring to the EIEIA, stated that the notification and implementation of arrangements consistent with Article 85(3) of the Treaty and with the report of June 1994 would clearly render unnecessary any further proceedings and that it had therefore taken no steps to prepare a decision withdrawing immunity.

362 On the other hand, in the supplementary statement of objections dated 1 March 1996 on withdrawal of indemnity, and without the reasons for the change in the Commission's position being apparent from either the supplementary statement of objections or the file, the Commission claims that the EIEIA could never, regardless of the benefits it could actually bring, make the exercise of authority to fix intermodal transport rates eligible for exemption. The applicants state that, in response to specific questions they put to the Commission asking whether the services and/or members of the Commission had held meetings with shippers' organisations or their representatives in relation to the notification of the EIEIA or matters relating to the change in the Commission's policy, the Commission merely indicated, by letters of 21 March and 10 April 1996, that 'no meetings or formal discussions [had] taken place between officials of the Directorate-General for Competition and individual shippers, shippers' organisations or their representatives, or indeed other third parties, in relation to the notification of the EIEIA'. However, the applicants point out that an article which appeared in the press in June 1996 reported a meeting held in December 1995, that is, after notification of the EIEIA but before the supplementary statement of objections, between the member of the Commission responsible for competition matters and one of the complainants, namely the ESC. There was discussion of the ESC's document 'Liner Shipping — Time for Change', which referred to the TAA and

the TACA and called for the withdrawal of the exemption for liner conferences. The applicants explain that they put a number of specific questions to the Commission because in the file there was no copy of the ESC's document and no indication that the meeting had taken place. They stress that the Commission did not answer their questions, neither confirming nor denying that the meeting had taken place, and merely indicated that the ESC document had not been placed on the file because it was a lobbying document and was publicly available.

363 The applicants point out that the Commission is under an obligation to make available to the undertaking concerned copies of all documents which are or might be relevant to its defence, whether or not they are relied upon by the Commission as inculpatory and whether or not they are clearly exculpatory (*Solvay*, cited at paragraph 334 above, Case T-36/91 *ICI*, cited at paragraph 192 above, and Case T-37/91 *ICI*, cited at paragraph 188 above). In accordance with the general principle that documents received from third parties must be disclosed to the defence (*BPB Industries and British Gypsum*, cited at paragraph 346 above), the Commission must disclose to the undertaking concerned any information received by it from complainants whether or not it relies on that information. Similarly, the *audi alteram partem* principle and the principle of equality of arms cannot be observed unless the undertaking is in a position to defend itself against the whole of the case developed by the Commission and unless it has genuine access to the same information. Having regard to the Commission's decision-making process, it cannot be maintained that discussions between the complainants and the member of the Commission responsible for competition matters, who has a central role in determining competition policy and who was actively involved in the progress of the present case, are of no interest to the defence.

364 The applicants submit that if a discussion concerning any of the issues in this case took place between the member of the Commission responsible for competition matters and one of the complainants, information about such a discussion might be relevant to their defence. According to the minutes, such a discussion took

place in the course of the administrative procedure and the ESC's position was that exemption ought not to be granted for intermodal authority under any circumstances. Moreover, that meeting is the only occurrence which might have explained the change in the Commission's policy. It was therefore an infringement of the applicants' rights of defence that the Commission refused to provide them with any of this information. As a general point, it is not permissible for the Commission, including the member of the Commission responsible for competition matters, not to be required to disclose to the undertakings concerned the fact that a meeting with the complainants took place, its subject-matter and any documents or other information provided by the complainants.

365 The applicants maintain that it follows from admissions made by the Commission in its defence in Case T-18/97 concerning the fact that a meeting between the member of the Commission responsible for competition matters and the ESC took place and the subject-matter of that meeting that, as a matter of law, there was a clear infringement of the rights of the defence.

366 The applicants state that it is apparent from the case-law (*Solvay*, cited at paragraph 334 above, and Case T-36/91 *ICI*, cited at paragraph 192 above) that the defendant undertakings have a right of access to all relevant documents in the Commission's possession, subject only to the protection of legitimate confidential information, and that relevance is for the undertakings, and not the Commission, to determine. The notion of inculpatory or exculpatory documents cannot help to define the scope of a defendant's right of access to the file.

367 The applicants claim that, contrary to the Commission's submission, they are therefore entitled to have access to information received from third parties which has prompted the Commission to take a position against the applicants, even if it is not expressly relied upon by the Commission in so doing.

368 Seen in that light, the information in the present case about the meeting was manifestly relevant to the applicants' defence. First, it is apparent that the ESC sought to persuade the Commission to end inland rate-fixing. Second, it could be inferred from the statements made by the member of the Commission responsible for competition that he was sympathetic to those representations. Third, the adoption of the supplementary statement of objections after the meeting constituted a change in the Commission's policy. Fourth, the supplementary statement of objections disregarded the agreement with the Commission concerning the method of notification of the EIEIA and the encouragement given by the Commission to the introduction and development of the EIEIA. The implication that the Commission was 'prompted' (see the defence in Case T-18/97, paragraph 57) by the ESC at this meeting to adopt the supplementary statement of objections confirms the importance of these issues to the rights of the defence.

369 The applicants point out that they would have had access to the ESC's representations had they been made in writing in the normal way. The fact that the representations were made orally should not defeat their defence. It is also inconceivable that the Commission does not have in its possession any notes or record of the meeting.

370 The applicants therefore maintain that the Commission should make available all notes and minutes of the meeting between the Commission and the ESC and all notes and minutes of any other meetings or contacts between (i) any member of the Commission's staff, the member of the Commission responsible for competition matters, members of his or her office, any other members or member of any other member's office and (ii) any third party concerning any of the issues in the present case.

371 The Commission considers that it has not infringed the applicants' right of access to the file and therefore that the Court should reject the present complaint.

2. Findings of the Court

372 In so far as by the present plea the applicants allege in general terms that the Commission failed to disclose the minutes of meetings between the Commission and third parties it must be rejected for the reasons set out in paragraphs 349 to 359 above.

373 It is necessary at this stage therefore to examine the present plea only in so far as it alleges that the Commission failed to disclose to the applicants any information concerning a meeting between Mr Van Miert, the member of the Commission responsible for competition matters at the time of the relevant facts, and the ESC, the shippers' association and intervening party in the present action, during which the ESC gave the Commission a document entitled 'Liner Shipping — Time for Change' ('the meeting in question').

374 According to the applicants, even if the information about the contested meeting, in particular the fact that it was held, its purpose, the minutes drawn up on that occasion and the notes thereon, does not expressly support the Commission's complaints, it is useful for their defence, having regard to the fact that that meeting influenced the Commission's decision not to grant them an individual exemption in respect of the collective price-fixing agreement for inland transport services provided as part of intermodal transport. In that regard, the applicants point out that shortly after that meeting, on 1 March 1996, the Commission adopted a supplementary statement of objections withdrawing immunity from fines in respect of that agreement, whereas before that meeting, following the notification of the EIEIA agreement, the Commission was favourably inclined in that regard.

375 By the present plea, the applicants thus submit essentially that the Commission should have given them access to evidence which, even if it is not expressly used

to support the complaints relating to the collective price-fixing agreement for inland transport services provided as part of intermodal transport, led it to raise those complaints against them, that evidence being useful for their defence since it is likely to show the reasons for which the Commission raised those complaints.

376 As a preliminary point, it must be remembered that access to the file is not an end in itself but is intended to protect the rights of the defence (*Cimenteries CBR*, cited at paragraph 172 above, paragraph 156). In particular, with regard to access to inculpatory evidence, it is apparent from the case-law cited at paragraph 337 above that observance of the rights of the defence requires only that the undertaking concerned must have been able to express its views effectively on the evidence used by the Commission in the decision to support its allegation of infringement. The right of access to the file is therefore observed if the undertaking concerned was given the opportunity to comment on the complaints made against it after becoming acquainted with the inculpatory evidence used by the Commission in support of those complaints, and that evidence must appear in the Commission's investigation file.

377 It follows that, in determining whether the right of access to inculpatory evidence in the file has been observed, the relevant question is not why the Commission raised a complaint or what underlies that complaint but solely whether the complaint in the final decision is based on inculpatory evidence which was disclosed to the undertakings which are the subject of the infringement procedure. The right of access to the file cannot therefore be understood as intended to enable the undertakings concerned to examine the process by which the Commission arrived at its conclusions (see, to that effect, the order in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1986] ECR 1899, paragraph 16). Since the right of access to the file is not an end in itself, but is intended to protect the rights of the defence, the Commission is under no obligation to disclose to the undertakings concerned the inculpatory evidence upon which it does not rely in its decision in support of the complaints.

378 It is in the light of those principles that the arguments put forward by the applicants in the context of the present plea should be examined.

379 In so far, first, as the applicants allege that the Commission did not disclose to them even that the meeting in question took place and its purpose, it should be noted that during the administrative procedure, notwithstanding the applicants' repeated requests, the Commission systematically refused to confirm or deny, as is apparent from its letters of 15 March, 21 March, 10 April and 26 April 1996 to the TACA's representatives, that the meeting in question took place. However, in the context of the present action, it asserts in its defence that 'it is no secret' that that meeting took place, so that it is now not in dispute between the parties that the meeting in question took place on 4 December 1995.

380 In response to the applicants' requests for information on that point, the Commission sent the TACA on 16 and 24 July 1996 two requests for information requiring the production of the document 'Liner Shipping — Time for Change' cited by the applicants in their requests for access to the file. However, it is not in dispute that the ESC handed over that document to Mr Van Miert during the meeting in question, so that the Commission was in possession of that document when those two requests for information were sent.

381 However, in the context of the present plea alleging infringement of the right of access to the file it is necessary merely to check whether the applicants were able to express their views effectively on the evidence used by the Commission to support its complaints — in the present case, the evidence leading to the refusal to grant an individual exemption for the collective price-fixing agreement for inland transport services provided as part of intermodal transport.

382 Neither the fact that the meeting in question took place nor its purpose is such as to constitute evidence capable of substantiating the complaints made in the contested decision. For the reasons set out above it is irrelevant, as regards access to the inculpatory evidence contained in the Commission file, that disclosure of the fact that such a meeting had taken place and of its purpose might have been

useful for the applicants' defence during the administrative procedure. In any event, the applicants do not maintain that the existence of the meeting or its purpose could have been used by them as exculpatory evidence.

383 Therefore observance of the TACA parties' right of access to the file did not require the Commission to inform the applicants of the existence of the meeting in question and the purpose thereof.

384 Second, in so far as the applicants allege that the Commission did not disclose the minutes of the meeting in question and any notes thereon, it should be noted at the outset that in response to a written question from the Court on that point the Commission stated, without being contradicted by the applicants during the hearing, that its staff had kept no minutes or notes of the meeting in question.

385 As stated above at paragraph 351, the right of access to the file in competition cases is intended solely to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file. There is by contrast no general duty on the part of the Commission to draw up minutes of meetings with the complainants which take place in the course of the application of the Treaty's competition rules.

386 It is true that if the Commission intends to use in its decision inculpatory evidence disclosed by a complainant, even oral, it must, as stated above at paragraph 352, make it available to the undertakings to which the statement of objections is addressed by creating a written document to be placed in the file (see, to that effect, *Endemol*, cited at paragraph 334 above, paragraphs 83 to 91). However,

in the present case, the applicants do not allege that the Commission did not disclose to them evidence substantiating the complaints, but merely that it did not disclose evidence which might have led it to raise certain complaints against them.

387 It suffices to point out that the right of access to the file is intended solely to enable the undertakings concerned to express their views effectively on the evidence used by the Commission to support its complaints in the contested decision, in the present case the evidence which led to the refusal to grant an individual exemption for the collective price-fixing agreement for inland transport services provided as part of intermodal transport. Consequently, the inculpatory evidence supplied by the ESC, which might have led the Commission to refuse to grant such an exemption, only had to be disclosed to the TACA parties in the exercise of their right of access to the file if that evidence was in fact relied upon by the Commission in support of the complaints on that point in the contested decision.

388 However, that is not the case.

389 First, the only document which has been shown to have been handed over in the course of the contested meeting is that entitled 'Liner Shipping — Time for Change'. It is not in dispute between the parties that the applicants had access to that document during the exercise of their right of access to the file. Furthermore, it is not apparent from paragraphs 425 to 436 of the contested decision, by which the Commission refuses to grant an individual exemption for the collective price-fixing agreement for inland transport services provided as part of an intermodal transport operation, that that document was used in support of the Commission's complaints. Furthermore, that document was a lobbying document, in which the complainant essentially claims that the block exemption scheme for liner conferences laid down by Regulation No 4056/86 should be abolished. There can be no doubt, and indeed it is not in dispute, that such a

document does not *per se* contain any inculpatory evidence which could have been used in any relevant way by the Commission in support of the refusal to grant an individual exemption for the price-fixing agreement for inland transport services provided as part of intermodal transport.

390 Next, it is not apparent from paragraphs 425 to 436 of the contested decision that the refusal to grant an individual exemption for the agreement in question is based, even in part, on inculpatory evidence which was provided perhaps orally by the ESC to the Commission during the meeting in question and to which the applicants did not have access. According to paragraph 433 of the contested decision, the applicants made no attempt to show that joint price-fixing was indispensable to the EIEIA or to any benefits which may flow from that arrangement. It is apparent from the contested decision that the Commission based that finding on the Interim Report of the Multimodal Group presented to Mr Van Miert on 6 February 1996 (footnote 124 at paragraph 430), the comments of Mr Rakkenes, Chairman of the TACA and ACL, in the October 1995 edition of *American Shipper* (paragraph 434) and the comments of Mr Casjens, executive board member of Hapag Lloyd, reported in the *Journal of Commerce* of 6 December 1995 (paragraph 435). First, the applicants do not claim that that inculpatory evidence was provided by the ESC to the Commission during the meeting in question, and second, they do not deny that they had access to that evidence in the exercise of their right of access to the file, so that even if the Commission had relied on inculpatory evidence supplied by the ESC at that meeting in support of the complaints in question, those complaints would continue to be based on other evidence to which the applicants do not deny they were given access and the merits of which they do not dispute.

391 Furthermore, in so far as the applicants allege that the Commission was influenced by inculpatory evidence put forward by the ESC during the meeting in question, without however relying upon it expressly in the statement of objections and then in the contested decision, it must be observed that the applicants adduce no specific evidence whatsoever to show that such evidence was put forward. Moreover, the rights of the defence were sufficiently protected

by the fact that the applicants were given the opportunity to comment on the inculpatory evidence mentioned in the statement of objections. The inculpatory matters put forward by a complainant before the adoption of the statement of objections, whether mere arguments or documentary evidence, if not relied on in the statement of objections do not constitute complaints to which the undertakings concerned have to respond, so that they do not have to be disclosed to them in the exercise of their right of access to the file.

392 Contrary to the applicants' claim, it is not true that if the evidence provided by the ESC had been presented in writing rather than orally at a meeting, it would necessarily have been in the file to which they had access. As already stated above at paragraph 357, where the Commission decides on the basis of a complaint to initiate infringement proceedings the undertakings concerned must respond not to the complaint but to the statement of objections. Matters set out in the complaint but not used in the statement of objections do not constitute complaints to which the applicants have to respond. The rights of the defence cannot therefore be infringed by the fact that the applicants were not given the opportunity to comment thereon.

393 Furthermore, according to the case-law, in a proceeding under Article 86 of the Treaty the Commission may in any event refuse access to the correspondence with third parties by reason of its confidential nature, since an undertaking to which a statement of objections has been addressed, and which occupies a dominant position in the market, may adopt retaliatory measures against a competing undertaking, a supplier or a customer who has collaborated in the investigation carried out by the Commission (Case T-65/89 *BPB Industries and British Gypsum*, cited at paragraph 334 above, paragraph 33, confirmed in Case C-310/93 P *BPB Industries and British Gypsum*, cited at paragraph 346 above, paragraph 26).

394 Finally, and in any event, the minutes or notes which the Commission may have made of the meeting with the complainant — *quod non* — would be internal documents which, according to settled case-law, do not in principle have to be

disclosed to third parties exercising their right of access to the file (Case T-65/89 *BPB Industries and British Gypsum*, cited at paragraph 334 above, paragraph 33; *BASF*, cited at paragraph 335 above, paragraph 45; Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai Speciali Terni* v *Commission* [2001] ECR II-3757, paragraphs 46 and 47; *Cimenteries CBR*, cited at paragraph 172 above, paragraphs 196 and 420; and *LR AF 1998*, cited at paragraph 334 above, paragraph 170). That restriction on access to internal documents is justified by the need to ensure the proper functioning of the institution concerned when dealing with infringements of the Treaty competition rules.

395 In the light of the foregoing, it must be held that the Commission's failure to draw up minutes of the meeting in question did not deprive the applicants of the opportunity to acquaint themselves, in the exercise of their right of access to the file, with the inculpatory evidence on which the complaints made by the Commission in the contested decision are based.

396 Furthermore, the applicants do not claim that certain evidence relating to the meeting in question could have been used by them as exculpatory evidence. In any event, even if the plea were to be interpreted in that way, the applicants do not identify the exculpatory evidence in question and have not adduced any evidence of its existence and therefore of its usefulness for the purposes of the present case. In those circumstances, since according to the case-law infringements of the rights of the defence must be examined in relation to the specific circumstances of each particular case (Case T-36/91 *ICI*, cited at paragraph 192 above, paragraph 70), there can be no infringement of the right of access to the file on that point (see, to that effect, *Baustahlgewebe*, cited at paragraph 334 above, paragraph 93).

397 In those circumstances, the present plea alleging infringement of the right of access to the file must be rejected.

D — The plea alleging that the file is incomplete

1. Arguments of the parties

398 Lastly, the applicants submit that the contested decision should be annulled for the sole reason that they have raised serious doubt as to the completeness of the file, in so far as the materials absent from the file might explain the Commission's approach in the contested decision.

399 The Commission considers that the present plea is generalised and contends that the Court should reject it for the same reasons as it rejects the preceding pleas.

2. Findings of the Court

400 As is apparent from the analysis of the preceding pleas, the applicants' submission that the Commission did not disclose to them certain inculpatory evidence relied upon in support of the complaints mentioned in the contested decision, which was provided to it orally by third parties in the course of meetings, is wrong. Accordingly, the applicants have failed to establish that there is a serious doubt that the Commission's file is complete.

401 In any event, contrary to what the applicants claim, the Commission's reliance in the contested decision on inculpatory documents that were not in the investigation file and were not disclosed to them does not in itself entail the

annulment of that decision as a whole. According to the case-law cited at paragraph 338 above, it is still necessary in that case to verify the extent to which the complaints made in the final decision are sufficiently made out by the other inculpatory evidence relied on to which the applicants did have access.

402 Therefore, the present plea must be rejected.

Part three: infringement of the principles of sound administration, objectivity and impartiality

403 Under the third part of the pleas alleging infringement of the rights of the defence, the applicants allege that the Commission infringed the principles of sound administration, objectivity and impartiality, first, with regard to the conduct of the administrative procedure, second, with regard to the assessment of the facts, evidence and relevant questions and third, with regard to the assessment of the fines. The applicants claim that for these reasons the contested decision should be annulled.

404 As a preliminary point it should be noted that the guarantees afforded by the Community legal order in administrative proceedings include, in particular, the principle of sound administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 34; Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649, paragraph 93; and Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 99).

405 It is therefore necessary in the present case to consider whether the applicants' complaints show that the Commission infringed that principle.

A — The conduct of the administrative procedure

1. Arguments of the parties

406 The applicants consider that the conduct of the fact-finding procedure shows that the Commission prejudged the outcome of its administrative investigation. In support of that complaint they point, first, to the fact that the Commission's statement of objections was sent prematurely, and second, to the fact that the Commission began to draft the contested decision before the conclusion of the fact-finding procedure. The applicants rely in that respect on the letter addressed to them by the Hearing Officer two years before the adoption of the contested decision, on 12 November 1996, in which it was stated that members of the Commission's staff were working on the draft decision.

407 The applicants point out that this prejudice of the outcome of the investigation is apparent from the threats of fines the Commission made throughout the administrative procedure. In support of that complaint, the applicants refer first to the Commission's statements, reported in the press, concerning the procedure for the withdrawal of immunity from fines in respect of collective price-fixing for inland transport services as part of intermodal transport. The applicants claim that it is apparent from those statements that the Commission had already shown at the time that it intended to impose fines on the applicants in the TACA case, notwithstanding the suspension order of 10 March 1995 in Case T-395/94 R. Thus, in the press release issued on the adoption of the statement of objections concerning the withdrawal of immunity, the Commission stated that 'the TACA parties have chosen to notify an arrangement which, they clearly know, is unlawful following the decisions of the Commission'. Furthermore, as regards the allegations of abuse of a dominant position, the applicants refer to various

articles and press releases which show that the Commission regarded the imposition of fines under Article 86 of the Treaty as a means of circumventing the immunity from the imposition of fines under Article 85 of the Treaty for which the applicants qualified as a result of notifying the TACA.

408 The Commission contends that the Court should reject the applicants' arguments on that point.

2. Findings of the Court

409 The applicants consider that the conduct of the administrative procedure shows that the Commission prejudged the outcome of its investigation. They rely on the argument that the statement of objections was premature, on the fact that the drafting of the contested decision began prior to the hearing before the Commission and on the threats of fines made by the Commission during the administrative procedure.

(a) The prematurity of the statement of objections

410 The applicants allege essentially that the further requests for information sent shortly before and after the adoption of the statement of objections ('the relevant requests for information') show that in the statement of objections the Commission prejudged the final outcome of the investigation. They also point in this context to the large number of those requests and of the questions contained therein.

411 First, as regards the applicants' allegation that the very fact of sending the relevant requests for information shows that in the statement of objections the Commission prejudged the final outcome of the investigation, it has already been held above at paragraph 116, in the course of examining the first part of the present pleas alleging infringement of the rights of the defence, that since the statement of objections is not a measure recording the Commission's final assessment of the lawfulness of the practices in question but a purely preparatory measure setting out the Commission's provisional findings, which it may revisit in the final decision, the Commission is perfectly entitled, in order in particular to take account of the arguments or other evidence put forward by the undertakings concerned, to continue with its factual investigation after the adoption of the statement of objections by sending further requests for information with a view to withdrawing certain complaints or adding others if appropriate.

412 Therefore, far from providing evidence of any prejudice on the part of the Commission against the applicants, the sending by the Commission of the relevant requests for information constitutes conduct inherent in the adversarial nature of the administrative procedure under the Treaty's competition rules, attesting, on the contrary, to the Commission's willingness to examine carefully and impartially all the relevant aspects of the individual case in order, in particular, to be able to adopt a decision on the applicants' application for exemption in full knowledge of the facts.

413 Consequently, the mere fact that in the present case the Commission sent the TACA parties numerous further requests for information shortly before and after the adoption of the statement of objections does not demonstrate that the Commission infringed the principles of sound administration, objectivity and impartiality.

414 Furthermore, the review of legality carried out by the Court in the context of an action for annulment on the basis of Article 173 of the Treaty is not of the statement of objections but of the final decision adopted thereafter. According to

the case-law, the statement of objections may not in any case be the subject of an action for annulment (*IBM*, cited at paragraph 96 above, paragraph 21). Therefore, even if the Commission had shown in the statement of objections that it was prejudiced against the applicants, such prejudice could only vitiate the contested decision if it was manifested in that decision. The applicants do not show that to be the case here (see, to that effect, *ABB Asea Brown Boveri*, cited at paragraph 404 above, paragraph 105).

415 Finally, and in any event, even if the prejudice alleged by the applicants were manifested in the contested decision, such prejudice does not constitute an infringement of the rights of the defence capable of leading to annulment of the contested decision but must be examined in connection with the review of the assessment of the evidence or of the statement of reasons for the decision (see, to that effect, *ICI*, cited at paragraph 188 above, paragraph 72).

416 For those reasons, the applicants' arguments alleging that in the statement of objections the Commission prejudged the final outcome of the investigation must be rejected.

417 Second, as regards the large number of requests for information, it is common ground between the parties that between 22 May 1996, two days before the adoption of the statement of objections, and 16 September 1998, when the contested decision was adopted, the Commission sent 32 requests for information containing more than 100 questions to the TACA parties. It is also common ground that several of those requests for information were sent during the period allotted to the TACA parties to reply to the statement of objections, namely between 24 May 1996, when the statement of objections was adopted, and 6 September 1996, when the TACA parties sent their response to the statement of objections.

418 The sending of a large number of requests for information after the adoption of the statement of objections may affect the effective exercise by the undertakings concerned of their right to comment on the complaints made against them. According to the case-law cited at paragraph 404 above, it is for the Commission to ensure that the administrative procedure is conducted with due care. It has been held that the Commission's requests for information must comply with the principle of proportionality and the obligation imposed on an undertaking to supply information should not be a burden on that undertaking which is disproportionate to the needs of the inquiry (*SEP*, cited at paragraph 119 above, paragraph 51).

419 Therefore it is necessary to consider whether in the present case the sending of the relevant requests for information imposed a disproportionate burden on the applicants such as to infringe the rights of the defence. It is necessary in that regard to take account of the content of those requests for information, the context in which they were sent and their purpose.

420 It is apparent from an analysis of the relevant requests for information that they can be grouped essentially into eight categories.

421 First, one request for information, that of 22 May 1996, was sent two days before the statement of objections. However, that request sought to obtain mere clarification and further information in respect of the information disclosed by the applicants on 9 May 1996 in response to a request for information of 8 March 1996, so that it cannot reasonably be considered to have placed a disproportionate burden on the applicants. Furthermore, it is apparent that the fact that the request at issue was sent two days before the adoption of the statement of objections arose from the applicants' own conduct since the information which formed the subject of the questions in the relevant request should, according to the request for information of 8 March 1996, have been provided by 25 March

1996, but, because of various extensions of time sought by the applicants, was only finally disclosed on 9 May 1996, two months after the Commission's initial request.

422 Second, four requests for information dated 16 October 1996 and 12 February, 2 June and 19 June 1997 sought information requested but not provided in response to earlier requests or further details of information provided earlier, whilst four other requests for information dated 27 January, 13 February, 15 May and 2 October 1997 sought an update of information provided earlier, before the statement of objections was sent. In so far as the requests for information in question sought information requested earlier, but not provided, it should be remembered that under Article 16(5) of Regulation No 4056/86 and the equivalent provisions of Regulation No 17 and Regulation No 1017/68 the undertakings concerned are required to disclose fully the information requested within the time-limit fixed by the Commission. Thus, in so far as those requests for information were the result of the applicants' own failure to fulfil that obligation, the Commission was not at fault in sending them. Moreover, in so far as they merely seek to clarify and update information previously supplied, such requests for information must be considered to be justified by the needs of the inquiry and did not place a disproportionate burden on the applicants.

423 Third, nine requests for information dated 12 September, 16 September, 18 September, 9 October, 8 November and 15 November 1996 and 22 April, 26 May and 30 September 1997 respectively were intended to enable the Commission to examine the merits of the arguments put forward by the applicants in their response to the statement of objections. Clearly, such requests for information were justified by the needs of the inquiry, since they enabled the Commission to take account of the arguments and information put forward by the applicants in response to the statement of objections in order to amend the complaints made against them, if appropriate.

424 Fourth, five requests for information, those dated 11 July, 17 July and 8 August 1996 and 24 January and 19 June 1997, sought, at least in part, information which was not the subject of requests for information before the adoption of the statement of objections. Those requests for information concerned, inter alia, certain aspects of service contracts, contacts between the TACA on the one hand and UASC and APL on the other with a view to their possible accession to the TACA, Hanjin's pricing practices and the complaints of certain shippers in Ireland. However, and this is not challenged by the applicants, the information sought by those requests for information was relevant to the assessment of the TACA practices in question, in particular so as to verify the merits of the allegation of abuse of a dominant position appearing in the statement of objections. Those requests for information were therefore justified by the needs of the inquiry.

425 Fifth, two requests for information dated 16 and 24 July 1996, sent in response to the allegations of infringement of the right of access to the file, sought information about the document 'Liner Shipping — Time for Change'. As has already been stated above at paragraph 380, it is apparent from the Court file that the Commission was in possession of that document when it sent the two requests for information in question. In those circumstances, those requests for information were not justified by the needs of the inquiry.

426 Sixth, one request for information dated 5 December 1996 sought responses to questions asked at the hearing on 25 October 1996. There can be no dispute that such a request, intended to give the applicants the opportunity to continue in writing the discussion initiated at the hearing, was justified by the needs of the inquiry.

427 Seventh, three requests for information dated 21 October 1997, 24 November 1997 and 18 March 1998 sought information relating to the TACA parties' turnover. Since those requests for information were intended to enable the

Commission to check that the fines it intended to impose on those undertakings did not exceed the maximum amount permitted under Article 15(2) of Regulation No 17, Article 22(2) of Regulation No 1017/68 and Article 19(2) of Regulation No 4056/86, they were in principle justified by the needs of the inquiry (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 490). In the present case, the applicants do not deny in any case that the Commission used the information supplied in response in order to ensure that the fines imposed in the contested decision did not exceed the maximum permitted amount.

428 Eighth, three requests for information dated 17 January, 17 February and 11 March 1997 concerned the 'hub and spoke' system notified on 10 January 1997 after the statement of objections was issued. There can be no question but that such requests for information, which sought clarification of the agreements notified by the applicants with a view to obtaining individual exemption under Article 85(3) of the Treaty, were justified by the needs of the inquiry since they enabled the Commission to check whether the requirements laid down by that provision were met.

429 It follows from the foregoing that only two of the relevant requests for information, namely those dated 16 and 24 July 1996, were not justified by the needs of the inquiry. However, that two requests for information out of a total of 32 sent over a period of 22 months were not justified cannot have imposed a disproportionate burden on the applicants such as to affect the effective exercise of their right to be heard.

430 Lastly, and in any event, even if the Commission had infringed the rights of the defence, that infringement would only entail the annulment of the decision if, had the relevant requests for information not been sent, there was even a small chance that the applicants could have brought about a different outcome to the

administrative procedure (see, to that effect, *Hercules Chemicals*, cited at paragraph 95 above, paragraph 56, and *Cimenteries CBR*, cited at paragraph 172 above, paragraph 383). The applicants do not claim that that may have been the position in the present case and adduce no evidence to that effect.

431 For those reasons, the applicants' arguments in support of the complaint that the Commission sent them a large number of requests for information after the adoption of the statement of objections must be rejected.

432 It follows from all of the foregoing considerations that the applicants' plea alleging infringement of the principle of sound administration on that point is unfounded.

(b) The drafting of the contested decision

433 The applicants allege essentially that the Commission began to draft the contested decision before the completion of the administrative investigation procedure.

434 It is common ground between the parties that the Commission began to draft the contested decision shortly after the hearing with the TACA parties on 25 October 1996. In its letter of 12 November 1996, the Commission Hearing Officer informed the TACA parties as follows:

'As I understand it, the relevant Directorate is now drafting the proposed decision in the TACA case and the normal procedure will apply.'

435 Furthermore, it is true that, as the applicants point out, the Commission continued with the administrative investigation procedure after the hearing with the TACA parties by sending further requests for information until March 1998. Since the contested decision was adopted on 16 September 1998, it is clear that the Commission did begin to draft the contested decision before the completion of the administrative investigation procedure.

436 However, contrary to the applicants' submission, such conduct does not infringe the principle of sound administration. On the contrary, observance of that principle, which requires, inter alia, diligence on the part of the Commission in dealing with the cases for which it is responsible, may mean that it must begin drafting its final decision before the end of the administrative investigation procedure in order to ensure that the decision is adopted within a reasonable period having regard to the particular circumstances of the case, and in particular its context, the conduct of the parties in the course of the procedure, the importance of the case for the various undertakings involved and its complexity (*PVC II*, cited at paragraph 191 above, paragraphs 187 and 188; Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 56; and Case T-127/98 *UPS Europe* v *Commission* [1999] ECR II-2633, paragraph 38).

437 In the present case, it is not in dispute that the aspects of the TACA which were the subject of the administrative procedure before the Commission raise complex factual and legal questions which meant that the Commission had to examine a large amount of information provided by the TACA parties in their various notifications as well as in their response to the statement of objections and in their replies to the requests for information.

438 In those circumstances, since the Commission received the TACA parties' response to the statement of objections on 6 September 1996, following 26 months of investigation after the notification of the TACA agreement on 5 July 1994, and had heard those parties at the hearing on 25 October 1996, it had sufficient information at that time to begin drafting the contested decision, especially in view of the fact that, of the requests for information sent after the hearing, only those dated 24 January, 15 May and 19 June 1997 concerning, respectively, some of Hanjin's pricing policies, consortia links between the TACA parties, and the complaints of certain shippers in Ireland, sought information which had not been the subject of earlier requests for information.

439 In any event, the applicants do not state how the requests for information sent after the hearing show that the Commission was not in a position to begin drafting its final decision after the hearing.

440 Therefore, the applicants' arguments on that point must be rejected.

(c) The threats of fines

441 The applicants submit first that certain statements made in the course of the procedure surrounding the adoption, on 26 November 1996, of the decision withdrawing from the TACA parties immunity from fines in respect of collective price-fixing for inland transport services as part of intermodal transport show that, from that time, the Commission intended to impose high fines on them.

442 The applicants point out first in this regard that when the President of the Court of First Instance ordered that the TAA decision be suspended in so far as it prohibited collective price-fixing (order of 10 March 1995 in *Atlantic Container Line*, cited at paragraph 29 above, confirmed by the order of 19 July 1995 in *Commission* v *Atlantic Container Line*, cited at paragraph 29 above), the Commission stated in a press release dated 14 March 1995 that 'if the members of the TACA lose their action on the merits, they risk facing heavy fines for continuing that practice'.

443 Far from prejudging its final decision as to the imposition of fines on the TACA parties, the Commission by that statement merely highlights, rightly, the legal effects attaching to an order of the President of the Court of First Instance making a ruling in application of Articles 185 and 186 of the EC Treaty (now Articles 242 and 243 EC) in the context of an application for the suspension of a Commission decision.

444 The purpose of the order of the Court of First Instance of 10 March 1995 in the TAA case (the order in *Atlantic Container Line*, cited at paragraph 29 above) was not to determine the legality of the TAA decision's prohibition of the collective price-fixing agreement for inland transport services provided as part of inter-modal transport, since that assessment falls exclusively within the competence of the court deciding the case on the merits, but to suspend that prohibition. Consequently, until the Court of First Instance had pronounced judgment on the merits, on 28 February 2002, the TAA decision's prohibition of the agreement in question still stood, since only the enforcement of that prohibition was suspended.

445 In so far as it is not in dispute that the agreement between the TACA parties is essentially the same as the one which was the subject of the order of 10 March 1995 in *Atlantic Container Line*, cited at paragraph 29 above, and that it was entered into, at least at first, between the same parties, the Commission was right

to point in the statement in question to the risk which the TACA parties faced of being fined for entering into that agreement. As for the allusion in that statement to the large amount of the fines, it suffices to state that the Commission merely pointed to a risk and not to a final decision in that regard. Furthermore, in so far as the threat made in the statement in question of large fines is reflected in the contested decision, the fines imposed therein being said to be excessive, the applicants' complaint must be assessed on its merits in the course of the Court's assessment of the amount of the fines in the context of the exercise of its unlimited jurisdiction.

446 Next, the applicants refer to the statements of the member of the Commission responsible for competition matters, Mr Van Miert, on 21 June 1995 at the time the statement of objections was issued, informing the TACA parties of the Commission's intention to withdraw immunity from fines in respect of the agreement between the TACA parties providing for collective price-fixing for inland transport services provided as part of intermodal transport.

447 It is true that Mr Van Miert stated there that the proposed decision should be 'a clear and unambiguous signal that the TACA agreement is not acceptable to the Commission' and that the longer the applicants took to find a solution to the problems identified by the Commission, 'the higher the fines will be'.

448 However, far from prejudging in those statements the Commission's final decision as to the imposition of fines on the TACA parties, Mr Van Miert was merely highlighting, rightly, the legal effects attaching to a decision withdrawing immunity from fines.

449 The purpose of the Commission's decision withdrawing immunity in the present case was not to impose fines on the TACA parties or to commit the Commission to adopting a decision to that effect, but merely to enable it, by way of a precaution, to keep that option open notwithstanding the TACA parties' notification, should the applicants qualify for immunity from fines in respect of agreements falling within Regulation No 1017/68. It thus appears that the Commission's decision was largely motivated by the fact that the successive notifications made by the applicants ought not to deprive it of the option to impose fines for past conduct should it decide that one of the amended versions of the TACA could qualify for exemption.

450 Since under Article 22(2) of Regulation No 1017/68 the amount of the fines is based inter alia on the duration of the infringement, the Commission was entitled to inform the TACA parties that any delay in adopting a solution to the problems identified by it would result in an increase in the amount of the fines.

451 In any event, given that Regulation No 1017/68 does not provide for immunity from fines in respect of agreements covered by it and that there is no general principle of Community law according to which notification of an agreement confers immunity from fines on the notifying undertaking even where there is no express legislative provision for such immunity (*Atlantic Container Line*, cited at paragraph 44 above, paragraphs 48 and 53), the decision withdrawing immunity in the present case could in no way affect the legal position of the TACA parties since, whether or not the Commission adopts a decision withdrawing immunity, it has the power in any event to impose fines notwithstanding the TACA parties' notification of the collective price-fixing agreement for inland transport services provided as part of intermodal transport.

452 On those grounds, the applicants' arguments on that point must be rejected.

453 Second, the applicants submit that it is apparent from various articles and press releases that the Commission regarded the application of Article 86 of the Treaty to various TACA practices as a way of circumventing the immunity from fines which they enjoyed under Article 85 of the Treaty.

454 However, whilst it is true that the articles and press releases referred to by the applicants show that the Commission may have intended to impose fines on the TACA parties in respect of agreements notified by the applicants with a view to obtaining individual exemption under Article 85(3) of the Treaty, it cannot be inferred from this that the Commission applied Article 86 of the Treaty to various TACA practices for the sole purpose of circumventing the immunity which its members enjoyed under Article 85 of the Treaty. Since the applicants adduce no other specific evidence in support of their argument they have not established the facts on which they base their complaint on that point.

455 In any event, even if the alleged aim of circumvention could be inferred from the various articles and press releases referred to by the applicants, the question whether the Commission was entitled to impose fines on undertakings, which had notified an agreement with a view to obtaining individual exemption under Article 85(3) of the Treaty, for an infringement of Article 86 of the Treaty goes to the merits of the application of Article 86 of the Treaty and of the fines imposed in respect thereof. The applicants' argument is based on the premiss that any party which infringes Article 86 of the Treaty cannot qualify for immunity from fines. However, if that premiss, which is in fact challenged by the applicants in their pleas relating to the fines, is incorrect, the question of circumventing that immunity does not arise, since immunity under Article 86 of the Treaty would have prevented any fines being imposed for an infringement of that provision. If, on the contrary, that premiss is correct, the question whether the Commission was entitled to impose fines depends solely on whether there was an infringement of Article 86 of the Treaty, which is denied by the applicants in their pleas relating to that provision. Either the infringement of Article 86 of the Treaty is

made out to the requisite legal standard, in which case the Commission was entitled to impose fines, or the infringement of Article 86 of the Treaty is not so made out, in which case the fines imposed under Article 86 of the Treaty must be set aside for that reason alone. The allegation of circumventing immunity under Article 85 of the Treaty is therefore irrelevant.

456 Therefore, the applicants' arguments on that point must be rejected.

B — The assessment of the facts, evidence and relevant questions

1. Arguments of the parties

457 The applicants claim, first, that the Commission based numerous findings of fact and law in the contested decision on speculation, supposition and presumption, rather than evidence or analysis. The contested decision used the words 'likely' or 'unlikely' on 47 occasions in connection with the examination of the relevant market (paragraphs 66 and 67), internal competition (paragraph 193), external competition (paragraphs 249, 252 and 258), potential competition (paragraph 290), the contents of service contracts (paragraphs 490 and 494), the remuneration of freight forwarders (paragraph 510) and the dominant position (paragraphs 540 and 541). Those various passages in the contested decision are not based on any evidence. Whilst it may, in certain circumstances, be legitimate for the Commission to balance the relevant considerations and determine an issue accordingly, the examples cited in the application demonstrate no such balancing.

458 Second, the applicants claim that the Commission's rejection of their evidence and arguments demonstrates that it did not 'address itself to the case with a mind open to all the evidence' (Opinion of Advocate General Slynn in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, 913).

459 They set out a number of examples from the contested decision in support of that complaint. First, as regards the examination of internal competition (paragraphs 201 and 202), the applicants consider that the statement that 'the mere fact that there are prices other than those laid down in the tariff is no more evidence of the existence of competition than it is of the absence of competition' shows that the Commission was not prepared to accept evidence of price competition. Second, as regards non-price competition (paragraphs 242 and 522), the applicants criticise the Commission for not having explained why it did not accept the evidence adduced by them. Third, as regards supply-side substitutability (paragraphs 280 to 282), the applicants claim that the Commission applied a presumption of invalidity of the evidence adduced by them on the ground that the findings of the Dynamar Report 'were coloured by the instructions given to the expert'. The applicants observe that in the defence the Commission does not seek to explain the grounds for its suspicion with regard to the Dynamar Report by reference to the correspondence between the applicants and Dynamar concerning the preparation of that report, which is annexed to the application. Fourth, regarding the allegations relating to price (paragraphs 308, 325, 543 and 589), the applicants criticise the Commission for having carried out a fresh analysis of service contract rates in the contested decision without reference to the allegations in the statement of objections and without replying to the arguments set out in their response to the statement of objections. In particular, the contested decision does not address the question whether the Commission's own findings (that between 1993 and 1997 maritime rates increased by 8% and EC inland rates fell by 4%, unadjusted for inflation) were consistent with a finding of a dominant position. The Commission's lack of confidence in its own analysis is apparent from the description of the contested decision in the 1998 competition policy report (XXVIIIth Report on Competition Policy — 1998, paragraph 107), in which the Commission refers to the discredited allegations of the complainants rather than to its own price analysis. Fifth, regarding dual-rate service contracts (paragraph 154), the applicants criticise the Commission for failing to ask them to supply information on the allegation that the initiative for that type of contract came from shippers party to such contracts. As regards this key aspect of the finding of abuse, it was not open to the Commission to try to place the burden of proof on the applicants. Sixth, and last, as regards the history of conference

contracts (paragraphs 469 to 471), the applicants claim that the Commission upheld only one item of evidence adduced by them, without addressing the others. They also observe that it is only in the defence, and not in the contested decision, that the Commission has sought to explain the reasons for the wholesale rejection of that material.

460 Third, the applicants criticise the Commission for failing to take account in the contested decision of certain facts subsequent to the statement of objections even though they disproved the contentions essential to the Commission's reasoning at the time the statement of objections was adopted. In particular, the Commission maintained in the contested decision (paragraphs 296, 562, 566 and 567) the allegation in the statement of objections (paragraphs 108, 113, 229, 235 and 236) that the applicants are not faced with significant potential competition, even though during the administrative procedure China Ocean Shipping Co. ('Cosco'), Yangming, K Line (in February 1997) and Norasia Line (in June 1998) entered the transatlantic trade as independent operators, whilst NOL (in May 1998) withdrew from the TACA in order to begin new business trading as APL. The applicants claim that the Commission based its finding that the applicants abusively altered the structure of the market on the allegation that potential competitors were induced to become members of the TACA.

461 The Commission contends that the Court should reject the applicants' arguments on that point.

2. Findings of the Court

462 By the present complaints, the applicants allege first that the Commission based numerous findings of fact and law in the contested decision on speculation,

supposition and presumption, rather than evidence or analysis. Next they allege that it rejected their evidence and arguments without an open mind. Finally, they allege that it failed to take account in the contested decision of certain facts subsequent to the statement of objections even though they disproved the contentions essential to the Commission's reasoning at the time the statement of objections was adopted.

463 The applicants thus claim essentially that the Commission lacked objectivity in assessing the facts, evidence and questions relevant for the present case.

464 The lack of objectivity allegedly shown by the Commission on these various points, even if it were proven, does not constitute an infringement of the rights of the defence capable of leading to annulment of the contested decision but must be placed in the context of the review of the assessment of the evidence or of the statement of reasons for the decision (Case T-37/91 *ICI*, cited at paragraph 188 above, paragraph 72).

465 Most of the applicants' allegations amount to a complaint that there is insufficient evidence in support of the Commission's allegations. That is so of the allegations concerning the use on 47 occasions of the words 'likely' or 'unlikely' in the decision, the fact that the Commission was not prepared to accept evidence of price competition between the TACA parties, the failure to take account of the findings of the Dynamar Report, the fact that the Commission carried out a fresh analysis of service contract rates in the contested decision without further reference to the allegations in the statement of objections, the failure to question the applicants about the fact that dual-rate service contracts were requested by the shippers, the fact that the Commission upheld only one item of evidence concerning the history of conferences adduced by the applicants

for the purposes of determining the intention of the legislature on service contracts and the fact that recent entries to the transatlantic trade contradict the Commission's allegations of the lack of potential competition.

466 The allegations to the effect that the Commission did not explain why it rejected the evidence of price competition and the history of conferences adduced by the TACA parties challenge in effect the statement of reasons in the contested decision on those points.

467 For those reasons, the applicants' arguments are not germane in the context of the present pleas alleging infringement of the rights of the defence and must therefore be rejected.

C — The assessment of the fines

1. Arguments of the parties

468 The applicants allege that the circumstances in which fines were imposed in the present case reveal a lack of objectivity on the part of the Commission. They point to the press coverage on that issue which refers to the existence of some opposition within the Commission and on the part of certain Member States in view of the amount of the fines proposed by the Directorate-General for Competition. The applicants also refer to the comments of a shipper to the effect that the fines are excessive. The applicants state that they do not know whether, and if so to what extent, those factors were taken into account by the Commission before the adoption of the contested decision.

469 The Commission contends that the Court should reject the applicants' arguments on that point.

2. Findings of the Court

470 The applicants allege by the present complaint essentially that the circumstances in which fines were imposed on the TACA parties reveal a lack of objectivity on the part of the Directorate-General for Competition.

471 First, as regards the alleged opposition of the Commission to the imposition of fines proposed by the Directorate-General for Competition, even if the latter did infringe the principles of sound administration, objectivity and impartiality the contested decision was adopted not by that directorate-general but by the College of Commissioners (see, to that effect, *ABB Asea Brown Boveri*, cited at paragraph 404 above, paragraph 104).

472 Next, as regards the opposition shown by some Member States to the amount of the fines proposed by the Directorate-General for Competition, in application of the relevant provisions of the regulations applying Articles 85 and 86 of the Treaty concerning co-operation with authorities of the Member States, the representatives of those Member States are consulted before the adoption of any decision imposing fines for infringement of the competition rules by means of the consultative committees on agreements and dominant positions set up by those regulations. In the present case, since the Commission adopted its decision on the basis of Regulations No 17, No 1017/68 and No 4056/68, the three consultative committees set up by those regulations were consulted. It is inherent in the decision-making process that where appropriate the Member States express reservations or raise objections in respect of the Commission's decisions. In any event, in so far as those consultative committees simply issue opinions, the Commission cannot infringe the principle of sound administration merely by departing from those opinions.

473 Furthermore, the opinion of a shipper as such is clearly irrelevant in assessing whether the Commission lacked objectivity. It cannot be deduced from the opinion of a third party that the Commission was prejudiced against the applicants. The press article cited by the applicants reports moreover that according to another shipper the TACA parties are perfectly able to pay the fine imposed on them, given the profits they made over the last five years.

474 Lastly, the lack of objectivity allegedly shown by the Commission or the Directorate-General for Competition in assessing the amount of the fines, even if it were proven, does not in any event constitute an infringement of the rights of the defence capable of leading to annulment of the contested decision but must be placed in the context of the review of the assessment of the amount of the fines and therefore will be examined with the pleas relating to that (see, to that effect, Case T-37/91 *ICI*, cited at paragraph 188 above, paragraph 72).

475 Consequently, the third plea concerning the assessment of the fines must be rejected in its entirety.

D — Conclusion on the third part

476 It follows from the foregoing considerations that the third part of the present group of pleas must be rejected in its entirety.

Conclusion on the pleas alleging infringement of the rights of the defence

477 It follows from all the foregoing that the first part of the present group of pleas alleging infringement of the rights of the defence, concerning the infringement of the right to be heard, must be upheld in so far as the applicants allege that the Commission based the second abuse recorded in the contested decision on four documents on which they were not afforded the opportunity to comment. The consequences to be drawn from that infringement in respect of the legality of the contested decision depend however on the assessment of the merits of the Commission's findings in respect of the second abuse, which are the subject of the applicants' pleas in relation to the allegation of infringement of Article 86 of the Treaty.

478 The remainder of the first part of the present group of pleas must be rejected. Furthermore, the second and third parts of the present group of pleas alleging infringement of the rights of the defence relating to, respectively, infringement of the right of access to the file and infringement of the principles of sound administration, objectivity and impartiality must be rejected in their entirety.

II — *The pleas alleging that there is no infringement of Article 85 of the Treaty and of Article 2 of Regulation No 1017/68 and various failures to state reasons in that regard*

479 The pleas advanced by the applicants in this context may be divided essentially into three separate parts. The first part concerns the assessments made in the contested decision concerning the price-fixing agreement for inland transport services. The second part concerns the assessments made in the contested decision concerning the rules on service contracts. The third and final part concerns the assessments made in the contested decision concerning the rules on the remuneration of freight forwarders.

Part one: the assessments made in the contested decision concerning the price-fixing agreement for inland transport

480 By the pleas advanced under the present part the applicants submit, first, that the prohibition by Article 1 of the contested decision of the agreement between the TACA parties fixing prices for inland transport services supplied within the territory of the European Community to shippers in combination with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America is incompatible with the order of 10 March 1995 in *Atlantic Container Line*, cited at paragraph 29 above. Second, the applicants submit that in the light inter alia of the cooperation agreements that they concluded in order to improve the supply of inland transport services to shippers, namely the EIEIA agreement and the 'hub and spoke' system, the agreement in question satisfies the conditions for individual exemption under Article 85(3) of the Treaty.

481 In reply to a question from the Court on that point, the applicants stated at the hearing however that having regard inter alia to the *FEFC* judgment (cited at paragraph 196 above) and Commission Decision 2003/68/EC of 14 November 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/37.396/D2 — Revised TACA) (OJ 2003 L 26, p. 53), they do not persist in the pleas advanced under the present part.

482 Therefore, it is no longer necessary to make a finding on the first part of the present group of pleas alleging that there is no infringement of Article 85 of the Treaty and Article 2 of Regulation No 1017/68 and various failures to state reasons in that regard.

Part two: the assessments in the contested decision concerning the rules relating to service contracts

483 The applicants' pleas under the second part are essentially of two types. By the first, they complain that by Article 3 of the contested decision the Commission prohibited them from entering into conference service contracts, jointly within the conference, with shippers, according to the voting procedures defined by the TACA agreement, referred to in the application as 'conference service contract authority'. By the second type of plea, the applicants complain that by Article 3 of the contested decision the Commission prohibited certain rules set out in the TACA agreement relating to service contracts.

A — The TACA parties' conference service contract authority

484 The applicants essentially advance two pleas relating to conference service contract authority. By the first, they submit that the Commission was wrong to find in the contested decision that that power does not qualify for block exemption under Article 3 of Regulation No 4056/86, whereas it is one of the traditional activities of conferences and is compatible with the concept of uniform or common freight rates within the meaning of Article 1(3)(b) of Regulation No 4056/86. By the second plea, the applicants complain that the Commission failed to take a decision under Article 85(3) of the Treaty on their application for individual exemption for conference service contract authority.

1. The block exemption under Article 3 of Regulation No 4056/86

(a) Arguments of the parties

485 The applicants claim first that, contrary to the Commission's assertion at paragraph 464 of the contested decision, conference service contract authority is a traditional activity of liner conferences, consistent with the concept of 'uniform or common freight rates', which therefore qualifies for block exemption under Article 3 of Regulation No 4056/86. Since conference service contract authority enjoys block exemption, the agreement as to the terms on which the conference members may exercise that authority must also benefit from block exemption under Regulation No 4056/86. In the TAA decision, moreover, the Commission did not discuss the application of the block exemption to joint service contracts.

486 The applicants point out that contractual arrangements between shippers and conferences for the carriage of cargo over a period of time at a rate other than the conference rate form part of the traditional practices of liner conferences and the term 'service contract' was used by the US Federal Maritime Board as early as 1961.

487 The applicants gave details of such conference contracts in their response to the statement of objections (Part II, at pages 164 to 181) and they describe the traditional practices of liner conferences in their application. Those factors demonstrate that there is no foundation for the Commission's argument that service contracts were only introduced on the entry into force of the US Shipping Act and are not a traditional conference activity.

488 Second, the applicants submit that, contrary to the findings at paragraph 462 of the contested decision, conference service contract authority is consistent with the existence of uniform or common freight rates within the meaning of Regulation No 4056/86.

489 According to the applicants it is clear from Regulation No 4056/86 that either (i) the definition of uniform or common freight rates is sufficiently broad to encompass loyalty arrangements, TVRs and independent action, or (ii) the regulation permits conference members to enter into various additional pricing arrangements with shippers, such as loyalty arrangements, TVRs and independent action.

490 The applicants submit that the Commission advances no coherent theory as to the meaning of uniform or common freight rates. It adopts a narrow definition of 'uniform or common' which excludes conference service contract authority and puts forward artificial arguments as to why loyalty arrangements, TVRs and independent action are to be distinguished from service contracts.

491 Furthermore, the applicants allege that the contested decision does not explain whether the services supplied under loyalty arrangements, TVRs, independent action and individual service contracts constitute 'services which are materially different from those normally provided to shippers paying the conference tariff rates' within the meaning of paragraph 450 of the contested decision.

492 The applicants argue first in this respect that the Commission accepts that conference members depart from conference tariffs in certain circumstances, but does not reconcile that position with its definition of uniform or common freight rates. In particular, it does not explain whether the services provided under

loyalty arrangements, TVRs and independent action constitute services which are 'materially different from those normally provided to shippers paying the conference tariff rates'.

493 Next, the contested decision does not make it clear whether the services provided under individual service contracts — which the Commission believes conferences should allow — are (or need to be) 'materially different from those normally provided to shippers paying the conference tariff rates'. If they are, the contested decision does not explain how the services provided under conference service contracts are not. If, on the other hand, the services provided under individual service contracts are not of the kind envisaged in paragraph 450 of the contested decision, that decision does not explain how individual service contracts are compatible with the Commission's definition of uniform or common freight rates.

494 The Commission, supported by the ECTU, claims that it is unable to understand precisely what the applicants mean by the phrase 'conference service contract authority'. If what the applicants mean is that conference members may collectively enter into service contracts with shippers, the contested decision does not find that possibility in itself to be restrictive of competition, so the problem raised by the applicants does not arise.

(b) Findings of the Court

495 The applicants submit essentially that the contested decision wrongly finds that the power of the TACA parties to enter into conference service contracts, jointly

within the conference and according to the voting procedures defined by the TACA, does not qualify for block exemption under Article 3 of Regulation No 4056/86.

496 Before examining that question, however, it is necessary to determine whether the contested decision found that that authority is in itself a restriction of competition within the meaning of Article 85(1) of the Treaty.

497 At paragraph 449 of the contested decision, the Commission states that the block exemption under Article 3 of Regulation No 4056/86 'does not authorise... joint service contracts', but the Commission accepted in the defence that the term 'joint service contracts' in the contested decision covers both conference service contracts and individual service contracts entered into jointly by several carriers.

498 As the applicants claim, it could be inferred from that paragraph of the contested decision that the Commission considers that the mere fact that a shipping conference enters into conference service contracts is in itself a restriction of competition within the meaning of Article 85(1) of the Treaty which does not fall within the block exemption under Article 3 of Regulation No 4056/86 and which, therefore, in the absence of individual exemption under Article 85(3) of the Treaty, is prohibited by the first paragraph of that provision. That is all the more so given that the conclusion of conference service contracts is in essence the conclusion of a horizontal price-fixing agreement. Such agreements, apart from being expressly prohibited by Article 85(1)(a) of the Treaty, are clear infringements of Community competition law (Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 265, and Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109), including in the maritime transport sector which falls within the scope of Regulation No 4056/86 (*CMA CGM*, cited at paragraph 427 above, paragraphs 100 and 210).

499 However, the exact scope of the contested decision on that point must be determined having regard to its operative part and also to the grounds which constitute its essential basis (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 31).

500 In Article 3 of the operative part of the contested decision, the Commission finds that the TACA parties infringed Article 85(1) of the Treaty 'by agreeing the terms and conditions on and under which they may enter into service contracts with shippers'. Similarly, in the grounds of the contested decision, the Commission states in equivalent terms, at paragraphs 379(c) and 607(b), that it is the agreement 'as to the terms and conditions on and under which they may enter into service contracts with shippers' which has the object or effect of preventing, restricting or distorting competition within the meaning of Article 85(1) of the Treaty.

501 The first observation to be made is that it is apparent from paragraphs 477 to 501 of the contested decision, concerning the application of Article 85(3) of the Treaty to the TACA rules on service contracts, that the only 'terms and conditions' examined by the Commission are, first, the prohibition in 1994 and 1995 on entering into individual service contracts and, second, the restrictions as to the availability and contents of service contracts, that is, according to paragraphs 489 to 501 of the contested decision, the ban on contingency clauses, the ban on contracts lasting for more than a year (which was subsequently extended to two and then three years), the ban on multiple contracts, liquidated damages, the confidentiality of service contracts and the ban on independent action over service contracts. From its analysis the Commission concludes, at paragraph 502 of the contested decision, that those terms and conditions do not qualify for individual exemption under Article 85(3) of the Treaty. Similarly, it must be noted that at paragraph 149 of the contested decision the Commission lists as restrictions imposed by the TACA parties on the contents of service contracts and the circumstances under which they may be concluded 'restrictions

as to duration, bans on contingency clauses and multiple contracts, obligations as to non-confidentiality and agreement as to the level of liquidated damages for non-performance of the contract'.

502 By contrast, the mere fact that conference service contracts are entered into jointly within the conference according to the voting procedures defined by the TACA does not appear in the terms and conditions set out in paragraphs 477 to 501 of the contested decision, even though the relevant provisions of the TACA agreement laying down those procedures for the conclusion of conference service contracts were notified in the same way as most of the terms and conditions set out in paragraphs 477 to 501 of the contested decision in order to obtain individual exemption under Article 85(3) of the Treaty.

503 Second, at paragraph 445 of the contested decision the Commission states expressly in any event, in the course of its examination of the service contracts in the light of Article 85(1) of the Treaty, that 'joint service contracts' subject to the prohibition laid down by that provision are those 'of the kind entered into by the TACA parties'. In the preceding paragraphs, after noting at paragraph 442 that in 1994 and 1995 the TACA parties banned the conclusion of individual service contracts, the Commission states at paragraph 443 that 'joint service contracts to which two or more carriers are party may restrict competition inter alia where there is an express or implied agreement between those carriers not individually to enter into a service contract with that shipper'.

504 In such a case the Commission considers, as it states at paragraph 445, that 'joint service contracts... [have as] their object or effect... to restrict competition on price and other terms between competitors supplying the same service rather than to offer a new service to shippers'. It points out in particular in this regard at paragraph 446 that 'where the service being supplied is capable of being supplied by an individual shipping line, in the absence of a joint service contract carriers might offer such additional services as increased free time, extended credit and

free documentation or discounts on services provided in other trades'. The Commission states however at paragraph 445 that 'the TACA have supplied no evidence that joint service contracts result in additional benefits for shippers in comparison with the services that could be offered by individual lines'. On the contrary, at paragraphs 127 and 128 and paragraphs 145 to 148, in the section of the contested decision setting out the facts where it describes the conference service contracts concluded by the TACA parties, the Commission refers at length to the effects of the ban imposed by the TACA in 1994 and 1995 on the conclusion of individual service contracts and in particular the fact that the conference service contracts entered into by the TACA offered few individualised services, contrary to the situation prevailing prior to the entry into force of the TAA/TACA when the conclusion of individual service contracts was possible.

505 Thus it is apparent from paragraphs 442 to 446 of the contested decision read together that the Commission considered that the mere fact that the TACA parties entered into conference service contracts, jointly within the conference according to the voting procedures defined by the TACA, restricts competition within the meaning of Article 85(1) of the Treaty only to the extent that the same TACA parties were also prohibited from entering into individual service contracts, so that they could only enter into conference service contracts, individual service contracts being wholly excluded.

506 Consequently, in the light of Article 3 of the operative part as interpreted in the light of the grounds set out at paragraphs 442 to 502, it is clear that where the contested decision states, at paragraph 449, that 'joint service contracts' do not qualify for block exemption under Article 3 of Regulation No 4056/86 and therefore, in the absence of individual exemption under Article 85(3) of the Treaty, are prohibited by Article 85(1), it refers solely to the TACA parties' ban on individual service contracts.

507 Hence in the contested decision the Commission does not consider that the power of the TACA parties to enter into conference service contracts according to the voting procedures defined by the TACA constitutes in itself a restriction of competition within the meaning of Article 85(1) of the Treaty, and therefore it does not prohibit that power. In any case the Commission expressly confirmed, both in the defence and in its replies to the Court's written questions and at the hearing, that the contested decision does not prohibit the TACA parties from entering into such conference service contracts. It should also be noted that Decision 2003/68 on the revised TACA, in particular paragraph 66, indicates that the TACA parties continued to offer conference service contracts after the contested decision was adopted.

508 Therefore, the present plea must be rejected as being devoid of purpose.

2. Individual exemption under Article 85(3) of the Treaty

(a) Arguments of the parties

509 The applicants allege that in their application for exemption of 5 July 1994 they requested individual exemption for the exercise of conference service contract authority. Whilst that authority was found to be contrary to Article 85(1) of the Treaty and not to fall within the block exemption under Article 3 of Regulation No 4056/86, the Commission did not consider the possibility of individual exemption and Article 3 of the contested decision does not refer to their application for exemption.

510 The Commission, supported by the ECTU, repeats that it does not understand the term 'conference service contract authority' used by the applicants and contends that in any event the plea is unfounded.

(b) Findings of the Court

511 In reply to a written question from the Court on that point, the applicants stated that having regard inter alia to Decision 2003/68, they do not persist with the present plea. It is no longer necessary therefore to rule on it.

B — The TACA rules on service contracts

512 By the present pleas, the applicants challenge the Commission's findings in the contested decision concerning (i) the rules as to the content of conference service contracts, (ii) the rules on the availability and contents of individual service contracts and (iii) the prohibition on independent action on service contracts.

1. The rules as to the content of conference service contracts

(a) Arguments of the parties

513 The applicants allege first that because conference service contract authority is covered by the block exemption under Article 3 of Regulation No 4056/86 the

TACA parties are necessarily entitled to agree upon the terms on which they may, as a conference, enter into conference service contracts. Accordingly, the agreement of such terms by the TACA also falls within the scope of the block exemption.

514 The applicants point out that the Commission does not address that issue in the contested decision. Consequently, they seek the annulment of the contested decision on the ground that the finding that the block exemption does not apply to conference service contract rules is predicated on the erroneous view that conference service contract authority is not covered by the block exemption.

515 Next, the applicants point out that the Commission does not consider whether conference service contract authority satisfies the conditions for the grant of individual exemption. The Commission cannot refuse to grant individual exemption for the TACA rules governing the terms of individual service contracts without first carrying out that assessment.

516 The applicants therefore seek the annulment of the contested decision for lack of reasoning in so far as it refuses to grant individual exemption for the TACA service contract rules.

517 In reply to the ECTU's assertion that 'it is difficult to conceive of circumstances where an individual exemption would be available for joint service contracts, in any event', the applicants submit that that does not reflect the Commission's position in the defence, which is that it is disposed to allow members of liner conferences to enter into joint service contracts.

518 The Commission, supported by the ECTU, submits that it does not understand what the applicants mean by 'conference service contract authority' and 'the rules governing conference service contracts'. It contends that the Court should reject the present plea.

(b) Findings of the Court

519 By the present pleas, the applicants submit essentially, as they stated in reply to a written question from the Court on the scope of their pleas concerning the infringement of Article 85 of the Treaty, that the power of the TACA parties to enter into conference service contracts, jointly within the conference and according to the voting procedures defined by the TACA, necessarily gives them the power to determine the content of those contracts. They consider that the contested decision does not recognise that they have such a power.

520 It has already been stated above that, contrary to what the applicants claim, the contested decision does not prohibit the TACA parties under Article 85 of the Treaty from entering into such conference service contracts. Nevertheless it is necessary to determine whether, as the applicants claim, the contested decision prohibits them under that provision from freely determining the content of those contracts within the context of the conference.

521 In Article 3 of the operative part of the contested decision the Commission finds that the TACA parties infringed Article 85(1) of the Treaty 'by agreeing the terms and conditions on and under which they may enter into service contracts with shippers'. As stated above, it is apparent from paragraphs 477 to 501 of the contested decision, concerning the application of Article 85(3) of the Treaty to the TACA rules on service contracts, that those 'terms and conditions' include, besides the ban in 1994 and 1995 on entering into individual service contracts, certain restrictions as to the availability and contents of service contracts, namely, according to paragraphs 489 to 501 of the contested decision, the ban on

contingency clauses, the ban on contracts lasting for more than a year (subsequently extended to two and then three years), the ban on multiple contracts, liquidated damages, the confidentiality of service contracts and the ban on independent action over service contracts.

522 With regard to those last restrictions, paragraphs 472 to 502 of the contested decision do not distinguish between restrictions in relation to individual service contracts and those in relation to conference service contracts. On the contrary, at paragraph 442 of the contested decision the Commission expressly states with regard to the application of Article 85(1) of the Treaty that the terms and conditions laid down by the TACA rules continued to apply, notwithstanding the changes made to those rules, to 'all service contracts entered into by the TACA parties (whether joint or individual)'. One of the restrictions identified in paragraphs 487 to 501, the prohibition on independent action, is in any case, as is apparent from paragraphs 131 to 139 and 449, only likely to affect conference service contracts and not individual service contracts. Furthermore, when the Commission finds, at paragraph 493, that the ban on multiple contracts means that a party to a joint service contract cannot enter into individual service contracts, it expressly refers to a restriction on conference service contracts. Finally, paragraphs 472 to 502 form part of the section of the contested decision dealing with the application of Article 85(3) of the Treaty to 'joint' service contracts ('XX. Joint service contracts — Application of Article 85(3)'.

523 In the light of those paragraphs and given that the term 'joint service contracts' in the contested decision is, as the Commission stated in its defence, capable of covering conference service contracts, the applicants are correct in saying that it may be inferred from the contested decision that that decision prevents the TACA from freely determining the content of conference service contracts.

524 However, the contested decision must be read as a whole. With regard to the application of Article 85(1) of the Treaty to service contracts, the Commission — after stating at paragraph 445 that that provision applies to 'joint service contracts of the kind entered into by the TACA parties', thereby, as held at paragraph 506 above, referring to the prohibition of individual service contracts — states at paragraph 447 that Article 85(1) of the Treaty further applies to 'the agreement between the TACA parties to place restrictions on the conditions under which individual service contracts may be entered into'. Similarly, with regard to the application of Article 85(3) of the Treaty, after finding that the block exemption laid down by Regulation No 4056/86 does not apply to 'joint service contracts of the type entered into by the TACA parties', the Commission states at paragraph 464 of the contested decision that it follows that that block exemption does not apply to 'restrictions on the availability or content of individual service contracts'.

525 It follows that, according to the contested decision, the restrictions as to the contents of service contracts identified at paragraphs 487 to 501 only fall within Article 85(1) of the Treaty — and, failing application of the block exemption laid down by Article 3 of Regulation No 4056/86, only require individual exemption under Article 85(3) of the Treaty — in so far as they affect the terms and conditions of individual service contracts, either by determining the content of those contracts, or by determining the conditions under which they are available.

526 Thus, with regard to the content of individual service contracts, it is apparent from paragraphs 487 to 501 of the contested decision that it prohibits the TACA parties from imposing terms in those contracts providing for the ban on contingency clauses, the ban on contracts lasting for more than a year (subsequently extended to two and then three years) and the amount of liquidated damages. Similarly, with regard to the conditions under which individual service contracts may be entered into, it is apparent from the same paragraphs that the contested decision prohibits the TACA parties, in applying

the TACA rules on service contracts, from requiring that the terms and conditions of individual service contracts be disclosed and, given the ban on multiple contracts and independent action, from preventing the parties to a conference service contract from entering into individual service contracts and carrying out independent action on conference service contracts.

527 By contrast, in so far as the terms of conference service contracts entered into by the TACA parties do not affect the content or availability of individual service contracts, the contested decision does not prohibit those parties, without prejudice to the application of Article 86 of the Treaty, from freely determining the content of those contracts within the context of the conference, especially as to their duration or the amount of liquidated damages. It is true that some of the restrictions identified at paragraphs 487 to 501 of the contested decision apply to the TACA parties which have entered into conference service contracts; nevertheless, as stated above, those restrictions do not determine the content of such contracts, but, at most, indirectly determine the conditions for the availability of individual service contracts or for the carrying out of independent action.

528 Consequently, as the Commission stated, both in its written pleadings and in reply to the Court's written questions and at the hearing in reply to specific questions on that point, just as the contested decision does not prohibit the TACA parties under Article 85 of the Treaty from entering into conference service contracts, it does not prohibit them under that article from freely determining the content of those contracts, since the Commission considers in the contested decision that the power to enter into conference service contracts necessarily implies, subject to the application of Article 86 of the Treaty, the power freely to determine the content of such contracts.

529 Therefore, the present pleas must be rejected as being devoid of purpose.

2. The rules on the availability and content of individual service contracts

(a) Arguments of the parties

530 The applicants submit that the Commission's statement at paragraph 464 of the contested decision that because 'joint service contracts of the kind entered into by the TACA parties' do not qualify for block exemption, neither does an agreement restricting individual service contracts lacks reasoning and is illogical. The Commission does not explain why the exemption under Article 3 of Regulation No 4056/86 does not apply to the restrictions on the availability and content of individual service contracts.

531 The applicants note that the only apparent reason given in support of the Commission's position is that because Article 3 of Regulation No 4056/86 does not apply to conference service contract authority, an agreement restricting the content of individual service contracts must also not qualify for block exemption. The applicants claim, however, that even if the block exemption does not apply to conference service contract authority, the members of a liner conference are entitled to agree not to enter into individual service contracts and to impose restrictions on the content of such contracts.

532 Furthermore, since the members of a conference are entitled to prohibit individual service contracts, it follows that any relaxation of that prohibition does not constitute an unacceptable restriction of competition. Consequently, the applicants consider that the finding that the block exemption does not apply to the rules on the availability and content of individual service contracts is based on the erroneous view that the prohibition of such contracts is not covered by the block exemption.

533 The Commission, supported by the ECTU, considers that these pleas are unfounded.

(b) Findings of the Court

534 By the present pleas, the applicants challenge the assessments made by the Commission concerning the application of the block exemption laid down by Article 3 of Regulation No 4056/86 to the TACA rules on the availability and contents of individual service contracts.

535 They claim, first, that the reasoning in paragraph 464 of the contested decision is illogical as regards the absence of block exemption for the ban on individual service contracts and the restrictions on the availability and contents of such contracts.

536 The Court notes that at paragraph 464 of the contested decision the Commission found that since 'joint service contracts of the kind entered into by the TACA parties are not one of the traditional conference activities which have been group-exempted, since they were only introduced following the implementation of the US Shipping Act... it also follows that restrictions on the availability or content of individual service contracts are not group-exempted and must be shown to satisfy the conditions of Article 85(3) of the... Treaty... if they are to qualify for individual exemption'.

537 It is plain that, as the applicants maintain, there is no logic in the Commission's reasoning on this point. The fact that joint service contracts entered into by the TACA are not traditional for the TACA cannot logically justify excluding

restrictions on the availability of individual contracts, including the outright ban on them in 1994 and 1995, and restrictions on their contents, from the block exemption.

538 However, whilst the reasoning relied on in the contested decision in this respect is thus erroneous, the Court finds that, for the reasons set out in paragraphs 1381 to 1385, in the context of the examination of the pleas concerning the alleged failure to comply with the procedure laid down by Regulation No 4056/86, the Commission was entitled to find, in paragraph 464 of the contested decision, that the ban on individual service contracts in 1994 and 1995 and the restrictions on the availability and contents of individual service contracts applied from 1996 are not covered by the block exemption.

539 This plea must therefore be rejected.

540 Secondly, the applicants submit that since the ban on individual service contracts enjoys block exemption any mitigation of the ban must likewise enjoy that exemption.

541 The Court finds that, for the reasons set out below at paragraphs 1381 to 1385, in the examination of the pleas concerning the alleged failure to comply with the procedure laid down by Regulation No 4056/86, the ban on individual service contracts is not covered by the block exemption.

542 Consequently, as this plea is based on a false premiss it must be rejected on that ground.

3. The prohibition of independent action on service contracts

(a) Arguments of the parties

543 The applicants submit that the contested decision contains no reasoning to support the Commission's contention that the prohibition of independent action on conference service contracts does not qualify for block exemption under Regulation No 4056/86 or for individual exemption.

544 The Commission, supported by the ECTU, contends that that plea is unfounded.

(b) Findings of the Court

545 As the applicants point out, paragraph 449 of the contested decision merely states that the prohibition of independent action on conference service contracts does not qualify for block exemption under Article 3 of Regulation No 4056/86, without providing any specific explanation.

546 However, in paragraphs 451 to 471 of the contested decision the Commission explained in detail why conference service contracts are not covered by that exemption. Since the Commission found that conference service contracts do not fall within the block exemption laid down by Article 3 of Regulation No 4056/86 because contract rates vary depending on the shipper and therefore do not reflect

common or uniform freight rates, it must follow that the ancillary prohibition on independent action on those contracts which serves to ensure compliance with the rates to be applied in conference service contracts cannot qualify for that block exemption for the same reason.

547 As for the grant of individual exemption under Article 85(3) of the Treaty, it suffices to note that at paragraph 500 the contested decision states, first, that the applicants have not explained why this prohibition fulfils the conditions for the grant of individual exemption and, second, why independent action on service contracts was allowed in the past. Furthermore, paragraph 501 of the contested decision states that the prohibition of independent action on service contracts does not appear to be indispensable given the existence of independent action on the tariff itself and the failure of that prohibition to accord any benefit to consumers.

548 It follows that the contested decision provides the applicants with an adequate indication as to whether the contested decision is well founded as regards the application of Regulation No 4056/86 and Article 85(3) of the Treaty to the prohibition of independent action on service contracts or, on the contrary, whether it may be vitiated by a defect enabling its validity to be challenged (Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 51).

549 The findings on these points in the contested decision are thus supported by an adequate statement of reasons and the present plea alleging failure to state reasons must therefore be rejected.

Part three: the assessments in the contested decision in relation to the rules on the remuneration of freight forwarders

A — Arguments of the parties

550 The applicants claim first that the contested decision does not take into account the significance, in legal terms, of the history of the agreements between the conference members on maximum levels of freight-forwarder remuneration and the way in which US law treats those agreements and for this reason, and because of the failure to provide an adequate statement of reasons which is its corollary, Articles 2 and 4 of the contested decision should be annulled.

551 The Commission adopts a narrow interpretation of the phrase 'the fixing of rates and conditions of carriage' in Article 3 of Regulation No 4056/86 and its approach differs from that used by it elsewhere, in particular with regard to service contracts. The practice of agreements fixing a ceiling for the remuneration of freight forwarders dates back to the beginning of the 20th century, not only in the United States but in other countries as well. In the United States conference members may agree on the amount, level and terms of remuneration to be paid to freight forwarders.

552 Second, the applicants assert that there is 'a direct and necessary link' between the freight rates and the amounts paid to freight forwarders, so that the agreement on the maximum levels of freight-forwarder remuneration should be regarded as a necessary and ancillary corollary of the agreement on freight rates which enjoys block exemption under Article 3 of Regulation No 4056/86.

553 Third, the applicant in Case T-213/98 submits that the Commission has misunderstood the status of freight forwarders and their contractual relationship with the carrier and his client (the shipper). The freight forwarder generally does not supply any services directly to the shipping line; there is no contract between the forwarder and the line for the provision of any such services and the freight forwarders' remuneration is not a payment for such services. Consequently, the Commission's assessment of the agreement in question under Article 85(1) and Article 85(3) of the Treaty is flawed.

554 The applicant considers that the description in the contested decision of the *modus operandi* of freight forwarders in the market is inaccurate in one respect. In continental Europe the general rule is that, whilst the freight forwarder acts as agent for his client (the shipper), he acts as principal for the carrier. The freight forwarder's remuneration is therefore, in reality, a reduction in the freight rate in the form of a discount on the sum owed by the shipper to the carrier under the contract of carriage. The TACA, which fixes the levels of freight-forwarder remuneration in continental Europe, is thus an agreement setting the rates and conditions of carriage within the meaning of Article 3 of Regulation No 4056/86.

555 The Commission's assessment is based on the idea that freight forwarders are paid by the TACA members as the price of services rendered by the former to the shipping companies. That is incorrect.

556 In the United Kingdom and Ireland the precise status of the freight forwarder varies from case to case. He may act purely as agent, in which case the contract of carriage is between the shipping company and the shipper. In certain circumstances he may undertake obligations to the shipping company.

557 In any event, the same errors of analysis apply, *mutatis mutandis*, to the Commission's assessment of the situation in the United Kingdom and Ireland. In particular, the fact that in those countries no sums are paid to the freight forwarders confirms that the latter do not provide a distinct service to the shipping companies and that the only services they do provide are to their clients (the shippers), who are the only ones to pay them. It follows that in the United Kingdom and Ireland the rule against payment of a commission to freight forwarders is no more than a rule prohibiting discounts on freight rates.

558 Fourth and finally, the applicant in Case T-213/98 adds that the contested decision lacks reasoning in that:

— the only intermediary services provided by freight forwarders in the situation under consideration are those supplied by them to their clients (the shippers), whose agent they are;

— the contested decision contains no description of the services that freight forwarders supposedly provide for lines and does not explain how those services differ from those provided to the shippers;

— the contested decision does not identify the contractual or other relationship between the lines and the freight forwarders under which such services are supposed to be provided for the lines, since there is in fact no separate contract for such services and the only contractual relationship between the freight forwarder and the line is the one in which, in continental Europe, the freight forwarder acts as principal in relation to the contract of carriage with the line concerned.

559 The Commission, supported by the ECTU, contends that none of those pleas is well founded.

B — Findings of the Court

560 By the present pleas, the applicants, who do not deny that the agreement in question restricts competition within the meaning of Article 85(1) of the Treaty, claim essentially that the contested decision is flawed in several respects in that it finds at paragraphs 509 to 511 that the agreement in question does not fall within the block exemption laid down by Article 3 of Regulation No 4056/86.

561 The block exemption laid down by Article 3 of Regulation No 4056/86 applies to agreements fixing the rates and conditions of carriage in the maritime sector which must, under Article 1(3)(b) of that regulation, apply 'uniform or common freight rates... with respect to the provision of liner services'.

562 It follows that in order to qualify for block exemption under Article 3 of Regulation No 4056/86, rate-fixing agreements between members of a maritime conference must establish a uniform or common freight rate (*TAA*, paragraphs 138 to 143).

563 In the present case, as is apparent from paragraph 164 of the contested decision, the agreement in question consists in the fact that, under Article 5(1)(c) of the TACA, the TACA parties agree on the amounts, levels or rates of brokerage and

freight-forwarder remuneration, including the terms and conditions for the payment of such sums and the designation of persons eligible to act as brokers.

564 Such an agreement does not establish a freight rate within the meaning of Article 1(3)(b) of Regulation No 4056/86, but merely fixes the levels of commission paid by the conference members to freight forwarders in consideration for the intermediary transport services they provide as agents of the shippers. Such services, which according to paragraph 163 of the contested decision consist in arranging the transport of goods and negotiating the terms and conditions on which the transport takes place, together with completion of administrative formalities such as the preparation of documentation and customs clearance, cannot be equated with maritime transport services as such, which are the subject of the freight rates falling within the block exemption. Thus unlike the freight rate, which is paid by the shippers to the shipping companies, the commissions with which the agreement in question is concerned are paid by the shipping companies to the shippers' agents.

565 In those circumstances, the Commission was entitled not to apply the block exemption laid down by Article 3 of Regulation No 4056/86 to the agreement in question.

566 None of the pleas put forward by the applicants undermines that conclusion.

567 First, as regards the plea that there is a direct and necessary link between the freight rates and the amounts paid to freight forwarders, whilst the applicants claim that such a link exists they do not explain what it consists of. As the Commission rightly points out at paragraph 517 of the contested decision, the fact emphasised by the applicant in Case T-213/98 that in the United Kingdom

and Ireland the carriers do not pay commission to the freight forwarders suggests on the contrary that the agreement in question is not indispensable for the fixing of freight rates.

568 Furthermore, and in any event, even if such a direct and necessary link were shown to exist, the agreement in question would not fall within the block exemption laid down by Article 3 of Regulation No 4056/86. It is settled case-law that, having regard to the general principle laid down by Article 85(1) of the Treaty that agreements restricting competition are prohibited, provisions derogating therefrom in a regulation conferring block exemption must, by their nature, be strictly interpreted (Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 37, and Joined Cases T-24/93 to T-26/93 and T-28/93 *Compagnie maritime belge transports and Others* v *Commission* [1996] ECR II-1201 ('*CEWAL I*'), paragraph 48). The scope of Regulation No 4056/86 is restricted by Article 1(2) thereof to maritime transport services from or to ports. Consequently, the block exemption provided for under Article 3 of that regulation cannot be extended to services which, even if they could be considered to be ancillary to or necessary for maritime transport from or to ports, are not maritime transport services as such falling within the scope of Regulation No 4056/86. That is all the more so in the present case where those services constitute a separate market on which the freight forwarders are, as is apparent from paragraph 156 of the contested decision, in competition with other economic operators such as the NVOCCs (see, to that effect, *FEFC*, cited at paragraph 196 above, paragraph 261).

569 Next, as regards the plea that the agreement in question reflects a traditional practice amongst conferences in the United States and other countries as well, the application of the block exemption laid down by Article 3 of Regulation No 4056/86 to a particular agreement cannot depend on whether it is traditional, but depends above all on whether that agreement falls within the scope of that block exemption. Furthermore, according to the case-law, national practices,

even if common to all the Member States, cannot be allowed to prevail in the application of the competition rules set out in the Treaty (*VBVB and VBBB*, cited at paragraph 162 above, paragraph 40). A fortiori, therefore, the practices of certain non-member States cannot dictate the application of Community law (*FEFC*, cited at paragraph 196 above, paragraph 341).

570 It follows that the fact alleged by the applicants that the agreement in question reflects a traditional practice amongst conferences in the United States and other countries as well cannot, by itself, show that the Commission was wrong to refuse to apply the block exemption laid down by Article 3 of Regulation No 4056/86 to that agreement.

571 In so far as the applicants further allege failure to state reasons on that point, the present plea coincides with the specific plea alleging failure to state reasons in respect of the failure to have regard to US law, which is the subject of separate consideration at paragraphs 1396 to 1411 below.

572 As regards the plea made only by the applicant in Case T-213/98 that the remuneration paid to freight forwarders by carriers constitutes not the price paid for services rendered but a discount on the freight rate, it suffices to note that that plea is based on the false premiss that freight forwarders do not provide any services to the carriers. The Commission states at paragraph 163 of the contested decision, without being contradicted by the applicant, that where the freight forwarders act as agents of the shippers, their task consists in arranging the transport of goods and negotiating the terms and conditions on which the transport takes place, together with completion of the administrative formalities. Such services clearly benefit not only the shippers but also the carriers, since their purpose is to facilitate the conclusion and performance of the contract of maritime transport.

573 The fact that in the United Kingdom and Ireland no commission is paid to freight forwarders by carriers, far from demonstrating that freight forwarders provide no services to carriers, tends rather, as the applicant itself seems to recognise, to indicate the existence in those Member States of an agreement prohibiting the payment of any commission which, in terms of Article 85(1) of the Treaty, may be more restrictive of competition than the agreement at issue.

574 Finally, as regards the same applicant's plea alleging failure to state reasons, its criticisms seek in fact to challenge the merits of the Commission's findings in the contested decision in relation to the services provided by freight forwarders and their legal status in relation to carriers and shippers. Such arguments, which for the reasons given above must be rejected, are not germane to the issue of whether the Commission has complied with its obligation to state reasons (*PVC II*, cited at paragraph 191 above, paragraph 389).

575 In any event, even if the arguments put forward by the applicants in the present plea may be regarded as seeking to challenge the statement of reasons in the contested decision, it should be borne in mind that it is settled case-law that although, pursuant to Article 190 of the EC Treaty (now Article 253 EC), the Commission is bound to state the legal reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, in particular, Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraphs 26 and 44). At most the Commission is under an obligation, with regard to Article 190 of the Treaty, to reply specifically only to the applicants' primary allegations made in the course of the administrative procedure (*FEFC*, cited at paragraph 196 above, paragraph 426).

576 In the present case, during the administrative procedure, and in particular in the response to the statement of objections, the applicant did not put forward any evidence to challenge the Commission's findings in the statement of objections in respect of the services provided by the freight forwarders and their legal status in relation to the carriers and shippers. Clearly the Commission cannot be criticised in terms of its obligation to state reasons for not having adopted a position in the contested decision based on evidence which was not submitted to it before that decision was adopted.

577 For all of those reasons, the applicants' pleas in relation to the Commission's findings concerning the agreement relating to the remuneration of freight forwarders must be rejected in their entirety.

Conclusion on the pleas alleging that there is no infringement of Article 85 of the Treaty and of Article 2 of Regulation No 1017/68 and various failures to state reasons in that regard

578 It follows from the foregoing that the present pleas must be rejected in their entirety.

III — *Pleas alleging absence of infringement of Article 86 of the Treaty and various failures to state reasons in that regard*

579 These pleas are essentially developed in three parts. In the first part, the applicants deny that their position can be assessed collectively. In the second part, they claim that the TACA members do not hold a collective dominant position.

Last, in the third part, they deny the two abuses of a dominant position of which the Commission accuses them in the contested decision.

Preliminary observation on the admissibility of these pleas

580 As a preliminary point, the Commission contends that the part of the applications devoted to Article 86 of the Treaty is inadmissible, in that it seeks annulment of the findings of fact set out in the grounds of the contested decision (*NBV and NVB*, cited at paragraph 499 above).

581 It is clear, however, that by these pleas the applicants are not seeking annulment of the findings of fact set out in the grounds of the contested decision but are challenging those findings in so far as they constitute the necessary support for Articles 5 to 7 of the operative part of the contested decision, which they seek to have annulled and in which the Commission found that the TACA parties had abused their dominant position by altering the competitive structure of the market so as to reinforce the dominant position of the TACA and by placing restrictions on the availability and contents of service contracts, and ordered them to put an end to the abuses.

582 The Commission's objection of inadmissibility of the application on this point must therefore be rejected as unfounded.

Part one: the absence of a dominant position held collectively by the TACA parties

583 The applicants deny that the position held by the TACA members can be assessed collectively. In support of this part of their pleas, they claim that the Commission made errors of assessment as regards the economic links between the TACA parties and the internal competition between those parties.

A — Pleas alleging incorrect assessment of the economic links between the TACA parties

1. Arguments of the parties

584 The applicants observe that at paragraphs 526 to 531 the contested decision identifies five links, namely the tariff, the TACA enforcement provisions, the TACA secretariat, the publication of business plans and consortia arrangements. They submit that those factors, whether taken individually or collectively, do not suffice to justify a collective assessment of their position on the relevant market.

585 First, as regards the tariff, the applicants allege that the obligation in US law (under the United States Shipping Act) to adhere to the tariff does not constitute an economic link such as to lead the applicants to adopt the same conduct on the market, since US law permits members of a conference to depart from the tariff by taking independent action. A tariff comprises both 'ordinary rates' and various exceptions to those rates. The mechanisms for those exceptions are as lawful as the rates themselves. The Commission's position comes down to saying that the

members of every liner conference and price cartel should be assessed collectively under Article 86 of the Treaty, which would entail recycling the evidence relevant to an assessment under Article 85 of the Treaty for the purposes of drawing conclusions on the application of Article 86 of the Treaty.

586 Second, enforcement measures are normal within liner conferences and are viewed favourably by the United States Federal Maritime Commission ('the FMC') as a means of protecting competition because they are intended to prevent discrimination on the part of conference members against shippers. Furthermore, provided that those measures do no more than ensure compliance with the obligations laid down by the TACA, they cannot logically be considered to be a link in their own right. Last, and in any event, that type of measure does not restrict competition between the TACA members.

587 Third, as regards the role of the TACA secretariat, the applicants point out, first, that it acts on the instructions of the conference members in negotiating service contracts. It is not correct to say, as the Commission does, that the secretariat participates in the negotiation of individual service contracts against the wishes of the shipper. Even where a shipper chooses to involve the secretariat in the negotiation of individual service contracts, it very rarely participates in the negotiation of commercial terms. Next, the applicants consider that the secretariat's role in enforcing service contracts is purely administrative and has no bearing on the competitive position of the members. Similarly, the issuing of press releases is a routine administrative function enabling conferences to communicate with shippers.

588 Fourth, the purpose of publishing a business plan is to announce changes to the tariff and conference service contract rates. Since conference members are

required to agree on a tariff, that periodic announcement cannot constitute a link in itself and serve to present the conference members as having a common commercial strategy (paragraph 530 of the contested decision). The applicants also assert that the business plan is a measure intended to contribute to the consultation process with the shippers required by Article 5(1) of Regulation No 4056/86.

589 Fifth, the applicants do not participate in the same consortium. Furthermore, consortium agreements provide operational and technical efficiencies which, as recognised in the fourth and sixth recitals in the preamble to Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ 1992 L 55, p. 3), contribute to improving the competitiveness of liner transport. As the Commission noted in its decision on the merger between P&O and Nedlloyd (Decision of 19 December 1996 declaring a concentration to be compatible with the common market (Case No IV/M.831 — P&O/Royal Nedlloyd), according to Council Regulation (EEC) No 4064/89 (OJ 1997 C 110, p. 7), paragraph 65) 'competition takes place between the lines within the consortia which compete by, firstly, marketing their services separately and, secondly, in the quality of their service e.g. the availability of specialist equipment; the provision of logistic (e.g. container packing) and intermodal services and by the speed and quality of documentation including data processing'. Membership of consortium agreements is only relevant as an economic link if the parties to the agreements adopt the same conduct on the market. That is not so in this case. On the contrary, the TACA parties' membership of different consortia serves to increase internal competition between them.

590 Last, the applicant in Case T-212/98 claims that the Commission's finding that the links between itself and the other TACA members are sufficiently strong to

show collective dominance is based on a flawed assessment of the economic links between them. The applicant's market share of the trade in question (less than 0.1%) and its turnover on that trade in 1996 compared with that of other TACA members (only 1.2% of its turnover arose from that trade) show that it cannot have acted as a single economic entity with the other applicants on the relevant market.

591 The Commission, supported by the ECTU, contends that the economic links identified in the contested decision demonstrate to the requisite legal standard the collective nature of the position held by the TACA parties.

2. Findings of the Court

592 By these pleas, the parties allege in substance that the economic links between the TACA parties identified in the contested decision, whether taken individually or collectively, are not sufficient to justify a collective assessment of their position on the relevant market.

593 By the subsequent pleas alleging incorrect assessment of the internal competition, which are examined below, the applicants criticise the Commission for not having taken into account the significant competition between the TACA parties within the conference, especially as regards prices. In those circumstances, these pleas must be taken as intended solely to criticise the Commission for having considered that the links resulting from the existence of the conference are as such capable of justifying a collective assessment of the position held by the TACA parties.

594 It has consistently been held that Article 86 of the Treaty is capable of applying to situations in which several undertakings together hold a dominant position on the relevant market (Case C-393/92 *Almelo and Others* [1994] ECR I-1477, paragraph 43; Case C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, paragraphs 32 and 33; Joined Cases C-140/94 to C-142/94 *DIP and Others* [1995] ECR I-3257, paragraphs 25 and 26; Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* ('*Flat glass*') [1992] ECR II-1403, paragraph 358; and *CEWAL I*, cited at paragraph 568 above, paragraph 60).

595 In order to conclude that such a dominant position exists, the undertakings concerned must, according to the case-law, be sufficiently linked between themselves to adopt the same line of action on the market (*Centro Servizi Spediporto*, cited at paragraph 594 above, paragraph 33; *DIP and Others*, cited at paragraph 594 above, paragraph 26; Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* ('*Kali und Salz*') [1998] ECR I-1375, paragraph 221; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 113; and *CEWAL I*, cited at paragraph 568 above, paragraph 62). In that regard, it is necessary to examine the links or factors of economic correlation between the undertakings concerned and to ascertain whether those links or factors allow them to act together independently of their competitors, their customers and consumers (*Almelo*, cited at paragraph 594 above, paragraph 43; *Kali und Salz*, cited above, paragraph 221; Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* ('*CEWAL II*') [2000] ECR I-1365, paragraphs 41 and 42; and *Wouters*, cited above, paragraph 114).

596 At paragraph 525 of the contested decision, the Commission stated that 'the members of the TACA collectively enjoy a dominant position by reason of the fact that they are bound together by a considerable number of economic links which has led to a significant diminution of their ability to act independently of each other'. The parties are agreed that at paragraphs 526 to 531 of the contested decision, the Commission relied on the following five economic links: the tariff (paragraph 526), the enforcement provisions and penalties (paragraph 527), the secretariat (paragraphs 528 and 529), the annual business plans (paragraphs 528 and 530) and the consortia arrangements (paragraph 531). Paragraph 528 of the

contested decision states that in the Commission's view the tariff and the enforcement provisions and penalties constitute 'restrictions on the TACA parties' ability to act independently of each other [which] are intended to eliminate substantially price competition between them'. The Commission further stated at paragraph 528 of the contested decision that the TACA secretariat and the annual business plans were measures which allowed the TACA parties 'to present [themselves] as a single united body and so diminish pressure for price reductions from customers'.

597 With the exception of the consortia arrangements, the links identified by the Commission, namely the tariff, the enforcement provisions and penalties, the secretariat and the annual business plans, are the direct consequences of the activities carried out by the applicants within the TACA and, accordingly, of their membership of it.

598 It is common ground that the TACA is a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86. In order to constitute a liner conference within the meaning of that provision, the undertakings concerned must necessarily establish a certain number of links between them.

599 Article 1(3)(b) of Regulation No 4056/86 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 under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services'.

600 The eighth recital in the preamble to that regulation states that such conferences 'have a stabilising effect, assuring shippers of reliable services;... they contribute generally to providing adequate efficient scheduled maritime transport services and give fair consideration to the interests of users;... such results cannot be obtained without the cooperation that shipping companies promote within conferences in relation to rates and, where appropriate, availability of capacity or allocation of cargo for shipment, and income;... in most cases conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport;... 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'.

601 As the Court of Justice and the Court of First Instance have already held (*CEWAL II*, cited at paragraph 595 above, paragraphs 48 and 49; *Flat glass*, cited at paragraph 594 above, paragraph 359; and *CEWAL I*, cited at paragraph 568 above, paragraphs 63 to 66), it follows from those provisions that both by its nature and in the light of its objectives, a liner conference, as defined by the Council for the purposes of qualification for block exemption under Regulation No 4056/86, may be described as a collective entity which presents itself as such on the market vis-à-vis both users and competitors. Furthermore, the Council has laid down in Regulation No 4056/86 the provisions necessary to avoid a liner conference having effects incompatible with Article 86 of the Treaty. That does not in any way prejudge the question whether, in a given situation, a liner conference has a dominant position on a particular market or, a fortiori, has abused that position. As is clear from Article 8(2) of Regulation No 4056/86, it is by its conduct that a conference holding a dominant position may produce effects which are incompatible with Article 86 of the Treaty.

602 In the light of the foregoing, it is appropriate to regard the links resulting from the existence of a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86 as being, in principle, capable of justifying a collective assessment of

the position on the relevant market of the members of that conference for the purposes of the application of Article 86 of the Treaty, in so far as those links are such as to allow them to adopt together, as a single entity which presents itself as such on the market vis-à-vis users and competitors, the same line of conduct on that market.

603 None of the arguments put forward by the applicants in the context of these pleas is capable of upsetting that conclusion.

604 First, as regards the TACA's tariff, the applicants claim that the obligation in US law to comply with the tariff does not constitute an economic link of such a kind as to lead them to adopt the same conduct on the market, since US law allows the members of a conference to depart from the tariff in the context of independent action. The applicants further state that a tariff has both ordinary rates and various exceptions to those rates.

605 In order to examine the merits of this plea, it is appropriate to recall that at paragraph 526 of the contested decision the Commission expressed the view that the tariff constituted the first of the economic links between the TACA parties. It observed that the TACA parties not only agreed to adhere to a tariff but were also required to do so by US law, failing which they might be fined up to USD 25 000 for each violation. The Commission thus considers, according to paragraph 528 of the contested decision, that the tariff is a restriction on the TACA members' ability to act independently of each other and is intended to eliminate substantially price competition between them.

606 The very existence of a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86, such as the TACA, requires the application of a tariff providing for uniform or common freight rates.

607 Such a liner conference therefore presents itself as a single entity on the market since it fixes uniform or common freight rates for all its members, in the sense that the same price will be charged for the carriage of the same cargo from point A to point B, regardless of which shipowning member of the conference is responsible for carriage (*TAA*, paragraph 157).

608 The fact that the tariff provides for certain special rates, such as TVRs, in addition to the ordinary rates, is irrelevant, since, as the Commission stated in respect of the special rates at paragraph 120 of the contested decision, and as the applicants themselves accept, these special rates are also uniform or common rates forming an integral part of the tariff.

609 As regards the applicants' claim that US legislation requires that members of a liner conference be permitted to carry out independent actions on the tariff rates, it should be emphasised that those independent actions constitute exceptions to the principle of joint price-fixing (*TAA*, paragraph 307), so that they cannot, in principle, affect the uniform nature of the tariff rates and, accordingly, call in question the collective assessment of the conference as resulting, together with other factors, from the tariff. As stated above, the question whether in this case the independent actions and the other specific pricing practices of the TACA parties are of such a kind as to call such an assessment in question is, as stated above, the subject of separate pleas.

610 Last, contrary to what the applicants claim, the fact that an agreement is prohibited by Article 85(1) of the Treaty does not prevent the Commission from taking such an agreement into consideration in order to conclude, in the context of the application of Article 86 of the Treaty, that the position of the undertakings concerned on the relevant market is a collective one. As the Court of Justice has already held, an agreement, decision or concerted practice (whether

or not covered by an exemption under Article 85(3)) may, where it is implemented, result in the undertakings concerned being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis-à-vis their competitors, their trading partners and consumers. The existence of a collective dominant position may therefore flow from the nature of the terms of an agreement, from the way in which it is implemented and, consequently, from the links or factors which give rise to a connection between undertakings which result from it (*CEWAL II*, cited at paragraph 595 above, paragraphs 44 and 45). As observed at paragraph 601 above that applies, according to the case-law, to a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86. It is common ground in this case that the TACA is such a liner conference. Accordingly, the Commission was entitled to rely on such an agreement in order to conclude, in the context of the application of Article 86 of the Treaty, that the position of the TACA parties on the relevant market was a collective position.

611 It must therefore be concluded that the Commission was entitled to rely in particular on the TACA tariff in order to make a collective assessment of the position of the TACA parties on the relevant market. The applicants' arguments on this point must therefore be rejected.

612 Second, the applicants submit that the TACA enforcement provisions and penalties are normal within liner conferences and that they are looked on favourably by the FMC as a means of protecting competition, since they are intended to prevent discriminatory practices on the part of conference members vis-à-vis shippers. Furthermore, in so far as those measures serve merely to ensure compliance with obligations laid down by the TACA, they cannot logically be regarded as a link in their own right.

613 It should be noted that at paragraph 527 of the contested decision the Commission stated that adherence to the TACA is ensured by extensive enforcement provisions. Paragraph 21 of the contested decision states that Article 10 of the TACA provides for the setting up of an Enforcement Authority

which is responsible, acting on its own initiative or following a complaint, for investigating any alleged breach of the agreement. The Commission observes at paragraph 22 of the contested decision that the Enforcement Authority has unfettered access to all documents related to a carrier's activities in the trade and is authorised to impose substantial fines for any breach of the agreement, in particular the price-fixing arrangements, and for any refusal to allow access requested during an investigation. The Commission thus states at paragraph 527 of the contested decision that 'these provisions are the most extensive policing arrangements ever seen by the Commission in the liner shipping sector'.

614 Clearly, such enforcement provisions and penalties, intended primarily to ensure compliance with the tariff adopted by a liner conference, are likely to reinforce the link established by that tariff, particularly when, as stated at paragraph 599 above, the very existence of a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86 requires the application of a tariff providing for uniform or common freight rates, so that the existence of enforcement provisions and penalties to ensure compliance therewith by the parties to the liner conference constitute measures necessary and, therefore, ancillary to any liner conference within the meaning of that provision.

615 Contrary to what the applicants claim, it is immaterial in this regard that the FMC takes a positive view of the enforcement provisions adopted by liner conferences. Those measures are singled out in the contested decision not as constituting an infringement of the Treaty competition rules but as a factor likely to reinforce the link between the parties to the TACA resulting from the tariff adopted by it. The existence of such a link, which may induce the Commission to make a collective assessment of the position of the TACA parties, does not in itself imply any infringement of the Treaty competition rules. Only the abuse of that position is capable of constituting such an infringement, at least when the position held collectively assumes dominance on the relevant market (*CEWAL II*, cited at paragraph 595 above, paragraphs 37 to 39).

616 The fact, alleged by the applicants, that the enforcement provisions and penalties do not in themselves constitute a link is irrelevant, since it has been found above that those measures were likely to reinforce the link established by the tariff.

617 The Commission was therefore entitled to rely in particular on the existence of enforcement provisions and penalties to make a collective assessment of the position held by the TACA members on the relevant market.

618 Third, as regards the TACA secretariat the applicants emphasise, first of all, that for the purpose of negotiating service contracts the secretariat acts on the instructions of the members of the conference and that even when a shipping agent chooses to involve the secretariat in negotiating individual service contracts, the secretariat very rarely participates in the negotiation of the trade terms. Furthermore, the secretariat's role in implementing the service contracts is purely administrative and is not relevant as regards the members' competitive position.

619 At paragraph 528, however, the Commission stated that the TACA secretariat enabled the liner conference to present itself on the market as a single united body. At paragraph 529, it pointed out that the TACA secretariat had extensive administrative and financial functions, that it was authorised to act as agent for the TACA members by entering into transport contracts on their behalf, that it had the right to attend service contract negotiations between shippers and members and that it issued press notices on behalf of the parties.

620 Without there being any need to inquire into the precise role of the TACA secretariat in negotiating and implementing service contracts, it is clear that the mere undisputed existence of a common administrative body having the capacity

to represent the TACA parties, in particular vis-à-vis shippers, is a factor capable of demonstrating that the TACA is in a position to present itself as a single united body on the market, thus reflecting the links existing between the TACA parties as a result of their activities as members of a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86. It is also apparent from the file before the Court that correspondence from shippers concerning the conclusion of service contracts with the conference is addressed to the TACA secretariat.

621 The Commission was therefore entitled to rely on the existence of the TACA secretariat to make a collective assessment of the TACA parties' position on the relevant market. The applicants' arguments on this point must therefore be rejected.

622 Fourth, as regards the TACA's annual business plans, the applicants maintain that, as they are intended to announce changes in the tariff, they cannot in themselves constitute a link and serve to present the conference as having a common trading strategy. Furthermore, the annual business plan is intended to contribute to the consultation process with the shippers required by Article 5(1) of Regulation No 4056/86.

623 However, the Commission stated at paragraphs 528 and 530 of the contested decision that publication by the TACA of annual business plans showed that the TACA parties were seen by shippers as having a single trading strategy on the market and thus permitted the TACA to present itself on the market as a single united body.

624 It is clear that publication by the TACA of annual business plans, drawn up jointly by its members in the context of their activities as a liner conference within

the meaning of Article 1(3)(b) of Regulation No 4056/86, is a factor manifestly capable of showing the TACA as a single body vis-à-vis third parties, thus reflecting the existence of the links existing between the members of a liner conference within the meaning of that regulation. Contrary to the applicants' contentions, the annual business plans therefore constitute in themselves a link which, owing precisely to the fact that they are published by the TACA, is capable of presenting the TACA as a collective entity on the relevant market vis-à-vis its competitors and shippers.

625 That is borne out by the fact that, as the applicants themselves point out, the annual business plans are intended to contribute to the process of consultation with shippers required by Article 5(1) of Regulation No 4056/86. According to that provision, the purpose of those consultations is to seek solutions on general issues of principle concerning the rates, conditions and quality of scheduled maritime transport services arising between users and the liner conference as a whole. Therefore, far from contradicting the Commission's finding that publication of the annual business plans serves to enable the TACA to present itself as a collective entity on the relevant market, the fact that publication is the consequence of an obligation imposed on liner conferences by Regulation No 4056/86 is, on the contrary, likely to reinforce it.

626 In that regard, it should also be observed that publication of those annual business plans is identified in the contested decision not as constituting a breach of the Treaty competition rules but as a factor likely to present the TACA as a collective entity on the relevant market. The existence of such a collective entity does not in itself imply any breach of the Treaty competition rules. Only the abuse by that collective entity of its position on the relevant market is susceptible of constituting such an infringement, at least when the position thus held is a dominant position on the relevant market (*CEWAL II*, cited at paragraph 595 above, paragraphs 37 to 39).

627 The Commission was therefore entitled to rely in particular on the publication of the TACA's annual business plans in order to make a collective assessment of the position held by the TACA parties on the relevant market. The applicants' arguments on this point must therefore be rejected.

628 All those considerations show clearly that, in accordance with the case-law cited at paragraph 601 above, the tariff, the enforcement provisions and penalties, the secretariat and the annual business plans of the TACA demonstrate to the requisite legal standard the existence of substantial links between the TACA parties of such a kind as to justify a collective assessment of their position on the relevant market.

629 Consequently, without there being any need to rule on the relevance of other links between the applicants resulting from the conclusion of other agreements, such as consortia agreements, it must be concluded that the Commission was entitled to rely on those factors, which result from the applicants' activities as parties to the TACA and, accordingly, from their membership of a liner conference within the meaning of Article 1(3)(b) of Regulation No 4056/86, in order to make a collective assessment of the TACA parties' position on the relevant market.

630 In the case of the applicant in Case T-212/98, that conclusion is not affected by the minimal nature of its market share or of its turnover on the trade in question. Provided that the links serving to justify the collective assessment of the position of the TACA parties result from their membership of the TACA, the position of each party to the TACA must, by the simple fact of that membership, be assessed with that of the other parties to the TACA, since by that membership the applicant has bound itself, as regards its conduct on a specific market, to the other parties which have joined the TACA, in such a way that they present themselves on the market as a collective entity vis-à-vis their competitors, their trading partners and consumers (*CEWAL II*, cited at paragraph 595 above, paragraph 44). In this case, the applicant does not dispute that it was a party to the TACA during the relevant period.

631 Furthermore, it has been held that in order for the position of a number of undertakings to be assessed collectively on the relevant market it is sufficient that they are able to adopt a common policy on that market. On the other hand, there is no need to show that those undertakings have in fact all adopted that common policy in all circumstances (see, to that effect, *Kali und Salz*, cited at paragraph 595 above, paragraph 221).

632 In those circumstances, the fact that, owing to its minimal position on the market, not every act carried out by the TACA can be imputed to the applicant is of no relevance in the context of these pleas relating to the collective nature of the position held by the TACA parties.

633 At most, the fact that one party to the TACA did not follow the conduct adopted by the other TACA parties might show that that party to the TACA did not participate in an infringement of Article 86 of the Treaty, should it transpire that the conduct adopted by the other TACA parties constituted an abuse for the purposes of that provision. Although the existence of a collective dominant position may be deduced from the position which the economic entities concerned together hold on the market in question, the abuse does not necessarily have to be the action of all the undertakings in question. It need only be capable of being identified as one of the manifestations of such a joint dominant position (*Irish Sugar*, cited at paragraph 152 above, paragraph 66).

634 Accordingly, even if the applicant's market share or turnover on the trade in question was minimal during that period, it must be considered that, regard being had to the tariff, the enforcement provisions and penalties, the secretariat and the annual business plans of the TACA, that applicant was capable of forming together with the other TACA parties a single entity on the relevant market.

635 It follows from all of those considerations that the pleas, complaints and arguments alleging incorrect assessment of the economic links between the TACA parties must be rejected in their entirety.

636 The Court must none the less ascertain whether, as the applicants claim in the subsequent pleas, the evidence relating to internal competition which they have adduced can show that the links identified in the contested decision do not in this case justify a collective assessment of the dominant position held by the TACA parties.

B — Pleas alleging errors of assessment concerning internal competition between the parties to the TACA

637 As regards internal competition between the TACA parties, the applicants claim, first of all, that in the contested decision the Commission applied the wrong legal test. They go on to claim that the Commission incorrectly assessed internal price and non-price competition between the TACA parties. Last, the applicants rely on various failures to state reasons in the contested decision in those respects.

1. Application in the contested decision of the wrong legal test

(a) Arguments of the parties

638 First of all, the applicants complain that the Commission did not consider whether the links between the TACA members led to the existence of a single

body operating on the market. In particular, they submit that the Commission did not 'define [those links] by reference to their result, namely the establishment of a situation where a group of independent undertakings performs as a single market entity' (Opinion of Advocate General Fennelly in *CEWAL II* [2000] ECR I-1371, point 28).

639 In support of this complaint, the applicants claim that the Commission thus refers at paragraphs 528 and 530 of the contested decision to their intentions and to the appearance of their actions, without proving the effect of those links on their conduct on the market.

640 Second, they challenge the Commission's assertion at paragraph 522 of the contested decision that it follows from the judgment in *Flat glass*, cited at paragraph 594 above, that 'the continued existence of a possible degree of competition between the parties does not rule out the finding of a collective dominant position'.

641 The applicants contend that the judgment in *Flat glass* does not contain that argument. The Court of First Instance merely held there that 'there is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market' (paragraph 358 of the judgment). The applicants submit that that passage gives no indication of the degree of competition that would be compatible with a finding of collective dominance.

642 The applicants claim that the Commission is seeking by its argument to develop a new test which makes the common tariff the predominant factor justifying a finding of collective dominance, so that if the undertakings in question adopt the same general approach, evidence of independent conduct on the market,

including independent pricing, does not mean that there is no collective dominant position. Since under Article 3 of Regulation No 4056/86 any liner conference must be based on a uniform or common tariff, the Commission has applied a virtually irrebuttable presumption that the members of any liner conference, including the TACA, are capable of having a collective dominant position. That argument also explains the Commission's reluctance to address the evidence of actual competition.

643 The applicants assert that, on the contrary, it is apparent from Community case-law that the existence of a collective dominant position presupposes a lack of competition between the undertakings concerned. At paragraph 34 of the judgment in *Centro Servizi Spediporto*, cited at paragraph 594 above, the Court of Justice held that 'national legislation which provides for the fixing of road-haulage tariffs by the public authorities cannot be regarded as placing economic agents in a collective dominant position characterised by the absence of competition between them' (see also *DIP*, cited at paragraph 594 above, paragraph 27, and, as regards the Commission's practice, the Notice on the application of the competition rules to access agreements in the telecommunications sector — framework, relevant markets and principles, OJ 1998 C 265, p. 2, paragraphs 78 and 79). In his Opinion in *CEWAL II*, cited at paragraph 638 above, Advocate General Fennelly concluded that 'it emerges clearly from the case-law discussed above, particularly *Centro Servizi Spediporto*, *DIP* and [*Kali und Salz*], that absence of competition between a number of putatively collective dominant undertakings is a salient feature of collective dominance' (point 34). That case-law is, moreover, consistent with generally accepted economic theories on collective dominance.

644 The applicants claim that it follows that, in order to determine whether there is a collective dominant position, it is necessary to consider first whether the undertakings concerned have adopted a mutual pricing strategy and, if so, secondly whether the extent and intensity of non-price competition are such as to negate a finding of collective dominance based on the existence of a mutual

pricing strategy (Opinion of Advocate General Fennelly in *CEWAL II*, cited at paragraph 638 above, paragraph 34). In this case, the applicants claim, the contested decision does not make that twofold assessment.

645 Third, the applicants allege that the Commission failed to assess the main question, namely whether the applicants adopted 'the same conduct on the market' (*Almelo*, cited at paragraph 594 above, paragraph 42) and whether they constitute 'a single market entity' (Opinion of Advocate General Fennelly in *CEWAL II*, cited at paragraph 638 above, paragraph 28). The only conclusion drawn on this issue in the contested decision, at paragraph 525, is that the economic links between the TACA members have 'led to a significant diminution of [their] ability to act independently of each other'. That does not justify a finding that the applicants are capable of occupying a collective dominant position. Contrary to the requirements of the case-law and the economic theories on the matter, the Commission does not purport to characterise the effect of those links as the adoption of the same conduct on the market for all relevant aspects of competition on the market. The claim in the defence that it was sufficient that the TACA members adopted 'substantially the same conduct' cannot therefore be upheld.

646 The applicants also observe, by way of conclusion, that the Commission's approach in diluting the 'same conduct' test blurs the distinction between Article 85 and Article 86 of the Treaty and in effect gives the Commission a discretion to determine the circumstances in which Article 86 of the Treaty is to apply to the conduct of two or more undertakings. Whilst the Commission has refused to define the scope of that discretion, it appears to consider that horizontal collusion may be 'worse' than dominance by a single undertaking and must, for that reason, fall within Article 86 of the Treaty.

647 The applicant in Case T-212/98 further claims that even if it could be regarded as occupying a collective dominant position with the other TACA members for the

sole reason that it is a TACA member, it does not follow that any action taken by one or more TACA parties in relation to the transatlantic trade must necessarily be attributed to all TACA parties at any time. Notwithstanding the fact that the abuses with which the applicants are charged fall wholly or partly outside the scope of the TACA agreement, the Commission has failed to show that all of the TACA parties adopted the same conduct on the market in relation to the issues addressed by the contested decision. The applicant claims that its weak position on the market at the time of the facts makes it unlikely that there was the same conduct since it would have derived few advantages from that. It emphasises, moreover, that as a new TACA member, it agreed to be bound by the clauses of the conference agreement as they stood at the time of its joining.

648 The Commission, supported by the ECTU, claims that this plea should be rejected.

(b) Findings of the Court

649 By the arguments which they put forward in support of this plea, the applicants are essentially criticising the Commission for having failed to establish to the requisite legal standard that the TACA members formed a single body which had adopted the same conduct on the market, leading to the elimination of any competitive relationship between them.

650 The applicants correctly observe that the Commission did not establish in the contested decision that the TACA parties had adopted the same conduct on the market in question, but only, as stated at paragraph 525, that the numerous economic links identified at paragraphs 526 to 531, resulting on the one hand from the tariff, the enforcement provisions and penalties, the secretariat and the TACA annual business plans and from the consortia agreements on the other had led to a 'significant' diminution of their ability to act independently of each other. The Commission also expressly stated, at paragraph 528 of the contested

decision, that the restrictions on the ability of the TACA members to act independently of each other as a result of the tariff and the TACA enforcement provisions and penalties were intended to eliminate 'substantially' price competition between them. The Commission concludes in paragraph 522 of the contested decision that 'the continued existence of a possible degree of competition between the parties does not rule out the finding of a collective dominant position'.

651 It is therefore necessary to consider whether, as the applicants maintain, in order to assess collectively the position held by a number of undertakings in the context of the application of Article 86 of the Treaty, the Commission is required to establish that the undertakings concerned have adopted the same conduct leading to the elimination of any competitive relationship between them.

652 It has been held that, in order for the position of a number of undertakings to be the subject of a collective assessment on the relevant market, it must be shown that the undertakings concerned are together, in particular because of factors giving rise to a connection between them, able to adopt a common policy on the market (*Kali und Salz*, cited at paragraph 595 above, paragraph 221). That is so if the undertakings are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices (Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 276, and Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, paragraph 60).

653 Although the possibility that one undertaking may align its conduct with that of one or more competitors necessarily implies that competition between them is significantly restricted, such a possibility to align competitive conduct in no way implies that competition between the undertakings concerned is completely eliminated. Furthermore, the existence of a collective dominant position within

the meaning of Article 86 of the Treaty presupposes the existence of economic links between two or more economic entities which are, by definition, independent and, accordingly, capable of competing with one another, and not the existence between the undertakings concerned of institutional links comparable to those existing between a parent company and its subsidiaries (see, to that effect, *Flat glass*, cited at paragraph 594 above, paragraphs 357 and 358).

654 Consequently, although the lack of effective competition between operators alleged to be members of a dominant oligopoly is a significant factor among those that must play a role in determining the existence of a collective dominant position (*Airtours*, cited at paragraph 652 above, paragraph 63; see also, to that effect, *Centro Servizi Spediporto*, cited at paragraph 594 above, paragraph 34, and *DIP*, cited at paragraph 594 above, paragraph 27), there can be no requirement, for the purpose of establishing the existence of such a dominant position, that the elimination of effective competition must result in the elimination of all competition between the undertakings concerned.

655 The applicants are therefore wrong to maintain that the existence of a collective dominant position within the meaning of Article 86 of the Treaty essentially precludes any competition between the undertakings holding such a position and requires the adoption by those undertakings of the same conduct for all aspects of competition on the relevant market.

656 The arguments whereby the applicant in Case T-212/98 alleges that, even if it could be regarded as holding together with the other members of the TACA a dominant position solely by reason of its membership of the TACA, it does not follow that every act carried out by two or more parties to the TACA concerning transatlantic traffic must necessarily be attributed to all the parties of the TACA at any time have already been answered at paragraphs 630 to 634 above in the context of the preceding pleas.

657 It follows from all the foregoing that this plea, alleging application of the wrong legal test must be rejected.

2. Pleas alleging incorrect assessment of internal price and non-price competition

(a) Arguments of the parties

658 The applicants put forward two pleas. The first alleges incorrect assessment of internal price competition and the second alleges incorrect assessment of internal non-price competition.

659 As regards, first, price competition, the applicants submit that the Commission's analysis of the evidence they adduced regarding their individual pricing strategy is on economic and legal grounds inconsistent with a finding of a collective dominant position.

660 As a preliminary point, the applicants argue that it is necessary to distinguish between conference rates and independent action rates. They explain that conference rates include tariff rates and conference service contract rates. Tariff rates in turn comprise both 'ordinary rates', applicable for the transport of commodities falling within certain classes regardless of quantity ('class tariff rates'), and TVRs, which relate to the transport of a given volume over a particular period. All those rates are set by the members of the conference acting together. Independent action rates, by contrast, include independent action both on 'ordinary rates' or by way of TVR (time/volume rates, independent action, or

'TVRIA') and individual service contract rates. They are negotiated directly between the shipper and one or (in the case of joint individual service contracts) more conference members.

661 The applicants emphasise that both conference rates and independent action rates reflect competition in the market. Thus, in agreeing on conference rates, the applicants must take account of competition from non-conference carriers, operators on alternative routes, independent action and other modes of transport and of customer purchasing power. As a result of that competition, the prevailing rates on the transatlantic trade are low, as the conclusions of the Drewry Report and the Mercer Report show.

662 The applicants submit that in the case of liner conferences a finding that there is a common pricing strategy requires that all or practically all cargo is carried by the conference at conference 'ordinary rates' or conference service contract rates. In this case, however, the applicants adopted an independent pricing policy in response to both internal and external competition. The existence of internal competition is demonstrated by the existence of independent action, individual and joint service contracts and contracts with NVOCCs. The applicants claim that to deny that internal competition exists is to find, as the Commission implicitly does, that the members of a shipping conference must by definition be considered collectively, regardless of evidence of price- or non-price competition between them. The applicants consider that the evidence described below shows that they did not adopt the same price fixing behaviour on the market. The Commission has adduced no evidence to the contrary.

663 First, the applicants submit that, whilst it is true that independent action is often very short-term or provides a temporary solution pending the negotiation of service contracts, such actions are evidence of internal price competition in that recourse to independent actions, even for a short period, is an independent

pricing decision. The applicants stress in particular the possibility for each conference member to adopt the independent action taken by another member (by means of a 'me too'). The applicants claim that such actions are evidence of internal competition since they attest to the willingness of the member electing to 'me too' to compete with the member initiating the independent action. The right to 'me too' is guaranteed by the US Shipping Act.

664 The applicants further stress that the procedure governing independent action gives conferences a wide margin of discretion to respond to internal and external competition. They point out in that respect that independent action on 'ordinary rates' must be notified to the conference secretariat, which in turn notifies all conference members and publishes it in the new conference tariff, so that any shipper may benefit from that rate throughout its period of validity without having to ship cargo with the member who took the initiative. The applicants stress that any conference member may offer its services at the TVRIA provided it does so before that rate becomes effective and provided it obtains the consent of the initiator. The applicants also observe that under the FMC regulations once a shipper accepts the rate it can no longer be revised, even if subsequently the conference rate falls.

665 In this case, the applicants explain, there were numerous examples of independent action by the TACA members from 1994 to 1997 and they claim, on the basis of TVRIA data for 1996, that (i) in 1996, 8.3% of total cargo transported on the transatlantic trade was at TVRIA rates; (ii) the applicants pursued different strategies on the subject (for example, whilst two TACA members carried no cargo at TVRIA rates, two other members carried more than 20% of their total cargo at such rates; (iii) even if they are unable to identify the volume of cargo carried in the context of an independent action on the 'ordinary rates', it is clear that the total volume of cargo carried in that context is greater than that carried at TVRIA rates alone.

666 The applicants also state, relying on the statistics for 1996, that competition between the members of each of the consortia to which the TACA members are party is characterised by independent action and 'me toos', which contradicts the assertion at paragraph 198 of the contested decision that 'vessel-sharing agreements have the effect of reducing the number of independent actions entered into by their members'. The statement by an FMC official set out at paragraph 197 of the contested decision, and on which the former assertion was based, does not represent the FMC's official position. The fact that a high number of vessel-sharing agreements have been accepted by the FMC shows, however, that that body makes no link between the existence of that type of agreement and the level of independent action activity engaged in by its members. The applicants take note of the fact that in the defence this is considered to be a minor part of the contested decision, but maintain that the Commission has adduced no evidence in support of that finding.

667 Lastly, the applicants challenge the relevance of the comparison, in Table 4 of the contested decision, between independent actions on the transpacific trade and independent actions on transatlantic trades. They point out (i) that the Commission provides no information as to the relative size of the two trades; (ii) that the Commission does not take account of the fact that, in the TACA, each notification of independent action is counted as one independent action, regardless of the number of tariff line items affected (in terms of commodities and routings), whilst on the Asia-bound transpacific trade independent actions are recorded for each commodity and each routing affected; (iii) that in the case of the TACA, which contains 'ordinary rates', independent action taken for one class may affect several commodities, whilst in the case of the transpacific trade, which has one tariff 'per commodity', independent actions are generally undertaken with respect to a single commodity; and (iv) that the Commission has not given the source for the data quoted. In support of their challenge, the applicants attach a statement from Mr Conrad, the Deputy Executive Director of the Transpacific Stabilisation Agreement and former General Manager and Managing Director of the Asia North America Eastbound Rate Agreement, explaining why Table 5 of the contested decision does not bear the conclusions the Commission seeks to draw from it.

668 Second, the applicants point out that in 1996 they entered into a total of 92 individual and joint service contracts, representing 17.8% of all service contracts entered into by them and 15.3% of the total cargo transported by them in 1996. The applicants also point out that the participation in joint service contracts demonstrates the different commercial policies followed by each of the TACA members. Thus, whilst some members did not participate in any such contracts, seven participated in at least one, and eight participated in more than 70. They point out that those service contracts do not need to be put to the vote of the conference. Since almost all of the applicants entered into individual or joint service contracts, and did so to varying degrees, the applicants claim that they do not understand the significance of the Commission's observation that slightly fewer than half of the contracts were with proprietary shippers. The fact, highlighted by the Commission, that almost all service contracts stipulate different prices is the product of individual strategies of individual carriers. Similarly, the fact that certain shippers also ship part of their cargo under conference service contracts is a reflection of the willingness of the individual carriers to pursue business as individual operators competing against the conference as a whole, other conference members and companies outside the conference.

669 The applicants submit that the conclusion of those service contracts resulted in a reduction in the conference tariff. Thus, the individual service contract entered into in 1996 by Hanjin with Wittwer Schwelm concerning the transport of vehicle spare parts and chemicals, after prompting a 'me-too' on the part of Ocean World Lines, an NVOCC, resulted in a reduction in 'ordinary rates' for various commodities of up to 17.7%. The applicants submitted this evidence to the Commission in the comments on the statement of objections but the Commission disregarded it in the contested decision with no explanation.

670 Third, the applicants allege that the individual strategies adopted by the TACA members in relation to competition for the transport of NVOCC cargo show that

there was no collective dominant position. Thus it is apparent from figures given in the application that (i) in 1994 seven of the then 16 members of the TACA competed for the carriage of NVOCC cargoes; (ii) in 1995, nine of the then 17 TACA members competed for the carriage of NVOCC cargoes; (iii) in 1996, 15 of the 17 TACA members competed for the carriage of NVOCC cargoes; and (iv) in 1997, 16 of the 17 TACA members competed for the carriage of NVOCC cargoes. Furthermore, the same data show that the share of each of the applicants of the total NVOCC cargo carried by the conference varied considerably over the period in question, which again demonstrates the different policies pursued by each of the TACA members in this area. Thus, for example, Hapag-Lloyd's share of total NVOCC cargo carried by the conference increased between 1994 and 1997 from 0.9% to 9.6%, at the expense of the companies traditionally dealing with that type of cargo. The explanation was given by the applicants' legal adviser in a letter to the Commission dated 3 May 1995, which states that:

'In relation to full container load ("FCL") cargo, however, some TACA parties have elected, as part of their overall corporate business policy, planning, marketing and investment strategy, not to maintain large sales forces and/or extensive agency networks to solicit cargo from the numerically great number of small and medium -sized proprietary shippers of FCL cargo. As a consequence, such carriers tend to utilise and depend to a greater extent upon the [NVOCCs] to solicit and aggregate significant volumes of FCL cargo. In distinction to such TACA parties, others have elected to maintain, and bear the fixed costs of, extensive internal sales forces, customer service functions and agency networks. These carriers tend to deal to a much greater extent directly with FCL proprietary shippers and therefore tend to view NVOCCs as competitive and rival carriers (since they too are competing for proprietary shipper FCL cargo)'.

671 Those adopting the former approach include, for example, Cho Yang, whose share of the conference's NVOCC cargo fell from 19.5% in 1994 to 8.3% in

1997. In the reply the applicants explain that these are former independent lines which do not possess the marketing and sales infrastructures to compete effectively for proprietary shippers' business, and which relied on the NVOCCs to provide that marketing and sales infrastructure. The applicants consider that those divergent policies in relation to NVOCC cargo resulted in genuine competition between the TACA members, with members losing a significant share of that business to other members.

672 In the light of those factors, the applicants challenge the allegation at paragraph 296 of the contested decision that 'the majority of the TACA parties do not compete to participate in service contracts with NVOCCs'. They point out that although the Commission reproduces the letter of 3 May 1995 in footnote 55 at paragraph 151 of the contested decision, it ignored their explanation. Furthermore, they criticise the Commission for basing its allegation on the data for 1995 alone without examining the trends and developments in the market which reflect the individual strategies of each of the TACA parties. Finally, the Commission appears to limit its allegation to NVOCC service contracts. As the data in the application show, Hapag-Lloyd carried all of its NVOCC cargo in 1994, 1995 and 1996 under TVRs and was the only line to do so in 1994. In 1995 and 1996, several applicants carried NVOCC cargo on the same basis. Since 1994, all NVOCC cargo carried by way of TVRs has been transported not at a jointly-agreed rate but at a rate fixed by the lines acting individually under TVRIAs.

673 As for the Commission's critical observation that four TACA members carried the bulk of NVOCC cargo, this amounts to a claim that the TACA members would only have sufficiently different strategies if they all did the same thing. The relevant issue is rather whether the TACA members pursued different strategies in

relation to NVOCC cargo, which they did. The foregoing evidence shows that the carriage of NVOCC cargo changed considerably over time. Whether it was performed under service contracts or by way of TVR is immaterial. It is the competition for such business which is relevant.

674 Second, the assessment of the evidence adduced by the applicants in relation to their individual strategies towards non-price competition is incompatible on economic and legal grounds with a finding of a collective dominant position. In particular, the applicants challenge the Commission's finding at paragraph 194 of the contested decision that 'the "product" on offer from each carrier becomes indistinguishable from the others', notwithstanding the weight of evidence of non-price competition adduced by them during the administrative procedure.

675 The applicants observe, as a preliminary point, that the services offered by carriers are not limited to the services expressly included in service contracts but must also be understood to include 'value-added services', namely those governing the shipper's selection, at the pre-contractual stage, of carriers to tender for the carriage of a particular cargo, of a particular carrier to contract with, and of a specific carrier in the context of a conference or jointly agreed individual service contract. The applicants consider that those competitive factors are reflected in conference service contracts, the demand of shippers for specific services and 'value-added services.'

676 First, the applicants stress that when a conference service contract is signed it is for the shipper to allocate its cargoes between the participating carriers in accordance with its commercial judgment. Relying on the data given in the application, the applicants claim that in the majority of cases the identity of the lead carrier changed from one year to the next and that the proportion of cargo carried by the lead carrier varies considerably from one year to the next. It is not

correct to say, as the Commission claims on the basis of Annex V to the contested decision, that most of the switching of carriers takes place within groups of carriers which are party to the same agreement. On the contrary, it is apparent from that annex that the shippers' respective shares of the cargo carried by the lines belonging to each group changed considerably over the years from 1994 to 1996. Since the conference service contract rates have been agreed pursuant to conference procedures, those changes must be attributable to non-price competition.

677 Second, as regards the shippers' demand for specific services, the applicants claim that the shippers select carriers on the basis of the specialised 'value-added' services provided by them. There is, moreover, a wide range of services which, taken in isolation or in combination with others, determine the shipper's choice of carrier.

678 In support of those claims the applicants refer, first, to the shippers' comments when they negotiated conference service contracts with the conference secretariat. It is apparent in particular from the shippers' requests for a reduced rate from carriers who, in their opinion, offer lower quality services that the shippers attach considerable importance to differences in the levels of service provided by the carriers. The factors which influence differentiation relate to transit times, equipment availability, slot availability, port calls, scope of service, sales service, and speed of loading. Second, the applicants refer to the shippers' requirements in their invitations to tender, and to the carriers' responses to those invitations. Those documents also show the range of specific services required of each individual carrier. The applicants stress that the fact that, in the course of the administrative procedure, they sought to protect the confidentiality of those invitations to tender so that the Commission could not ascertain the shippers' opinion does not in the least prevent the Commission from making general enquiries. Third, the conference service contracts contain, in most cases, standard terms which require the carriers to give collective service commitments as to the regularity of sailings, space aboard those sailings, port calls, transit time and

containers, and individual service commitments as regards advertised sailing schedules, safety and special services or equipment. Furthermore, a significant number of service contracts concluded in 1995 contain service provisions which were negotiated individually with the shippers. The application refers to 16 different clauses of that type. The statement at paragraph 146 of the contested decision that 'the Commission has been told that sales representatives of the lines claim they are not allowed under the terms of the TAA/TACA to offer anything other than a standard service contract, namely a volume-related contract without additional services' is therefore unfounded. In any event, it should be recognised that factors taken into account by a shipper when selecting a carrier do not generally take the form of terms of the contract since the shipper will generally select on the basis of the value-added elements described above. Fourth, the applicants explain that in the case of conference service contracts, the conference members compete on the basis of individual service offers. Thus, each shipper will select a carrier for its own reasons. In reply to the Commission's criticism that the application sets out the applicants' opinion on this point and not that of the shippers, the applicants claim that the Commission did not try to obtain evidence from the shippers and that it also rejects the statements of the shippers, cited in the application. Fifth, and finally, the applicants underline the existence of global cooperation contracts between carriers and shippers.

679 Thirdly, the applicants maintain that they pursue different individual strategies to meet the shippers' service requirements. First, in the case of ocean services the TACA members compete on transit times and port calls, waiting and pick-up times, particularly in the case of intermodal transport, and also on expected arrival times and demurrage notices. The figures show conclusively the flaw in the Commission's argument that the TACA parties sought to determine the ports at which they would or would not call. Second, the TACA members have made individual investments in specialised equipment and non-standardised containers. Third, as regards port and inland services, the TACA members compete in terms of logistics, in particular with regard to their ability to reposition containers in

specific ports in response to shipper demand, and also as regards the possibility of offering weekend services and special services in the case of late booking or delivery. Fourth, as regards information technology, the applicants point out that they had to take individual steps to meet the shippers' requirements in relation to electronic data interchange and internet services, particularly to provide them with immediate shipping information. Fifth, the applicants offer different services in respect of customs clearance. Sixth, the applicants do not all offer the same quality assurance. In particular, not all shipping lines have obtained ISO 9002 (quality management) certification. Seventh, and lastly, the applicants emphasise the fact that they market their services by both traditional and electronic media on an individual basis and that they do not advertise collectively as a conference or within consortia. Furthermore, their marketing policy is intended to differentiate the services which each offers from those provided by other lines.

680 For all those reasons the applicants conclude that they provide distinct services and compete with each other to satisfy the shippers' specific requirements. It is accordingly wrong to say that they have adopted the same conduct on the market and present themselves on the market as a single entity.

681 The applicant in Case T-213/98 states that the particular facts in its individual case, which are not challenged by the Commission, confirm that there is no collective dominant position. It claims that its commercial policy, and in particular the reasons for which it joined the TACA in 1993, show that it acts autonomously in competition with the other TACA members, and so cannot be regarded as forming a single economic entity with the other TACA members.

682 The applicant explains as a preliminary point that, contrary to the Commission's assertion at paragraph 293 of the contested decision, its decision to become a member of the TACA was justified on commercial grounds. As a traditional carrier operating on the transpacific and Europe-Asia trades, it had to become a global carrier in order to adapt to the increasing tendency for customers to centralise their purchasing decisions at a regional level (North America, Europe) or even at the global level. In the circumstances the applicant decided to develop its transport business on the transatlantic trade in order to supply its existing customers with a single network (a 'one-stop shop') for the transport of their cargo around the world.

683 Given the losses incurred by the TACA members on that trade (see paragraph 590(b) of the contested decision), NYK took the view that the introduction of an independent service would entail unreasonable risk. It therefore chose to enter the trade by means of a consortium agreement with Hapag-Lloyd and NOL (Pacific Atlantic Express) to provide both a transpacific and a transatlantic service. It acknowledges that its presence on the transatlantic trade remained limited. That was justified, however, by the fact that its existing customers essentially required the transport of cargo on the transpacific trade and it was difficult to anticipate the extent to which customers would be prepared to entrust it with the carriage of their cargo on the transatlantic trade.

684 The applicant claims that the reason it then became a member of TAA/TACA is that its target customers in Europe and North America used that conference for the transport of their cargo. It also emphasises that it traditionally operated from within conferences and that its membership of the TACA was liable to promote stability on the trade in question in accordance with the objective stated in the eighth recital in the preamble to Regulation No 4056/86. Finally, in so far as US law requires that membership of a conference cannot be refused and results in access to all conference service contracts on the same conditions as those enjoyed

by other members, NYK simply took advantage of the opportunities open to it under US law to increase the cargo transported on the trade in question as part of a new global service.

685 The factors which led it to become a member of the TACA also determined the independent commercial policy it pursued thereafter. Hence, its commercial policy on the transatlantic trade was to concentrate on its existing customers on other trades. It claims that the commercial benefits it could offer its customers were, first, the option of an 'all water' service across the Atlantic to the United States West Coast and the transpacific lines (via the Panama Canal) and, second, a non-conference Canadian ports service.

686 Contrary to the Commission's insinuations (in paragraphs 293 et seq.) in the contested decision, TACA membership gives a carrier no guarantee of success in entering a new trade. In the first place immediate access to TACA service contracts is no guarantee of obtaining the cargo covered by those contracts since each carrier must persuade the shippers to entrust it with their cargo. The Commission therefore wrongly concluded, at paragraph 564, that it was immediate access to conference service contracts that induced Hyundai to become a member of TACA. The applicant stresses, however, that whilst its various commercial initiatives enabled it to win some new customers and to enter new markets (for example, the personal effects market in the United Kingdom) it also lost customers or was forced to withdraw from some markets for logistical reasons. The applicant points out that its market share on the trade in question fell from 0.9% in 1994 to 0.6% in 1995 and 1996.

687 In those circumstances the applicant considers that the Commission cannot claim that the market share of TACA members did not fluctuate over the period in question and that the absence of such fluctuation proves a lack of competition. In

any event, stable market shares do not necessarily imply that there is a lack of competition. In the shipping sector there is a natural tendency for market share to reflect a line's capacity on a particular route. Furthermore, stable market shares may also be explained by customer loyalty or customer switching. The applicant points out that the academic opinion quoted by the Commission in the defence supports that argument since Scherer & Ross (*Industrial Market Structure and Economic Performance*, Houghton Mifflin, 1990) acknowledge the existence of frequent brand switching arising from absence of consumer preference. In those circumstances, the applicant says, it matters little that maritime carriers engage in 'inefficient attempts to differentiate products', as those authors claim.

688 The applicant further claims that at no time did it choose not to compete for cargo so that it would be easier for Hanjin and Hyundai to establish themselves on the trade. There was no commercial justification for adopting such behaviour since a refusal to supply customers would have risked losing their custom on other trades.

689 It adds that since entry to the conference cannot be refused and since there are no arrangements within the TACA framework that effectively limit the capacity offered by each individual carrier, the conference cannot control capacity, particularly that offered by independent carriers. It follows that, as regards a vital aspect of the relationship between supply and demand, the TACA parties are unable to act as a single economic entity or eliminate potential competition.

690 As regards price competition in particular, the applicant states that, by comparison with the other TACA members, the relatively small number of independent actions in relation to price that it has engaged in, including under TVRs and joint and individual service contracts as set out in the tables in the

common part of the application, should not be interpreted as evidence that it has not exercised its freedom to compete independently on price. First, account should be taken of the fact that the figures, which are expressed in absolute terms, should be understood in the context of its limited market share on the trade in question. Second, those figures do not take account of its actions on the Canadian ports trade, on which it operates outside of any conference. Similarly, whilst the amount of NVOCC cargo it transported may appear to be small, one of its main customers was an NVOCC, and 25% of the westbound cargo which it carried in 1995 was from that customer. The applicant emphasises that more than 30% of the westbound cargo it carried, including to the Canadian ports, was NVOCC cargo.

691 The Commission's reliance on the fact that the applicants form part of a shipping conference qualifying for block exemption for maritime tariff fixing is irrelevant since the applicants have proved the existence of competition on other grounds. Indeed the Commission has in any event acknowledged the existence of such competition within a consortium (see the P&O/Nedlloyd decision, cited above). The applicants stress the fact that the TACA includes various consortia. Similarly, the Commission expressly acknowledged the possibility, in the context of Commission Regulation (EC) No 870/95 of 20 April 1995 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies ('consortia') pursuant to Regulation No 479/92 (OJ 1995 L 89, p. 7, see the eighth recital of the preamble and the second indent of Article 5), that there was effective competition between the conference members in terms of the services provided, the existence of such competition being a precondition for the applicability of the block exemption regulation.

692 Finally, the contested decision does not address the issue of whether its involvement in the TACA has had an appreciable effect on the relevant market so as to justify treating it as contributing to an abuse by a group of undertakings collectively holding a dominant position.

693 The Commission, supported by the ECTU, contends that the arguments put forward by the applicants in support of these pleas are unfounded and must therefore be rejected.

(b) Findings of the Court

694 By the arguments put forward in support of these pleas the applicants maintain, in essence, that the significant internal competition between the TACA parties contradicts the finding of a collective dominant position.

695 Without prejudice to the question whether the existence of significant internal competition within a liner conference, within the meaning of Regulation No 4056/86, is capable of affecting the stability of trade which justifies the application of the block exemption provided for in that regulation and, accordingly, of leading the Commission to withdraw that exemption, the applicants are right to argue that significant internal competition may also be capable of showing that in spite of the various links or factors of correlation existing between the members of a liner conference they are not in a position to adopt the same course of conduct on the market such as to give third parties the impression that they are a single entity and thus justify a collective assessment of their position on the market under Article 86 of the Treaty.

696 In this case, the applicants adduce evidence relating to both price competition and non-price competition. In addition, the applicant in Case T-213/98 puts forward a number of specific arguments.

(1) Internal price competition

697 The applicants claim that the independent actions, service contracts and carriage of NVOCC cargo testify to the price competition between TACA members. Essentially, they claim that the independent actions and individual service contracts lead to the application of prices lower than the tariff, while the conference service contracts and the carriage of NVOCC cargo represent individual commercial strategies, which some TACA members employ more than others.

698 As regards first the independent actions, namely the right under the US legislation for any member of a liner conference to offer a price lower than the conference tariff, that option, imposed by the legislation of a non-member State, of derogating, subject to certain conditions, from the tariff discipline of the price-fixing agreements for maritime transport constitutes an exception to the principle of joint price-fixing by a conference (*TAA*, paragraph 307).

699 Next, it is clear from Article 13 of the TACA Agreement that in spite of its name independent action is, as the Commission points out at paragraph 104 of the contested decision without being contradicted on that point by the applicants, supervised and restricted by the rules of the conference, in the sense that the TACA secretariat must be informed before it is taken, which affords the other members the opportunity to follow or to persuade the member concerned not to take that action. Independent action is thus not part of normal competition, by virtue of which each operator must determine independently the policy which he intends to adopt on the market, which strictly precludes any direct or indirect contact between economic operators the object or effect of which is either to

influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*TAA*, paragraph 307).

700 It is common ground between the parties, moreover, that, as the Commission stated at paragraphs 215 and 216 of the contested decision, independent action may be exercised for very short periods and may be used as a stop-gap measure while service contract negotiations are taking place.

701 Nor do the data provided by the applicants themselves belie the assertion at paragraph 221 of the contested decision that the incidence of independent action remained insignificant on the transatlantic trade. Whilst the data show the number of independent actions taken by TACA members on tariff prices, including TVRIAs, in 1994, 1995 and 1996, they do not show, for the first two years, the quantities of freight carried in the context of those actions, so that they cannot be recognised as having any probative value for the purpose of demonstrating the existence of significant internal competition. Quite to the contrary, it is apparent from the data relating to 1996, the only data to indicate, as regards TVRIAs, the quantities of freight carried in the context of independent actions, that during that year freight concerned by TVRIAs represented only 8.3% of total freight carried by the TACA parties, a relatively marginal quantity of that total.

702 Furthermore, the Commission established in Table 5 at paragraph 220 of the contested decision that the number of independent actions on the transatlantic trade is insignificant compared with the number of independent actions on the transpacific trade. Although the applicants dispute the method used by the Commission in calculating and comparing the number of independent actions on the two trades concerned, and claim that the contested decision does not explain

the lack of data on the respective size of the two trades, they adduce no evidence capable of contradicting the conclusion drawn by the Commission that the number of independent actions on the transatlantic trade is insignificant.

703 The arguments whereby the applicants seek to establish the existence of significant internal competition as a result of independent actions must therefore be rejected.

704 Second, as regards service contracts, the Commission was right to observe at paragraph 224 of the contested decision that such contracts cannot be relied on in order to demonstrate the existence of internal price competition. As conference service contracts are concluded by joint agreement within the conference according to the voting procedures defined in the TACA, they necessarily entail the collective fixing of a common price by all the members of the conference participating in the contract. The applicants allege that certain TACA members participate in conference service contracts more often than others, but that is immaterial because the shippers party to such contracts are in any event charged a common price for the carriage of their freight regardless of which participating TACA member actually carries it.

705 Next, individual service contracts are admittedly a source of internal price competition but they were banned by the TACA in 1994 and 1995. Consequently, they can be relied on by the applicants as evidence of the existence of internal competition in respect of only one of the three years covered by the contested decision, 1996. Furthermore, it is apparent from the data supplied by the applicants that in 1996 individual service contracts represented only 15.3% of the total freight carried by the TACA. Those figures also make it clear that most of those individual service contracts were concluded jointly by a number of carriers, with the consequence that internal price competition did not affect all the TACA parties. Lastly, as with independent actions the conclusion and the

negotiation of individual service contracts were regulated by Article 14 of the TACA, which, as stated at paragraph 149 of the contested decision, placed certain restrictions on the contents of service contracts and on the circumstances in which they might be concluded. At paragraph 447 of the contested decision the Commission stated, without being contradicted by the applicants on this point, that such restrictions fell within Article 85(1) of the Treaty. It follows that even where the individual service contracts were authorised by the TACA they did not represent normal competition.

706 As regards the applicants' allegation that the individual service contracts led to a reduction in the tariff, the applicants have not established, for the commodities which they identify in their application, the existence of a causal link between the individual service contracts and the reductions in the tariff decided on by the TACA, so that the facts on which that allegation is based are not made out. Furthermore, the fact that the TACA decided to reduce the tariff in order to bring it into line with the rates of the individual service contracts, far from casting doubt on the existence of a collective position, tends to confirm it, since it reflects the ability of the TACA parties to react collectively to individual initiatives taken by some of them with a view to extending to the whole conference the lower rates offered by them.

707 The arguments whereby the applicants seek to establish the existence of significant internal competition as a result of the service contracts must therefore be rejected.

708 Last, as regards the carriage of NVOCC cargo, it is clear from the figures provided by the applicants for 1994, 1995 and 1996 that all NVOCC cargo was

carried by the TACA parties either under TVRs or under service contracts. In response to a written question put by the Court concerning TVRs, the applicants gave support for the assertion in their application that all cargo covered by TVRs was in fact carried within the framework of independent actions and therefore constituted TVRIAs. Even though it is established, however, that sole fact is insufficient to demonstrate the existence of significant internal price competition within the TACA. First, in 1994, 1995 and 1996 NVOCC cargo represented only 12.5%, 14.5% and 15.1% of total cargo carried by the TACA in those three years. Furthermore, the proportion of NVOCC cargo carried under TVRIAs represented only 1%, 4.5% and 15.5% of total NVOCC cargo carried by the TACA parties in each of those years, the bulk of that cargo therefore being carried under service contracts. It will be recalled that in 1994 and 1995 the TACA did not permit conclusion of individual service contracts, so that during those two years NVOCC cargo carried under service contracts, which represented 99% and 94.5% respectively of total NVOCC cargo in those two years, was carried under conference service contracts, which necessarily entail the setting of common prices. The Commission states, moreover, without being contradicted by the parties on this point, that 70% of the NVOCC cargo carried under service contracts in 1996 was also carried under conference service contracts.

709 It is thus clear from the data provided by the applicants themselves that during the period covered by the contested decision NVOCC cargo was essentially carried at common prices fixed by the conference. In that regard it is irrelevant, for the purpose of demonstrating the existence of significant internal price competition, that certain TACA parties carry more NVOCC cargo than others, since for virtually all their freight the NVOCCs are charged a price fixed in common by the conference.

710 The arguments whereby the applicants seek to establish the existence of significant internal competition as a result of the carriage of NVOCC cargo must therefore be rejected.

711 It follows from the foregoing that none of the evidence adduced by the applicants, whether the taking of independent actions on the tariff, the conclusion of conference service contracts or individual service contracts or the carriage of NVOCC cargo, is capable of establishing the existence of significant internal price competition within the TACA. Even taken together, they attest to competition far too marginal to refute the absence of internal price competition resulting from the common or uniform tariff prices constituting the liner conference agreement within the meaning of Regulation No 4056/86.

712 However, it must still be ascertained whether the evidence adduced by the applicants in regard to internal non-price competition is capable of upsetting that conclusion.

(2) Internal non-price competition

713 For the purpose of demonstrating the existence of significant internal non-price competition the applicants claim essentially first, that in conference service contracts the 'lead carrier' and the proportion of freight carried by it each year vary from year to year. Next, they allege that shippers have specific service requirements which lead them to select carriers on the basis of the specialised services which they offer. Last, they maintain that the TACA parties pursue different individual strategies in order to meet shippers' service requirements.

714 As a preliminary point, it should be noted that the existence of non-price competition between the members of a liner conference, such as competition regarding the quality of service provided, is not in principle sufficient to negate the existence of a collective dominant position based on links inferred from their

common strategy on price-setting, unless the extent and intensity of those alternative forms of competition is such as to preclude reasonable reliance on their common pricing policy as the basis for establishing a single market entity (Opinion of Advocate General Fennelly in *CEWAL II*, cited at paragraph 638 above, point 34).

715 In this case, therefore, the applicants must adduce evidence not only of the fact that there is internal non-price competition within the TACA but, especially, of the fact that any such internal competition is of such extent and intensity as to preclude the TACA parties from being assessed collectively.

716 It is in the light of those considerations that the Court will consider the probative value of the evidence adduced on this point by the applicants.

717 As regards first of all the arguments relating to conference service contracts, it should be observed that in order to determine whether there is internal non-price competition the mere fact that the identity of the 'lead carrier' carrying the shippers' cargo varies from year to year is as such irrelevant unless account is also taken of the fact that each carrier is also a party to the consortia agreements on the trade in question. As the Commission rightly observes at paragraph 232 of the contested decision without being contradicted by the applicants on this point, where a carrier is party to a consortium agreement, such as the VSA agreement between P&O, Nedlloyd, Sea-Land, Mærsk and OOCL, competition on service quality is excluded, since the parties to such agreements share vessels and operate to a joint schedule. As consortia agreements are intended to standardise the services offered by the shipping companies which are members of those consortia, the existence of internal competition on services within the TACA is necessarily limited to the competition existing between the various consortia of which the

TACA is made up. Consequently, in order to demonstrate the existence of internal service quality competition within the TACA, as the Commission states at paragraph 233 of the contested decision, the applicants must show that shippers moved their cargo not just within one consortium but from one consortium to the other.

718 The Commission stated at that paragraph that the data provided by the applicants in their response to the statement of objections and set out in part at Annex V to the contested decision revealed that 'the shares enjoyed by the groupings of carriers have remained largely stable and..., except in [a] few cases, the switching that has taken place has not been between groupings'.

719 Although the applicants dispute that assessment, it must be observed that, apart from the fact that they first do so in the reply, the data they provided in these actions to show changes in the 'lead carrier' for some specific shippers, and also the annual variations in the proportion of freight carried by those carriers, are essentially the same as those submitted to the Commission in their response to the statement of objections. The data show clearly that, as the Commission stated at paragraph 233 of the contested decision, in most cases the changes in 'lead carrier' took place within the same consortium. As for the fact that the proportion of the freight of each of the shippers carried by each 'lead carrier' varies from year to year, it is sufficient to observe that in the absence of any indication as to the identity of the shipping companies carrying the remainder of the freight, the data provided by the applicants do not make it possible to determine which consortium carried that freight. In those circumstances, the data submitted by the applicants do not cast doubt on the finding in the contested decision that changes in 'lead carrier' take place as between shipping companies who are parties to the same consortium.

720 It follows that the evidence adduced by the applicants is not of such a kind as to demonstrate the existence of significant internal service-quality competition in the context of conference service contracts.

721 The applicants' arguments on this point must therefore be rejected.

722 As regards, second, the arguments relating to shippers' requirements, it cannot be disputed that shippers demand a certain level of quality in the transport services which the TACA parties supply. However, that sole fact is in itself not relevant for the purpose of demonstrating the existence of internal non-price competition between the TACA parties, unless it is proved that the shippers switch freight from one carrier to another specifically because of the different services offered by them. However, the applicants do not provide such proof but merely produce a list of services required by shippers.

723 Furthermore, although the applicants assert, without evidence in support, that conference service contracts propose, in addition to collective service undertakings by all the participating shipping companies, individual service undertakings by each of those companies, they do not show that those individual undertakings are reflected in freight being switched from one shipping line to another.

724 Lastly, the only examples of negotiated clauses submitted in the context of the application are all clauses negotiated by the TACA which provide for collective undertakings capable of being offered by all the participating shipping lines. The Commission was therefore right to state, at paragraph 242 of the contested decision, that few service contracts contained individually tailored provisions relating to the type of services offered. Admittedly, the individual service

contracts contain more special clauses than the conference service contracts. However, individual service contracts were not authorised by the TACA until 1996. It is also clear from the data provided by the applicants, moreover, that in 1996 the freight carried by the TACA parties under individual service contracts, including those made jointly by several carriers, represented only 15.3% of total freight carried by the TACA, and that only a minority of those contracts were concluded individually by a single carrier.

725 In those circumstances, the data provided by the applicants are clearly incapable of upsetting the findings in the contested decision on this point.

726 The applicants' arguments relating to the shippers' requirements must therefore be rejected.

727 As regards, third, the arguments relating to the individual strategy pursued by each TACA party, none of the data provided by the applicants is capable of proving that the differences between the services offered to shippers had a significant effect on the choice of shipping line chosen to carry their freight.

728 The applicants' arguments on this point are therefore irrelevant and must be rejected.

729 It thus follows from the foregoing that the evidence adduced by the applicants, in so far as it establishes the existence of internal non-price competition, fails to show that that competition is of such extent and intensity as to be capable of compensating for the absence of price competition resulting from the existence of uniform or common freight tariff rates.

(3) The specific arguments put forward by the applicant in Case T-213/98

730 As regards, first, the argument that the applicant joined the TACA for its own commercial reasons and pursued an independent policy within the TACA, the data it provided shows that its market share on the trade in question during the period covered by the infringements found in the contested decision never exceeded 1%. Consequently, even if its allegations (for which, incidentally, little evidence is provided) are correct as regards the independence of its commercial policy, the competition which that shipping line brings to bear on the other TACA parties is not sufficient to represent a source of internal competition of such extent and intensity as to be capable of casting doubt on the collective nature of the position held by the TACA parties on the trade in question resulting from the links identified at paragraphs 525 to 531 of the contested decision.

731 As regards, second, the argument that stable market shares do not necessarily imply the complete absence of competition, as they may also be explained by customer loyalty or compensatory customer transfers, it is sufficient to observe that the applicant has put forward no evidence capable of demonstrating the existence of real competition. Quite the contrary: the fact emphasised by the applicants in this argument that in the maritime sector there is a natural tendency for market shares to reflect the capacities offered by the companies on each line is apt to confirm the absence of internal competition between the members of a liner conference. In the light of the common tariff established by the conference,

the applicants have no incentive to introduce capacity in order to gain market share by adopting an aggressive pricing policy, since the introduction of new capacity has no impact on prices. In those circumstances, the Commission was right to note, at paragraphs 233 and 239 of the contested decision, that the fact that the shares of the TACA parties remained stable during the relevant period indicated an absence of significant internal competition.

732 As regards, third, the argument that, in so far as access to the conference cannot be refused and there is no agreement within the TACA to limit the capacity offered by each individual carrier, the TACA is not in a position to act as a collective entity with regard to a vital aspect of the relationship between supply and demand, it must be observed that the mere fact that the TACA has not concluded an agreement among its members dealing collectively with certain aspects of the commercial relations between its members is irrelevant, since such a collective agreement exists in respect of other aspects of those commercial relations and establishes to the requisite legal standard that the position of the TACA parties must be assessed collectively under Article 86 of the Treaty. Hence, even in the absence of common rules on capacity any new member of the TACA must, by virtue of its membership, comply with the collective rules fixed by the TACA, in particular as regards the tariff. In any event, owing to the tariff introduced by the conference, the TACA has little interest in regulating capacity, since each member is aware that any increase in or withdrawal of capacity will, in principle, have no effect on prices and therefore on its market share.

733 As regards, fourth, the other arguments put forward by the applicant, it is sufficient to state that those arguments seek to challenge not the collective assessment of the position held by the TACA parties but the existence of the abusive conduct of which those parties are accused in the contested decision.

734 Those arguments are therefore of no relevance in the context of these pleas and, accordingly, must be rejected.

(4) Conclusion on the extent of internal competition

735 In the light of all the foregoing, it must be concluded that the evidence adduced by the applicants in relation to internal price and non-price competition does not show that the Commission made an error of assessment in relying on the existence of a uniform or common tariff to find that price competition between the TACA parties was largely eliminated, so that those parties are likely to adopt the same course of conduct on the market and their market position must therefore be assessed collectively under Article 86 of the Treaty.

736 Consequently, all the arguments put forward by the applicants on this point must be rejected.

3. Pleas alleging failure to state reasons

(a) Arguments of the parties

737 The applicants observe, first, that at paragraph 531 of the contested decision the Commission infers from the existence of 'very close economic links' between the TACA members that they are capable of occupying a collective dominant position, without first establishing that the undertakings in question adopted the

same conduct on the market. The applicants submit that the defect is not made good by the references in the defence to the assessment of internal competition given at paragraphs 174 to 242 of the contested decision. The description of the facts given there does not support the proposition that the applicants adopted the same conduct or that there was insufficient competition on price or in other respects.

738 Second, the applicants claim that, at paragraph 522 of the contested decision, the Commission does not seek to quantify or explain the degree of internal competition which would be compatible with the finding of a collective dominant position. During the administrative procedure the applicants adduced evidence of internal competition. In the absence of clear criteria there is nothing in paragraph 522 which enables either the applicants or the Court of First Instance to know the Commission's reasons for rejecting that evidence and to determine whether it is true that the maintenance of some competition does not preclude the existence of a collective dominant position. They also claim that the Commission fails to identify the aspects of competition which are relevant in determining whether a collective assessment is justified. The contested decision did not take into account forms of non-price competition.

739 Third, the applicants consider that the Commission's analysis of competition between the TACA members lacks reasoning as regards (i) its finding at paragraph 198 that consortia such as the vessel-sharing agreements of which the TACA parties are members have the effect of reducing the number of independent actions entered into by their members; (ii) the absence of information at paragraph 221 as to the respective sizes of the transpacific and transatlantic trades; and (iii) its decision to use the data for a single year as the basis for concluding at paragraph 296 that the majority of TACA members do not compete to participate in service contracts with NVOCCs.

740 The Commission, supported by the ECTU, contends that these pleas and arguments should be rejected.

(b) Findings of the Court

741 As regards, first, the plea criticising the Commission for not having found in the contested decision that the TACA parties adopted the same conduct on the market in question, it is sufficient to observe that the applicants' arguments seek, in reality, to challenge the merits of the assessments made by the Commission in that regard in the contested decision. Such arguments, which must be rejected for the reasons stated at paragraphs 649 to 655 above, are irrelevant in the context of verification of compliance with the obligation to state reasons (*PVC II*, cited at paragraph 191 above, paragraph 389).

742 In any event, the contested decision sets out at paragraphs 525 to 531 the grounds on which the Commission considered that the TACA parties are together, because of factors giving rise to a connection between them, able to adopt a common policy on the market (*Kali und Salz*, cited at paragraph 595 above, paragraph 221). In the same paragraphs the Commission sets out each of the five economic links between the TACA parties which in its view justify a collective assessment of the position held by the TACA parties on the market in question. Furthermore, in the context of that assessment, the Commission states expressly, at paragraph 525 of the contested decision, that those links led to a significant diminution of the ability of the TACA parties to act independently of each other. In that regard, it states at paragraph 528 of the contested decision, first, that the tariff and the enforcement provisions and penalties were intended to 'eliminate substantially price competition between [the TACA parties]', thus referring by implication but without question to paragraphs 174 to 242, in which it examines the extent of internal competition between the TACA parties, and, second, that the secretariat and the publication of annual business plans allowed the TACA

parties to present themselves on the market as a 'single united body'. Those grounds give sufficient indication of the elements of fact or of law on which the legal justification of the contested decision depends and of the considerations which led the Commission to adopt it (see, in particular, *Remia*, cited at paragraph 575 above, paragraphs 26 and 44).

743 Furthermore, during the administrative procedure, and in particular in the response to the statement of objections, the applicants did not claim that the collective assessment of the TACA parties' position on the relevant market under Article 86 of the Treaty required the absence of any competitive relationship between them. In terms of compliance with the obligation to state reasons, the Commission clearly cannot be criticised for not having replied in the contested decision to arguments which were not raised before it was adopted (see, to that effect, *FEFC*, cited at paragraph 196 above, paragraph 427).

744 As regards, second, the plea alleging that the Commission did not quantify or explain in the contested decision the degree of internal competition that would be compatible with the finding of a collective dominant position, the Commission examined in detail at paragraphs 174 to 242 of the contested decision the degree of internal competition between the TACA parties. It follows from those paragraphs of the contested decision that the Commission found that internal competition between the TACA parties was limited, or indeed insignificant. In that regard, after examining the scope of the rules introduced by the US Shipping Act (paragraphs 175 to 180), the Commission emphasised the effect produced by the other restrictive agreements affecting transatlantic trade, in particular the consortia agreements (paragraphs 181 to 198). Then, at paragraphs 199 to 242, it examined each piece of evidence of internal competition adduced by the applicants during the administrative procedure relating to the independent actions, the service contracts, the unilateral actions concerning service contracts, the TVRs, the TVRIAs and competition on the services offered. The Commission then studied in turn the price discrimination practices (paragraphs 203 to 213), the independent actions (paragraphs 214 to 222), the service contracts (paragraphs 223 to 233), the fluctuation of market shares (paragraphs 234 to 239) and competition on quality (paragraphs 240 to 242). It was in this context that, at the stage of the legal assessment, the Commission established at

paragraph 525 of the contested decision that it was necessary to make a collective assessment of the position held by the TACA parties under Article 86 of the Treaty, since their ability to act independently of each other had been diminished.

745 It follows from the foregoing that in response to the evidence adduced by the TACA parties during the administrative procedure, the Commission stated in the contested decision the reasons why in this case internal competition between the TACA parties was insufficient to preclude a collective assessment of their position. In so doing, the Commission responded specifically to the principal allegations made by the applicants in the course of the administrative procedure (*FEFC*, cited at paragraph 196 above, paragraph 426). Furthermore, contrary to the applicants' contention, the Commission examined each of the aspects of internal competition that might be relevant, including not only the forms of price competition, at paragraphs 199 to 222 of the contested decision, but also, at paragraphs 231 to 233 and 240 to 242, the forms of non-price internal competition.

746 Admittedly, the Commission did not state in the contested decision what degree of internal competition might have made it possible to preclude a collective assessment of the position held by the TACA parties. However, in order to state reasons for its decision to the requisite legal standard, the Commission is only required to state clearly and precisely the reasons on which its decision is based (*Remia*, cited at paragraph 575 above, paragraphs 26 and 44). On the other hand, it cannot be required to state the reasons which it has not used and which are therefore purely hypothetical (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 64).

747 Consequently, as the Commission did not find in this case that internal competition within the TACA was sufficient to preclude a collective assessment of the TACA, it was not required to state what degree of competition was required in order to preclude such an assessment.

748 The plea alleging failure to state reasons in the contested decision on this point must therefore be rejected.

749 As regards, third, the plea alleging that the Commission did not provide sufficient reasons for the assertion at paragraph 198 of the contested decision that the consortia agreements of which the TACA parties are members have the effect of reducing the number of independent actions entered into by the parties to those agreements, it is sufficient to observe that, according to the actual wording of that paragraph, the assertion in question was made not by the Commission but by one of the TACA parties. Compliance with the obligation to state reasons laid down in Article 190 of the Treaty cannot place the Commission under an obligation to state reasons for the assertions of third parties, a fortiori when there is no indication in the contested decision that the Commission relied on that assertion in reaching its conclusion that there was a collective dominant position.

750 The plea alleging failure to state reasons on this point must therefore be rejected.

751 As regards, fourth, the plea alleging the absence of data, at paragraph 221 of the contested decision, relating to the size of the transpacific trade compared with the transatlantic trade, it is sufficient to observe that, in so far as the applicants maintain that in the absence of those data the Commission was not entitled to find that the number of independent actions on the transatlantic trade was 'comparatively' insignificant compared with the number of independent actions on the transpacific trade, they are in reality seeking to challenge the validity of the assessments made in the contested decision on this point. Such an argument, which must be rejected for the reasons stated at paragraphs 698 to 703, is irrelevant in the context of verification of compliance with the obligation to state reasons (*PVC II*, cited at paragraph 191 above, paragraph 389).

752 In any event, paragraphs 221 and 222 of the contested decision refer to the figures on which the Commission's analysis and the conclusion drawn therefrom

are based and therefore provide the applicants with an adequate indication as to whether the contested decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged and the Community judicature to review the legality of the decision (see, in particular, *Van Megen Sports*, cited at paragraph 548 above, paragraph 51).

753 The applicants' plea alleging failure to state reasons on this point must therefore be rejected.

754 As regards, fifth, the plea alleging that the Commission did not state at paragraph 150 of the contested decision its reasons for choosing to rely on the service contracts for a single year in order to support its finding that a very large number of service contracts with the NVOCCs had been concluded by the TACA parties which had formerly been unstructured members of the TAA, the Commission was under no obligation to state its reasons for making that choice. For the purpose of complying with the obligation to state reasons, provided that the Commission refers in the contested decision to the evidence on which its analysis is based and also to the conclusions which it has drawn from that evidence, it provides the applicants, and that is not disputed by them, with an adequate indication as to whether the contested decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged and the Community judicature to review the legality of the decision (see, in particular, *Van Megen Sports*, cited at paragraph 548 above, paragraph 51).

755 Furthermore, if the data relating to other years which the applicants put forward in the context of these actions were capable of contradicting the conclusions drawn by the Commission on the basis of the single year used in the contested decision, it would be for the Court to draw the consequences, not in terms of compliance with the obligation to state reasons but with regard to the substance.

756 For those reasons, the plea alleging failure to state reasons on this point must be rejected.

C — Conclusion on the first part

757 It follows from the foregoing that all the pleas put forward in the context of the first part relating to the absence of a dominant position held collectively by the TACA parties must be rejected.

Part two: the dominant nature of the position held by the TACA parties

758 In this part of their pleas alleging that there was no infringement of Article 86 of the Treaty, the applicants first dispute the definition of the relevant market used in the contested decision as the basis for the application of that provision. Next, they deny that their position on the market is dominant. Last, they invoke a number of failures to state reasons on those points.

A — Definition of the relevant market

759 The applicants put forward a number of pleas and complaints concerning both the definition of the relevant market for services and the definition of the relevant geographic market used in the contested decision as the basis for the application of Article 86 of the Treaty.

1. The relevant market for services

760 At paragraph 519 of the contested decision, the Commission states that the relevant market for services for the purpose of the application of Article 86 of the contested decision is described at paragraphs 60 to 75. After examining in those paragraphs the various possibilities for substitution put forward by the applicants, the Commission concludes at paragraph 84 that the relevant market for sea-transport services is the market for 'containerised liner shipping... between ports in northern Europe and ports in the United States and Canada'.

761 The applicants put forward two types of pleas and complaints to challenge that definition. First, they deny that containerised liner shipping constitutes the relevant market for services; and, second, they claim that the market includes, in addition to the ports of northern Europe, the Mediterranean ports of southern Europe.

(a) The relevant transport services

(1) Arguments of the parties

762 The applicants challenge at the outset the Commission's reliance on the decision of the Court of Justice in Case C-333/94 P *Tetra Pak* v *Commission* (*Tetra Pak II*) [1996] ECR I-5951 as authority for the proposition in the contested decision that stability of demand is the appropriate basis for defining the relevant market. The Commission explains at paragraph 61 of the contested decision that in that judgment 'the Court of Justice stated that the stability of demand for a certain product is the appropriate basis for defining a relevant market and that the fact

that different products are, to a marginal extent, interchangeable does not preclude the conclusion that those products belong to separate product markets'.

763 Firstly, the Court referred to 'a relevant criterion', which means that other criteria must also be taken into account in order to determine the degree of substitution. Secondly, the Court did not hold in that judgment that stability of demand constituted the appropriate basis for determining the relevant market, but assessed the question of stability of demand in the context of product substitutability. Third, and finally, it is apparent from the Commission's findings at paragraph 69 of the contested decision that, unlike the situation in *Tetra Pak II*, cited at paragraph 762 above, the volumes of cargo transported by container and bulk carriers respectively changed substantially over time and that the interchangeability between bulk and container transport is not marginal in terms of volume.

764 In the context of this plea, the applicants complain essentially that the Commission decided, at paragraphs 62 to 75 and 84 of the contested decision, that the relevant market for services was that for 'containerised liner shipping' excluding conventional break bulk transport, refrigerated transport, air transport and transport by NVOCCs. They consider that the Commission's analysis does not conform to the guidelines it adopted in the Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5) as to demand-side and supply-side substitutability.

765 In the first place, the Commission erred in its analysis of demand-side substitution. In Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 28, the Court held that 'the concept of the relevant market in fact implies that there can be effective competition between the products which form

part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned'.

766 The applicants complain first in general terms that the Commission failed to take account of the cumulative impact of the various sources of competition in finding that each of those sources could be substituted for containerised transport only in exceptional circumstances or for a limited range of goods. The applicants consider that for two products to be substitutable they cannot be required to be interchangeable in the majority of cases. Such an argument would not take account of the wide range of products and users with which the applicants deal. An operator carrying 50 different products, all of different value, and thus facing competition from one or more other carriers, faces competition in respect of each such product.

767 Next, the applicants criticise the Commission for having relied on the notion of 'one-way substitutability' in its assessment of traditional transport (paragraphs 65, 68 and 74 and footnote 29) and refrigerated transport (paragraph 73), instead of having regard to the sensitivity of the relative volumes of cargo carried by the two modes to their relative price as required by the Notice on the definition of relevant market for the purposes of Community competition law, referred to above, and economic doctrine. According to generally accepted economic principles, substitutability requires a symmetric (or two-way) relationship. For example, if customers are switching from bulk to container transport at the existing relative price, an increase in the relative price of the container mode would tend to slow down the rate of switching or would even, if the price change were large enough, reverse the switching. The existence of bulk services is therefore a constraining factor in the pricing of container services. The applicants therefore dispute the Commission's finding, at paragraph 67 of the contested decision, that 'once a type of cargo regularly becomes containerised it is unlikely ever to be transported again as non-containerised cargo'. The applicants claim

that a rigorous economic approach would require the Commission's statement to be qualified by the additional words 'if containerisation continues to offer the same net benefits as it has in the past'. Such an approach would require an analysis of the sensitivity of demand to changes in the net benefits which shippers find attractive. The decision contains no such analysis.

768 More specifically, the applicants allege that, in any event, the assessment of substitutability between container transport and the other forms of transport referred to above is factually inaccurate.

769 Firstly, break bulk transport is substitutable for containerised transport and therefore forms part of the same market. That substitutability was confirmed in an article published in August 1996 in the journal *American Shipper* quoting the comments of a manager of Mead Corporation, an American exporter of paper. On the eastbound transatlantic trade, switching between bulk transport and container transport generally involves large volume products from specific regions of the United States (for example, coffee, peanuts, apples and pears, lemons, etc). That substitution is particularly marked in the case of low-value cargoes owing to the reduced rates offered by the operators of the different types of vessel. The applicants note that, at paragraphs 217 and 218 of the contested decision, the Commission expressly accepts that substitutability in the cases of coffee and peanuts. The applicants consider that their argument is confirmed by the Dynamar report (Appendix 25), which establishes such substitutability by reference to figures in the case of certain iron and steel and forestry products. Contrary to the Commission's argument, the substitution of bulk transport remains possible even in the case of a shortage of container capacity on the transatlantic trade.

770 The applicants conclude by criticising the Commission for not having taken account of 'events or shocks', as mentioned at paragraph 38 of the Notice on the

definition of relevant market for the purposes of Community competition law, cited above, which requires the Commission to analyse recent examples of actual substitution on the market. The applicants claim that the examples of mutual substitution between break bulk and containerised transport constitute such examples, but were ignored by the Commission.

771 Second, the applicants allege that bulk refrigerated transport is also in direct competition with containerised transport, as evidenced by the statements of break bulk providers of refrigerated services. Next, they point out that competition between the two modes of transport further increases with the decision of certain container carriers such as Mærsk to increase their refrigerated capacity. In support of that argument, the applicants cite a study by Drewry (*World Reefer Market Prospects and Modal Competition — pallets v containers v break bulk*, 1997) which, they say, confirms that on the trade between Europe and the United States of America some American fruit is carried by container whilst some is carried by conventional refrigerated vessels. On that basis, the applicants conclude that for at least some commodities containerised transport and bulk refrigerated transport are substitutable.

772 Third, the applicants claim that air transport is a possible alternative to sea transport for certain commodities. They rely in that respect on a statement of the President of the Campbell Aviation Group acknowledging such substitution, in particular as regards high-value, low-weight items. Similarly, in May 1998 the *Journal of Commerce* reported that about 10% to 15% of ocean freight volume transported by freight forwarders was being transferred to air transport.

773 Fourth, the applicants submit that NVOCCs represent a significant source of competition which should be taken into account in defining the relevant market.

They explain that they are referring solely to NVOCCs which do not operate vessels either on the transatlantic trade or on other trades, as referred to at paragraph 159 of the contested decision. The applicants claim that from the shipper's point of view there is no difference between NVOCCs and sea carriers, since both compete at the retail level for the carriage of cargo of proprietary shippers (or freight forwarders). The applicants emphasise that NVOCCs are able to exercise considerable bargaining power over the sea carriers. This is because of the considerable purchasing power arising from the accumulation of volumes from individual shippers and because of the advantageous rates and services (port calls, transit times, customs requirements etc.) they can obtain from sea carriers (whether conference members or not) in the form of service contracts or TVRs. Given the NVOCCs' purchasing power, those rates are inevitably lower than those offered to individual shippers by sea carriers for low-volume shipments.

774 The applicants argue that competition operates at three levels: first, carriers compete *inter se* for the NVOCCs' cargo on the basis of the rates and conditions they offer; second, the NVOCCs select the most competitive carrier or carriers on the basis of the services and rates they offer; and third and finally the carriers also compete with the NVOCCs for the cargo business of shippers or freight forwarders. It follows that the carriers and the NVOCCs are in direct competition with each other. That competition is acknowledged by the NVOCCs themselves.

775 The applicants give a number of examples of the switching of cargo between the TACA members and the NVOCCs in support of their argument. They also observe that the calculations as to the size of the market include sales by NVOCCs which consequently reduce the applicants' sales. Thus, the volume of NVOCC cargo carried by TACA members under service contracts and TVRs increased from 11.8% in 1994 to 14.4% in 1997.

776 The Commission's argument that because NVOCCs buy their ocean capacity from vessel operators they do not provide any service different from the latter and must therefore be excluded from the relevant market confuses the intermediate market (sales to NVOCCs) with the end-user market (sales to proprietary shippers). From the point of view of the end-user there is no doubt that the services offered by the vessel operators and NVOCCs are similar and have a high degree of substitutability. The applicants draw an analogy in this regard with the case of cable TV operators who buy some of their programmes from satellite TV companies with whom they also compete in the supply of pay TV. The applicants add that in the case of intermodal transport, the transport comprises different segments and levels of service. Accordingly, just as individual carriers buy in elements of the complete intermodal service (such as inland transport and port services) from external suppliers, so the NVOCCs supply some elements of the intermodal transport service themselves and buy in others.

777 Last, the applicants point out that the Commission fails to explain why it considers that the NVOCCs are not part of the relevant market when at paragraph 22 of Commission Decision of 21 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty, IV/33.218 — Far Eastern Freight Conference, OJ 1994 L 378, p. 17), the Commission found that NVOCCs 'offer the same services as liner shipping companies which offer multimodal services, but instead of operating vessels they charter slots from vessel-operating carriers'.

778 In the second place, the applicants complain that the Commission did not take account of supply-side substitution, contrary to point 20 of its Notice on the definition of relevant market for the purposes of Community competition law, cited above. At paragraph 75 of the contested decision, the Commission refers, for its treatment of that issue, to paragraphs 278 to 282. Those paragraphs of the contested decision are not concerned with supply-side substitution, however, but with potential competition. The applicants claim that those two questions are

economically and legally distinct and should not be confused. Moreover, the statement at paragraph 305 of the contested decision that the Commission does not accept that the vast majority of customers of the TACA parties regard bulk transport as substitutable for carriage on a fully-containerised vessel is based on a single piece of evidence. That evidence, an advertisement for ACL which describes the special equipment available on its vessels, also demonstrates the existence of supply-side substitutability as a container operator would only advertise in this way if it was seeking to encourage switching to its services.

779 The applicants submit that fleet mobility, referred to in the eighth recital of the preamble to Regulation No 4056/86, is compatible with a high degree of supply-side substitutability. It is in any case apparent from the Dynamar report that in 1996 non-containerised operators on the transatlantic trade via the Canadian Gateway were potentially able to increase their carriage of containers by about 200 000 TEU for minimal cost, both westbound and eastbound. This represented 15% of the applicants' capacity and was available without the need to adapt or modify their vessels. In Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, the Court annulled the Commission decision for failing to take supply-side substitution into account, noting that 'a dominant position on the market for light metal containers for meat and fish cannot be decisive, as long as it has not been proved that competitors from other sectors of the market for light metal containers are not in a position to enter this market, by a simple adaptation, with sufficient strength to create a serious counterweight' (paragraph 33).

780 The Commission, supported by the ECTU, contends that the applicants' pleas are unfounded.

(2) Findings of the Court

781 The applicants maintain that the definition of the relevant market for services used by the Commission in the contested decision is the consequence of an incorrect assessment of both demand-side substitution and supply-side substitution.

(i) Demand-side substitution

782 The applicants claim that air transport, traditional liner transport ('break bulk') and the NVOCCs are substitutable for container shipping transport. They also criticise the Commission for having failed to take account of the cumulative effect of those sources of competition.

Air transport services

783 Although the applicants did not maintain in their response to the statement of objections that air transport services are substitutable for container liner services, they now claim that for certain goods air transport services are a possible alternative to sea transport. They rely in that regard on a statement by the President of the Campbell Aviation Group and on an extract from the *Journal of Commerce* of May 1998.

784 In the contested decision, the Commission states at paragraph 62 that 'air transport forms a separate market from containerised liner shipping for the reason, inter alia, that it has not been shown that a substantial proportion of the goods carried by container could easily be switched to air transport'. The Commission observed (in the same paragraph) that 'on the North Atlantic, air transport for cargo is up to 20 times more expensive than maritime transport and up to nine times faster'.

785 The evidence put forward by the applicants in this action is clearly not capable of showing that those statements are inaccurate.

786 Thus, far from contradicting the Commission's conclusions, the statement of the President of the Campbell Aviation Group, made by a representative of the aeronautics industry, expressly asserts that the alleged substitution concerns lightweight high-value items, such as computer components.

787 The article in the *Journal of Commerce* of May 1998, apart from being anecdotal, merely states the fact, not otherwise supported, that some forwarding agents have switched 10% to 15% of their ocean freight to air transport for an unspecified category of products. In those circumstances, no particular probative value can be placed on that document.

788 Therefore the evidence put forward by the applicants does not show that the Commission made an error of assessment in concluding that demand for air

transport concerned limited quantities of high-value-added lightweight goods and that air transport was a separate market from containerised liner shipping (see, to that effect, *TAA*, paragraph 279).

789 The arguments put forward by the applicants on this point must therefore be rejected.

Break bulk shipping

790 As regards, first, break bulk shipping transport, the applicants maintain first of all that the exclusion of this transport from the relevant market is wrongly based on the concept of one-way substitutability.

791 In that regard, the Court notes that at paragraph 65 of the contested decision the Commission considered that, in order to determine the competitive conditions on the relevant market, it was necessary to consider the effect of substitutability from carriage in container to carriage in bulk, substitution from bulk to container being irrelevant. The same reasoning is followed at paragraph 73 in respect of refrigerated services: the Commission observes that although refrigerated containers may be substitutable for bulk refrigerated services, that does not mean that bulk refrigerated services are substitutable for refrigerated container services. The Commission stated at paragraph 68 that 'as the degree of containerisation increases, shippers of non-containerised cargoes turn towards containerised services but once those shippers have become accustomed to shipping in containers they do not revert to non-containerised shipping. Such examples of one-way substitutability are not uncommon'.

792 It is apparent from the contested decision that that situation is due to the fact that shippers become accustomed to shipping in smaller but more frequent quantities and realise that once cargo has been loaded into a container, it is easier to ship onwards from the port of delivery to the ultimate consignee using multimodal transport (paragraph 67). Smaller shipments lead to reduced inventory costs and reduce the risks of damage and pilferage (paragraph 70). Almost all cargo can be shipped in containers; thus, in mature markets, such as the northern Europe/USA or the northern Europe/Far East markets, the process of change towards containerised shipping is more or less complete and few, if any, non-containerised cargoes are left which are capable of being shipped in containers (paragraph 66).

793 In this case, although the applicants dispute the Commission's conclusions at paragraphs 65 and 73 of the contested decision on one-way substitutability, they do not dispute the factual findings at paragraphs 66 to 70 on the underlying phenomenon of gradual freight containerisation. They do no more than claim that an increase in the cost of transport by container will tend to slow down the rate at which shippers switch to that mode of transport or even, if the change in price is sufficiently great, will reverse the trend. They maintain that the existence of bulk transport services will then be a constraining factor when fixing the price of container transport services. However, while it is true that a significant change in the price of container transport might, at least in theory, encourage some shippers to use bulk transport instead, the applicants adduce no firm evidence to support their allegation.

794 In those circumstances, the Court finds that the substitution of containerised transport for break bulk transport, once put into effect, is definitive (see, to that effect, *TAA*, paragraph 281).

795 The Commission was therefore entitled to conclude that that substitution was irrelevant for the purpose of defining the relevant market. The substitution does

not show that, from the shippers' point of view, the two modes of transport in question are substitutable for each other but merely reflects a phenomenon of cargo containerisation, leading to the emergence of a separate new market in which break bulk transport is not regarded as substitutable for the services provided by container transporters. Consequently, it must be concluded that the Commission did not make an error of assessment in basing its analysis of the relevant market on the concept of one-way substitutability.

796 Second, the applicants maintain that bulk transport, including refrigerated bulk transport, is substitutable for containerised transport.

797 As regards, first, non-refrigerated bulk transport, the applicants support their argument by reference to the existence of such substitution on the eastbound transatlantic trade for goods transported in large quantities originating in specific regions of the United States of America, such as, for example, coffee, peanuts, apples, pears or lemons. The applicants rely in that regard on the findings of a Dynamar report, which establishes, on the basis of figures, the existence of such substitution in the case of certain iron and steel products and forestry products. They also refer to an article published in August 1996 by the magazine *American Shipper*, quoting a manager of Mead Corporation, a United States paper exporter.

798 According to the case-law, the market to be taken into consideration comprises all the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products (*Michelin*, cited at paragraph 337 above, paragraph 37).

799 As the Court of Justice has already held, stability of demand for a particular product is therefore a relevant criterion for defining a relevant market, so that the mere fact that different products are, to a marginal extent, interchangeable does not preclude the conclusion that those products belong to separate product markets (*Tetra Pak II*, cited at paragraph 762 above, paragraphs 13 to 15; see also *TAA*, paragraph 273).

800 In this case, the Commission was therefore correct to rely at paragraph 68 of the contested decision on that decision of the Court of Justice in order to find, at paragraphs 64 to 74 of the contested decision, that the fact that other forms of sea transport may, for a limited number of cargoes, provide marginal competition on the market for transport services by container does not mean that they can be regarded as belonging to the same market.

801 Contrary to the applicants' contention, the reference to 'a relevant criterion' at paragraph 15 of *Tetra Pak II*, cited at paragraph 762 above, means not that other criteria must also be taken into account in order to determine the degree of substitution, but that the Commission is entitled to rely on that criterion in order to conclude that separate markets exist. In any event, in this case it is apparent from paragraph 75 of the contested decision that the Commission did not confine itself to studying demand-side substitution but that it also ascertained whether the examples of supply-side substitution given by the applicants were capable of calling its analysis in question. The Commission therefore did not base its assessments on a single criterion.

802 However, it is still necessary to ascertain whether the Commission was correct to find in this case that bulk transport provided only marginal competition for transport by container.

803 In that regard, it is apparent that, in the context of these actions, the applicants are in essence merely reiterating the arguments developed during the adminis-

trative procedure in their response to the statement of objections. They have not really challenged the grounds on which those arguments were rejected by the Commission at paragraphs 64 to 74 of the contested decision. It follows from those paragraphs, first, that for the great majority of categories of cargoes and users of containerised liner services, the other forms of break bulk liner services do not represent a foreseeable replacement solution on the trade in question and, second, that once a type of cargo is regularly containerised, there is virtually no prospect of its ever being carried in any other form. In that context, the Commission concludes, at paragraph 74, that 'while it is possible that in exceptional circumstances some substitution may occur between break bulk and container transport, it has not been demonstrated that there is any lasting changeover from container towards bulk for the vast majority of cases'.

804 None of the evidence put forward by the applicants in these actions is capable of showing that those findings are incorrect.

805 Thus, the statement of a manager of a shipper concerning a specific product, paper, cannot reasonably establish the existence of a high degree of substitution between the two transport services for a wide category of goods. In their written submissions, moreover, the applicants expressly recognise that the alleged substitution is significant only in respect of low-value cargoes owing to the reduced rates offered by the operators of the various types of vessels.

806 Next, the data set out in the application for the purpose of showing that certain cargoes, such as fertilisers and certain iron and steel products, are carried by both types of transport, do not prove that shippers switch their cargoes between those

two types of transport. In that regard, the Commission stated at paragraph 71, without being contradicted by the applicants, that:

'In this context, it is not important that certain commodities may still travel by either means: the essential question for determining demand substitutability is whether the choice of mode is made on the basis of the characteristics of the mode. Thus, the fact that some steel products may travel by bulk and others by container does not show that the two modes are substitutable, since it does not take into account the diverse nature (and value) of steel products [or] the delivery requirements of customers.'

807 Furthermore, at paragraphs 217 and 219 of the contested decision the Commission observed, again without being contradicted by the applicants, that the existence of a certain substitution for products such as coffee, peanuts and paper, for which it accepts that there is some residual competition from bulk carriers, was the result of independent action by TACA members. The Commission was right to conclude, at paragraph 72, that, far from showing that bulk transport should be included in the relevant market, those examples demonstrated the ability of the TACA parties to discriminate on price so as to attract marginal products away from bulk carriers without affecting freight rates generally, and that there was no evidence that bulk carriers were likewise able to discriminate as between customers.

808 With reference to the applicants' allegation that paragraph 69 of the contested decision, where the Commission states that, according to Drewry ('*Global container Markets — Prospects and Profitability in a High Growth Era*', London, 1996), the proportion of containerised freight rose substantially between 1980 and 1994, going from 20.7% to 41.6%, and is forecast to reach 53.8% by 2000, demonstrates the instability of demand, it is sufficient to recall that, as the Commission correctly concluded at paragraph 65 of the contested decision, that

substitution is irrelevant in determining the relevant market: the sole question is not to what extent containerised freight can be substituted for other forms of transport but, on the contrary, to what extent, once that substitution has been effected, the other forms of transport can be substituted for containerised freight if the price of containerised freight rises significantly.

809 Having regard to the foregoing, none of the evidence put forward by the applicants is capable of calling in question the Commission's finding that, for the great majority of categories of cargoes and customers of the companies providing containerised services, bulk transport is not a reasonable replacement solution for containerised transport (see, to that effect, *TAA*, paragraph 273).

810 As regards, second, bulk refrigerated transport services, the applicants observe that that substitution is borne out by the statements of the traditional operators of refrigerated transport services, by the fact that competition between the two forms of transport is increasing even more with the decision of certain container shippers, such as Mærsk, to increase their refrigerated capacity and by the fact that, on trade between Europe and the United States of America, some American fruit is carried both by containers and by traditional refrigerated vessels.

811 It is thus apparent that in these proceedings the applicants are merely repeating, in essence, the evidence put forward during the administrative procedure in their response to the statement of objections. They have not really challenged the grounds on which that evidence was rejected by the Commission at paragraph 73 of the contested decision, where it is stated that although that evidence shows that refrigerated containers are substitutable for bulk refrigerated services, it does not show that bulk refrigerated services are substitutable for refrigerated container services. Furthermore, the Commission found at that part of the contested

decision, first, that containerised refrigerated transport services offer some advantages, such as reduced volume and speed of transfer to other modes of transport, and, second, that a wider range of products can travel in containerised refrigerated transport than can travel as bulk refrigerated cargoes.

812 The evidence adduced by the applicants in the context of these actions does not show that those findings are incorrect.

813 As the Commission rightly observes at paragraph 73 of the contested decision, the evidence in question at the most confirms the phenomenon of the gradual containerisation of refrigerated transport and in no way shows that bulk refrigerated services are substitutable for refrigerated container services. As stated at paragraph 795 above, only proof of such substitution would be capable of demonstrating that both types of refrigerated transport belong to the same market.

814 Thus, the statements of the operators of bulk refrigerated transport services cited by the applicants merely emphasise that 'containerisation [is] the biggest threat to the traditional refrigerated cargo trades', but make no mention of the fact that bulk refrigerated transport services are substitutable for refrigerated container transport services. In any event, even if those statements might be so interpreted, they cannot seriously be regarded as proof of the existence of a significant substitution.

815 Likewise, the fact that container carriers are installing containerised refrigerated capacity proves not that bulk refrigerated transport services are substitutable for containerised refrigerated transport services but only that there is a phenomenon of containerisation of refrigerated transport services.

816 Last, the fact that certain products are carried both in containers and in bulk does not establish that shippers switch between those two modes of transport and therefore does not prove that bulk refrigerated transport services are for a significant part substitutable for containerised refrigerated transport services: at the most, it highlights the phenomenon that refrigerated freight is becoming containerised.

817 On those grounds, it must therefore be concluded that the applicants have not adduced evidence capable of calling in question the Commission's findings that bulk refrigerated transport services are substitutable for containerised transport services.

NVOCCs

818 The applicants maintain that the NVOCCs which do not operate vessels on any trade represent a significant source of competition which must be taken into account for the purposes of defining the relevant market. They also maintain that the decision is not reasoned to the requisite standard on this point, since it does not state why the NVOCCs are not part of the relevant market.

819 It is common ground that the NVOCCs which do not operate vessels on any trade obtain their maritime transport services, as the Commission states at paragraph 159 of the contested decision, from the TACA parties in the same way as shippers, that is, either at tariff rates or, more usually, on the basis of a conference service contract.

820 As those operators do not themselves provide any maritime transport services of their own, but obtain services from the TACA parties, they do not, as the

Commission points out at paragraphs 160 and 161 of the contested decision, compete with maritime carriers as regards the quality and price of the maritime transport service provided. It is true that the NVOCCs in question may have a certain purchasing power and may therefore obtain lower prices in the service contracts than those paid by other shippers. However, as the Commission states at paragraph 161 of the contested decision, those prices are in any event still fixed by the TACA parties.

821 Furthermore, since they do not themselves provide maritime transport services on the trade in question, NVOCCs which do not operate vessels on any trade do not bring any capacity of their own to the market, but, like the shippers, merely obtain capacity provided by the maritime carriers.

822 Consequently, the Commission was entitled to conclude that NVOCCs which did not operate vessels on any trade were not part of the same market as the TACA parties. The grounds set out at paragraphs 159 to 161 of the contested decision also containing sufficient reasoning on that point.

823 The parties' arguments on that point must therefore be rejected.

Consideration of the cumulative effect of sources of competition

824 Last, the applicants complain that the Commission ignored the cumulative effect of the various sources of competition when it considered that each of the sources could be substituted for containerised transport only in exceptional circumstances and for a limited number of products. Thus, according to the applicants, an

operator carrying 50 different products, each of a different value, and therefore facing competition from one or another alternative shipper, faces competition for all of its products.

825 However, as the Commission rightly observes at paragraphs 72, 203 to 213 and 534 to 537 of the contested decision, shippers which discriminate between the various categories of cargo by applying significantly different prices (since transport costs vary, depending on the goods, from one to five for the same transport service) are capable of limiting the effects of marginal competition for the transport of specific categories of cargo. Furthermore, the applicants' argument that since they face a different source of competition for each category of goods, they face competition for all their services, does not stand up. Not only have the applicants failed to establish that they faced competition from other forms of transport in respect of each category of cargo and therefore for the entire range of their services, but, moreover, it follows from the foregoing that the Commission established to the requisite legal standard that, for the great majority of categories of cargoes and users, the other transport services were not substitutable for containerised maritime transport services (see, to that effect, *TAA*, paragraph 282).

826 The complaint alleging failure to take into account the cumulative effect of the various sources of competition must therefore be rejected.

(ii) Supply-side substitution

827 The applicants submit that the Commission did not examine the possibility of supply-side substitution, but only the separate issue of whether the TACA parties were subject to certain potential competition. They further maintain that the

mobility of fleets, which is recognised in the eighth recital of the preamble to Regulation No 4056/86, is compatible with a high degree of supply-side substitution. It is also apparent from the Dynamar report that in 1996 non-containerised operators active on the transatlantic trade via Canadian ports were potentially capable of increasing at a minimal cost their transport of containers by approximately 200 000 TEU on both westbound and eastbound trades, representing 15% of the applicants' capacity, without any need to adapt or alter their vessels.

828 As regards, first, the allegation that the Commission failed to examine in the contested decision the question of supply-side substitution, it has been held that in order to be able to be regarded as constituting a separate market, the products in question must be distinguishable not only by the mere fact of their use but also by specific production characteristics which render them particularly appropriate for that purpose (*Europemballage and Continental Can*, cited at paragraph 779 above, paragraph 33).

829 Accordingly, in this case, for the purpose of defining the relevant market, the Commission was required to ascertain whether operators of vessels other than container carriers could, by a mere technical adaptation, convert their vessels to carry containers or increase the number of containers carried and thus present themselves on the container freight market with sufficient weight to constitute a serious counterbalance to container freight carriers (supply-side substitution).

830 In that regard, at paragraph 75 of the contested decision, the Commission refers for examination of the question of supply-side substitution to paragraphs 278 to 282.

831 That reference is incorrect. At those paragraphs, which form the first part of the section of the contested decision devoted to potential competition, the Commission does not examine the possibilities of supply-side substitution, but merely makes certain preliminary observations about the probative value of the Dynamar report (*The Transatlantic Trade — An overview of the carrying capacity/potential of non-TACA members*, 1996) on which the TACA parties relied in support of their response to the statement of objections on that point. Essentially, the Commission states that, the TACA parties not having provided it with the instructions given to Dynamar concerning the preparation of the report, it infers that the conclusions of the report were coloured by those instructions.

832 Later in the same section of the contested decision devoted to potential competition, however, at paragraphs 300 to 305, the Commission examines the competition from non-container vessels, so that paragraph 75 must be taken to refer to those paragraphs.

833 The Court agrees with the applicants that none of those paragraphs deals expressly with the question of supply-side substitution. At that point in the contested decision, the Commission does not examine the capacity of non-container vessels to be adapted to carry containers or to increase the number of containers carried but, as expressly stated at paragraph 301, only studies the question whether the operators of those vessels have the potential to compete to a significant extent with fully containerised vessels in the sense, first, that they are capable of competing economically and on even terms with the TACA parties and, second, that customers regard carriage by those operators as being functionally interchangeable with carriage on a fully containerised vessel. Following its analysis, the Commission concludes that such significant potential competition does not exist. On the first point, it emphasises at paragraphs 302 to 304 of the contested decision that the technical characteristics and performance of non-fully containerised vessels are significantly different from those of fully containerised vessels and that the operators of such vessels do not possess the

same fleets of containers as operators of fully containerised vessels and generally do not have the same land-side facilities. On the second point, it states at paragraph 305 of the contested decision that, from the customers' point of view, bulk or 'neo-bulk' vessels are not substitutable for container vessels.

834 Although potential competition and supply-side substitution are conceptually different issues, as the Commission expressly accepts in the defence, those issues overlap in part, as the distinction lies primarily in whether the restriction of competition is immediate or not. It follows that most of the evidence at paragraphs 302 to 304 of the contested decision is capable of justifying both the absence of significant potential competition and the absence of supply-side substitution. Thus, as regards the technical characteristics of non-fully containerised vessels, the Commission expressly states at paragraph 303 that some of those vessels 'militate against supply-side conversion', owing to 'the additional expenditure required to carry containers on vessels which were not specifically built as container vessels'. Nor can it be disputed that the absence of a significant container fleet or sufficient land-side facilities are significant obstacles to the rapid conversion of non-fully containerised vessels to fully containerised vessels.

835 It is also apparent from paragraph 300 of the contested decision that the purpose of the assessments made by the Commission at paragraphs 302 to 304 is to reject the applicants' argument based on the Dynamar report, which they also use to support these complaints, that operators of non-fully containerised vessels could adapt those vessels in order to carry containers or increase the number of containers carried.

836 In those circumstances, it must be accepted that the question of supply-side substitution is examined by implication, but unquestionably, at paragraphs 302 to 304 of the contested decision. The applicants' complaint on that point must therefore be rejected.

837 As regards, second, the evidence adduced by the applicants in order to demonstrate the existence of supply-side substitution, it must be emphasised, as stated above, that in the context of these proceedings the applicants essentially confine themselves to reiterating the arguments taken from the Dynamar report which they developed during the administrative procedure in their response to the statement of objections. The applicants have not challenged the grounds on which those arguments were rejected by the Commission at paragraphs 302 to 304 of the contested decision.

838 At the very most, the applicants claim that the assertion at paragraph 305 of the contested decision that the vast majority of customers of the TACA parties do not regard carriage in bulk as substitutable for container transport is supported by only one piece of evidence, an advertisement for ACL which is reproduced in that paragraph.

839 However, that criticism is irrelevant in the context of the examination of these complaints concerning the assessment of supply-side substitution. The assertion at paragraph 305 of the contested decision does not concern supply-side substitution but demand-side substitution.

840 In any event, contrary to the applicants' allegation, that assertion is not based solely on an advertisement for ACL. It is apparent from paragraph 69 of the contested decision that the Commission's assessments concerning the possibilities of substitution between containerised transport and bulk transport are essentially based on the Drewry report (*Global Container Markets — Prospects and Profitability in a High Growth Era*, London, 1996). Furthermore, as stated at paragraph 803 above, the applicants have not really challenged the arguments which the Commission sets out at paragraphs 64 to 74 to demonstrate that lack of substitution.

841 As regards the argument derived from the fact that the mobility of fleets is recognised in the eighth recital of the preamble to Regulation No 4056/86, in that recital the Council states that 'conferences continue to be subject to effective competition from both non-conference scheduled services and, in certain circumstances, from tramp services and from other modes of transport;... 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'. Thus, it is clear from the wording of that recital that the Council relies on fleet mobility not in order to establish that non-containerised vessels may increase their container capacity but in order to show that the liner operators which are parties to a liner conference on a given trade are, in principle, subject to potential competition from containerised vessels active on other trades. Furthermore, and in any event, the Commission stated at paragraphs 289 to 299 of the contested decision, without being contradicted by the applicants on that point, that fleet mobility had scarcely any prospect of being effective on the transatlantic trade. In those circumstances, the applicants cannot derive any argument from the fact that fleet mobility is recognised by Regulation No 4056/86 as a ground for challenging the definition of the relevant market for services employed in the contested decision.

842 The applicants' arguments concerning supply-side substitution must therefore be rejected.

(b) Geographical scope of the services in question

(1) Arguments of the parties

843 The applicants maintain that the definition of the relevant geographic market at paragraph 84 of the contested decision as being the market for sea-transport

services between northern Europe and the United States and Canada is inaccurate in that it excludes the Mediterranean ports of southern Europe (paragraphs 76 to 83 of the contested decision).

844 They make the preliminary observation that, contrary to what is suggested at paragraph 77 of the contested decision, they did not claim during the administrative procedure that the ports of Turkey, Lebanon, Israel, Cyprus, Egypt, Libya, Tunisia, Algeria and Morocco are substitutable for northern European ports. They go on to plead as follows.

845 First, they repeat that their criticism of the Commission is founded on its rejection, at paragraph 76 of the contested decision, of the proposition that the Mediterranean ports are substitutable on the basis of one-way substitutability. They refer to the criticisms put forward in connection with the definition of the relevant service market, but stress in particular that the Commission has not shown how the evidence that the northern European ports were substitutable for the southern European ports did not also demonstrate that ports in both regions were substitutes for each other. The applicants consider that in dismissing the evidence of substitutability presented by them in their response to the statement of objections, the Commission places on them the burden of proving that the ports of southern Europe are substitutable for the ports of northern Europe, even though the correct definition of the relevant market is a precondition for a finding of a dominant position. It was for the Commission to send the necessary requests for information to the shippers, since the applicants are not able to obtain the relevant evidence.

846 Secondly, the applicants allege that the Commission's findings at paragraphs 80 and 82 that Mediterranean ports are 'inadequate' and subject to 'infrastructural limitations' are inconsistent with the facts.

847 First, it is apparent from the specialist press that southern European ports are increasingly perceived to be substitutable for those of northern Europe. Thus, it has been reported that many carriers believe that it makes more sense to stop in Mediterranean ports to link the Europe/Asia services with those of Europe/North America. Furthermore, the Mediterranean ports themselves consider that their services compete with the northern European ports and put forward as evidence in support an advertisement for the Port of Marseilles Authority. The applicants also claim that the volume of cargo on the Europe/US trade handled by the southern European ports increased substantially between 1994 and 1997.

848 Second, the attitude of the sea carriers also shows that the ports of southern Europe are substitutable for those of northern Europe. One applicant carried out a survey which concludes that the ports of southern Europe compete favourably with those of northern Europe in terms of efficiency, that conferences have traditionally existed (SEAC and USSEC) on the trade between southern Europe and the United States of America and that independent lines such as Lykes and Evergreen have increased their services from southern European ports.

849 Third, and finally, it is apparent from the behaviour of the shippers that the southern European ports are substitutable for those of northern Europe. Thus, in one invitation to tender the shipper expressly states that 'the Mediterranean ports can be considered as loading ports without any preference from our side'. Furthermore, a number of shippers switched part of their cargo from northern European ports to those of southern Europe. There is no basis for the claim in the defence that evidence was submitted belatedly.

850 The Commission, supported by the ECTU, contends that the definition of the relevant geographic market in the contested decision is correct and supported by adequate reasoning. It therefore concludes that the applicants' pleas and arguments on this point should be rejected.

(2) Findings of the Court

851 The applicants criticise the Commission for having excluded the Mediterranean ports from its definition of the relevant market for services at paragraph 84 of the contested decision, whereas transport services on the transatlantic route provided from the ports of northern Europe and those provided from the Mediterranean ports of southern Europe are substitutable.

852 By that argument, the applicants are disputing the geographical component of the transport services constituting the relevant market. That component refers to the question of the determination of the points of origin and of destination of the transport services concerning the transatlantic route (*TAA*, paragraph 293).

853 As the Commission rightly observes, that question is separate from the question of the definition of the relevant geographic market, which in this case is given at paragraph 519 of the contested decision and which is intended to determine the territory on which the undertakings concerned are engaged in the supply of the services in question, on which conditions of competition are also sufficiently homogeneous and which may be distinguished from neighbouring geographical areas because, in particular, the conditions of competition there are significantly different (see, to that effect, Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 11, and Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 81).

854 First, the applicants criticise the Commission for having determined the geographical component of the relevant market by wrongly relying on the concept of 'one-way substitutability', in the sense that it took the view that the ports of northern Europe were substitutable for those of southern Europe but not

vice versa. They claim that the Commission has failed to demonstrate how the evidence showing that the ports of northern Europe were substitutable for the ports of southern Europe did not at the same time show that the ports of both regions were substitutable for each other.

855 It should be noted that at paragraphs 76 to 83 of the contested decision, the Commission excluded the Mediterranean ports of southern Europe from the geographical component of the relevant market for services because, as stated at paragraph 76, 'while northern European ports are for some shippers substitutable for some Mediterranean ports, very few, if any, shippers find that Mediterranean ports are substitutable for northern European ports'.

856 It is thus quite clear from paragraph 76 of the contested decision that, contrary to what the applicants suggest, the Commission did not find that the ports of northern Europe were substitutable for the Mediterranean ports of southern Europe but only that for 'some' shippers northern European ports were substitutable for 'some' Mediterranean ports of southern Europe.

857 Although that in itself provides sufficient ground to reject this complaint, it must also be emphasised that even if the Commission had established that the ports of northern Europe were substitutable for the Mediterranean ports of southern Europe, it would not have been required, in order to justify the exclusion of the Mediterranean ports of southern Europe from the relevant market, to establish the reasons for which the evidence proving that substitutability did not show that the Mediterranean ports of southern Europe were substitutable for those of northern Europe.

858 The TACA is an agreement governing the conditions of maritime container transport to the United States not from the European ports on the Mediterranean but from the ports of northern Europe and, more particularly, as stated at

paragraph 14 of the contested decision, from the ports situated in latitudes between Bayonne and the Cape of Norway and points in Europe served via those ports, apart from Spain and Portugal. For the purpose of determining the geographical component of the relevant market for services, with a view to examining such an agreement from the aspect of competition law, the only relevant question is therefore whether a shipper consigning freight from northern Europe to the United States of America could easily substitute for the services offered from the ports of northern Europe the services offered from the Mediterranean ports of southern Europe to the United States of America. The reasons for which a shipper consigning freight from the Mediterranean ports of southern Europe to the United States of America might substitute the ports of northern Europe are manifestly irrelevant.

859 Contrary to what the applicants claim, that does not constitute a reversal of the burden of proof. It follows from the contested decision that, in order to exclude the Mediterranean ports of southern Europe from the relevant market on the ground that no shipper consigned from northern Europe to the European ports of the Mediterranean significant quantities of freight whose final destination was North America, the Commission relies on evidence in a number of respects, namely:

— the fact that the TACA parties which are also VSA parties operate two to three round-trip rail shuttles a week between Milan and Rotterdam (paragraph 80);

— the fact that, according to the Drewry report (*Global Container Markets*, London, 1996), even for Europe/Far East services, Mediterranean ports do not appear to be substitutable (paragraph 82);

— the fact that, for certain categories of goods, the TACA parties may limit the effect of marginal competition from other means of transport by offering lower prices without affecting prices generally (paragraph 83).

860 According to paragraph 80 of the contested decision, the Commission considers that this evidence outweighs the evidence put forward by the TACA parties, which claimed, essentially, that shippers transferred some 8 000 to 10 000 TEU of freight from northern Europe to the European ports of the Mediterranean.

861 It follows from the foregoing that the Commission did indeed assume the burden of proof which it must bear in connection with the prior definition of the relevant market for the purpose of applying Article 86 of the Treaty.

862 For those reasons, these complaints alleging incorrect reliance on the concept of one-way substitutability must be rejected.

863 Second, the applicants claim that the Commission's assertions at paragraphs 80 and 82 of the contested decision concerning the 'inadequacy' and the 'infrastructural limitations' of the Mediterranean ports of southern Europe are contradicted by the facts. They maintain that the evidence which they adduce in the application shows that the Mediterranean ports of southern Europe are increasingly seen as substitutable for the ports of northern Europe.

864 It cannot be denied that there is a certain substitutability between the maritime transport services provided under the TACA and the regular container transport services on the transatlantic line offered from or to the Mediterranean ports of

southern Europe (*TAA*, paragraph 296). However, it is not the complete absence of substitutability that justifies excluding the latter services from the services of the relevant market but the fact that that substitutability is extremely limited.

865 At paragraph 80 of the contested decision, the Commission states that 'the TACA parties have provided no evidence that any shipper has sent material quantities of cargo to Mediterranean ports from northern Europe with North America as the ultimate destination'. The Commission observes at paragraph 79 of the contested decision that the alleged substitution of 8 000 to 10 000 TEU of freight from the northern European ports to the Mediterranean ports of southern Europe asserted by the applicants during the administrative procedure would, according to the applicants' own figures, have the effect only of increasing the total market by 2%, with the consequence that the TACA parties' market share would be reduced by approximately 1%.

866 As stated at paragraph 799 above, it is settled case-law that the existence of marginal substitutability does not prevent the conclusion that there are separate markets (*Tetra Pak II*, cited at paragraph 762 above, paragraphs 13 to 15, and *TAA*, paragraph 273).

867 The applicants have manifestly failed to provide evidence in these actions capable of showing that, for shippers in northern Europe, which constitutes the target area for the services provided by the TACA members, the services offered by the Mediterranean ports of southern Europe represent a reasonable alternative solution.

868 First, the applicants rely on the existence of transfers of freight from the ports of northern Europe to the Mediterranean ports of southern Europe. They rely in that regard on transfers by 13 shippers between 1996 and 1998, on the call for bids

from one shipper in which the shipper states that it has no preference between the ports of northern Europe and the European Mediterranean ports and on the data provided by P&O Nedlloyd on the ports from which it provides services to its customers.

869 However, although the applicants claim, on the basis of those data, that there are transfers of freight from the ports of northern Europe to the Mediterranean ports of southern Europe, they do not at any point contend that those transfers are substantial. As stated above, it was not the complete absence of transfers that led the Commission, at paragraph 80 of the contested decision, to exclude the European ports of the Mediterranean from the relevant market but the fact that those transfers do not relate to significant quantities.

870 Furthermore, it is clear upon examining the data provided by the applicants that they do not establish the existence of substantial transfers.

871 Thus, as regards, first of all, the examples of transfers made by 13 shippers, the data provided by the applicants reveal, at the most, transfers relating to a volume of 7 900 TEU over three years. It is apparent from Table 2 at paragraph 85 of the contested decision that in 1996 alone the TACA transported 1 429 090 TEU on the trade between northern Europe and the United States of America, so that the alleged transfers represent a minute quantity of the relevant market. Nor is it possible to draw the slightest relevant conclusion from the data in question, since they do not indicate either the place of establishment of the shipper or, in particular, the destination of the goods. Second, as regards the call for bids referred to in the application, it is sufficient to state that it relates to a single contract for services made by a single shipper and it cannot therefore be considered to have any particular probative value. As regards, last, the data from Nedlloyd concerning a single carrier, it must be observed that, as the Commission rightly observes, they have no probative value, since they merely indicate, for certain shippers who are customers of P&O Nedlloyd, the variations in the freight carried from the European ports of the Mediterranean between 1995 and

1996, without specifying the variations in total freight carried from the ports of northern Europe and from the Mediterranean ports of southern Europe. In those circumstances, it is impossible to establish on the basis of those data whether the variations in freight result from transfers from the ports of northern Europe or from a variation in volumes of exports to the United States of America.

872 Second, the applicants claim that the volume of freight relating to the trade between Europe and the United States of America which is handled in the Mediterranean ports of southern Europe increased substantially over the period from 1994 to 1997.

873 In that regard, it should be pointed out that although the data provided by the applicants on that point indisputably show such an increase, they do not prove that the increase was the result of transfers of freight from the northern Europe ports and not of other factors, such as an increase in exports to the United States (*TAA*, paragraph 297).

874 Third, the applicants submit that a study prepared by one of them concludes that the ports of southern Europe compete favourably with those of northern Europe in terms of efficiency. In that connection, they also claim that conferences have traditionally existed on the trade between southern Europe and the United States of America and that independent lines such as Lykes and Evergreen have increased their services from southern European Mediterranean ports.

875 However, those data fail to show that, from the shippers' point of view, the Mediterranean ports of southern Europe are substitutable to a significant extent for the ports of northern Europe. Thus, the study produced by the applicants merely examines the productivity of the European ports on the Mediterranean

and that of the ports of northern Europe, without at any point examining their substitutability. Such a study is therefore of no relevance for the purpose of challenging the definition of the relevant market in the contested decision. Although the other evidence adduced by the applicants does indeed show that a certain quantity of freight for destinations in the United States of America is carried from the Mediterranean ports of southern Europe, it does not in any way prove the existence of transfers of freight by shippers from the ports of northern Europe to the Mediterranean ports of southern Europe.

876 Fourth, and last, the applicants refer to certain articles from the specialist press which state, first, that 'many carriers believe it makes more sense to stop in the Mediterranean' ports of southern Europe in order to link Europe/Asia services with Europe/North America services and, second, that the operators of the Mediterranean ports of southern Europe consider that their services are competitive with the ports of northern Europe.

877 However, the impressions of shippers, as reported in the specialist press, concerning the Far East/North American link cannot reasonably serve to undermine the opposite conclusions drawn by the Drewry report (*Global Container Markets*, London, 1996), reproduced at paragraph 82 of the contested decision, to the effect that 'Mediterranean ports [of southern Europe] do not appear to be substitutable for northern European ports even for Europe/Far East services'. In any event, the press articles quoted by the applicants merely describe the increase in the trade in the Mediterranean ports of southern Europe, without in any way demonstrating that that increase is due to transfers of freight by shippers from northern Europe.

878 As regards the fact that the Mediterranean ports of southern Europe claim to be competitive with the ports of northern Europe, it is sufficient to observe that the

only supporting evidence adduced by the applicants is an advertisement for the Port of Marseilles Authority, the terms of which, having regard to its purpose, clearly cannot undermine the conclusions drawn by the Commission on the basis of the Drewry report.

879 It follows from the foregoing that the applicants have not established the existence of significant freight transfers from the ports of northern Europe to the Mediterranean ports of southern Europe.

880 Furthermore, the Commission stated in the contested decision, without being contradicted by the applicants, first, at paragraph 80, that the TACA parties which are also VSA parties operated two to three round-trip rail shuttles a week between Milan and Rotterdam and, second, at paragraph 83, that for certain categories of goods the TACA parties could limit the effect of marginal competition from other means of transport by offering lower prices without necessarily affecting prices generally. In its written submissions before the Court, the Commission also made the relevant point that the TACA's land tariff extends to Croatia. Such circumstances amount to serious evidence, as the Commission rightly states, of the inadequacy of the Mediterranean ports in southern Europe for shipments to North America and that they are therefore not substitutable for northern European ports.

881 Last, and in any event, as stated above, the applicants submitted during the administrative procedure that if the freight transported from the European Mediterranean ports were included in the relevant market, that would have the effect of increasing the total market by 2%. However, at paragraph 79 of the contested decision the Commission stated, without being contradicted by the applicants, that 'since they do not include in the TACA market share cargo carried by the TACA parties on trades falling outside the geographic scope of the TACA, this would decrease the TACA parties' share of the relevant market by

approximately 1%'. To that extent, in so far as these complaints seek, by disputing the definition of the relevant market, to call in question the dominant nature of the position held by the TACA parties on that market, they are invalid.

882 For all those reasons, the applicants' arguments concerning the geographical scope of the relevant market in the contested decision must therefore be rejected.

(c) Conclusion on the relevant market for services

883 It follows from all of the foregoing that the complaints raised by the applicants in respect of the definition of the relevant market for services in the contested decision must be rejected in their entirety.

2. The relevant geographic market

(a) Arguments of the parties

884 The applicants submit that the Commission's position with regard to the definition of the relevant geographic market is inconsistent. The Commission defined the geographic market at paragraph 84 of the contested decision as the sea routes between the ports of northern Europe and those of the United States of America and Canada, whereas at paragraph 519 it states that 'the geographic market consists of the area in which the maritime transport services are marketed,

that is, in this case the catchment areas of the ports in northern Europe' and that 'such a geographic market is commensurate with the scope of the TACA's inland tariff'. In those circumstances the applicants do not understand the conclusion at paragraph 91 that inland transport services between northern Europe and the United States as part of intermodal transport do not form part of the market for maritime transport services. If the relevant market includes those inland transport services it is undeniable that the applicants did not occupy a dominant position.

885 The Commission, supported by the ECTU, contends that this plea is unfounded.

(b) Findings of the Court

886 As a preliminary point, contrary to the applicants' contention, the definition of the relevant geographic market accepted by the Commission in this case is set out not at paragraph 84 but at paragraph 519 of the contested decision. As stated at paragraphs 851 to 852 above, at paragraph 84 of the contested decision the Commission does not define the relevant geographic market but only the geographical component of the relevant maritime services.

887 At paragraph 519 of the contested decision, the Commission states that the relevant geographic market for the maritime transport services '[consists] of the area in which the maritime transport services defined above are marketed, that is, in this case, the catchment areas of the ports in northern Europe' and specifies that 'such a geographic market is commensurate with the scope of the TACA's inland tariff'.

888 It is true, as the applicants observe, that at paragraph 91 of the contested decision the Commission states that the land transport services in question, namely those 'undertaken within the territory of the Community which shippers acquire together with other services as part of a multimodal transport operation for the carriage of containerised cargo between northern Europe and the United States of America... do not form part of the market for maritime transport services'.

889 Contrary to what the applicants maintain, however, there is no inconsistency there. Paragraphs 91 and 519 of the contested decision relate to different markets for services, namely the relevant market for land transport services and the relevant market for maritime transport services. The fact that the geographic markets for these services overlap in part, since they both cover the geographical area in which the TACA's land transport services are provided, cannot logically mean that the relevant land and maritime services are substitutable for one another and therefore belong to the same market for services. There is nothing to prevent the same geographical area from covering two separate markets for services.

890 As the reasoning in the contested decision is not inconsistent on this point, this complaint must be rejected.

3. Conclusion on the definition of the relevant market

891 It follows from all the foregoing that the applicants' pleas and arguments concerning the definition of the relevant market for services in the contested decision for the purposes of the application of Article 86 of the Treaty must be rejected in their entirety.

B — The existence of a dominant position on the relevant market

892 In this part of their pleas alleging that there has been no infringement of Article 86 of the Treaty, the applicants deny that the TACA parties held a dominant position on the relevant market during the period covered by the contested decision. In that regard, they maintain that the Commission made an incorrect analysis not only of their market shares but also of effective external competition, potential competition, internal competition and developments in rates on the relevant trade. The applicants further allege that there are certain defects in the reasoning on the last point.

1. The market share held by the TACA parties

(a) Arguments of the parties

893 The applicants' first plea is that the Commission made an error of law in finding, at paragraph 533 of the contested decision, that a market share of some 60% in 1994, 1995 and 1996 'gives rise to a strong presumption of a dominant position'. They maintain that the Commission's analysis of the data on the TACA parties' market shares is inaccurate and incomplete.

894 First, the applicants allege that the market share data used by the Commission do not cover a sufficiently long period (only three years). The Court has recognised the importance of the persistence of a significant market share over time before a finding of a dominant position can be made (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 41). Although the Court has not specified the

required time it is apparent from the legal literature (Bellamy and Child, *Common Market Law of Competition*, 4th edition, paragraph 9 024) that a period of five years would probably be sufficient, but that a period of less than three years, especially in a dynamic market, might be considered too short for a high market share to be indicative of a dominant position.

895 Second, the applicants submit that the Commission has not compared the position of the parties to that of the independent companies. Where an undertaking with a small market share is able to meet the demands of those clients who wish to break away from the undertaking with the largest share, the latter will not be an 'unavoidable trading partner' within the meaning of the judgment in *Hoffman-La Roche* (cited at paragraph 765 above) and therefore in a dominant position. The judgment states that 'an undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for — without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position' (paragraph 41). The applicants also stress that assessment of market shares in isolation without considering the market shares of principal competitors results in ignoring, first, the constraints of potential competition (even though they have adduced considerable evidence of the existence of such competition) and, second, the nature of the competitive dynamics in the market.

896 Third, the applicants submit that the Commission cannot base the conclusion that there is a dominant position solely on the existence of a market share in excess of 50%. That presumption, based on paragraph 60 of *AKZO*, cited at paragraph 95 above, for the purposes of a finding of individual dominance is

irrelevant in the case of collective dominance. In the latter case an assessment of the applicants' total market share should also take account of the existence of internal competition between the undertakings concerned. The *AKZO* presumption would only be legitimate where there is no such internal competition. The Court of Justice has upheld this point of view, in the context of Community merger control, in *Kali und Salz* (cited at paragraph 595 above), paragraph 226, where it held that 'a market share of approximately 60% [divided between the individual undertakings as 23% and 37% respectively] cannot of itself point conclusively to the existence of a collective dominant position on the part of those undertakings'. Furthermore, in making decisions on merger control the Commission has itself considered that asymmetrical market shares and output levels make the adoption of a common market strategy unlikely. In this case, the market shares of the applicants in 1996 varied from 9.6% in the case of Sea-Land to 0.1% in the case of NOL and their individual capacity utilisation differed considerably.

897 Fourth, the applicants stress that according to the Commission's practice in relation to both the law on agreements (Commission Decision 87/500/EEC of 29 July 1987 relating to a proceeding under Article 86 of the EEC Treaty, IV/32.279 — BBI/Boosey & Hawkes: Interim measures, OJ 1987 L 286, p. 36, paragraph 18) and the law on merger control (Commission Decision 91/251/EEC of 12 April 1991 declaring the compatibility with the common market of a concentration, Case No IV/MO42 — Alcatel/Telettra, OJ 1991 L 122, p. 48) a high market share does not create a presumption of dominance. Furthermore, liner conferences typically have a relatively high market share in order to exercise the stabilising role accorded to them by Regulation No 4056/86. The applicants consider in this respect that, because Regulation No 4056/86 contains a provision under which the Commission may apply Article 86 of the Treaty to liner conferences, it is not legitimate to presume, on the basis of a relatively high total market share, that a liner conference has a dominant position.

898 The applicants' second plea is that even if the Commission was entitled to consider the TACA parties collectively the applicants' collective market share is inconsistent with a finding of collective dominance.

899 First, the applicants allege that as TACA parties their market share for the years from 1994 to 1997 on the relevant market as defined by the Commission was, contrary to what was indicated in paragraph 85 and Table 2 of the contested decision, 58.1%, 57.6%, 56.2% and 54.3%. The applicants explain that the difference between the market shares relied on in the contested decision and those given by the applicants is accounted for by the different approach to transport via the Canadian ports. The applicants claim that transport by individual TACA members via the Canadian Gateway falls outside the scope of the TACA and is not therefore to be aggregated with cargo transported by the applicants on the direct trades.

900 Second, the applicants allege that on the correctly defined relevant market, the market share of the TACA parties is substantially below that stated in the contested decision. The market share of the TACA parties on that market is 47.2%, 46.4% or even less than 40% depending on the case, once account is taken on the demand side of break bulk and refrigerated services respectively, the Mediterranean ports and the NVOCCs. The data relating to air transport are not available but if they had been, the applicants' market share would have been still less than those figures. Furthermore, if account were taken of the possibility of supply-side substitution, their market share would be 43.3% (including NVOCC cargo). Those figures are based on their own data for 1995 in respect of demand-side substitutability and for 1996 in respect of supply-side substitutability. The applicants claim that the imperfections due to the limited nature of those data operate in any case to their disadvantage, since more information on cargo transported in containers and in break bulk would diminish their market share still more.

901 The applicant in Case T-213/98 further submits that the Commission cannot dismiss as irrelevant the fact that the TACA's market share fell in 1997 (paragraph 533 of the contested decision) without examining the reasons for the fall. If it was due to pressure of competition on the TACA that fact would be relevant in assessing the TACA's position on the relevant market.

902 The Commission, supported by the ECTU, contends that these pleas are unfounded.

(b) Findings of the Court

903 In essence, by these pleas and complaints the applicants deny that their market share on the transatlantic trade is of such a kind as to give it a dominant position on that market.

904 However, it must be stated at the outset that it is apparent from the contested decision that the Commission did not rely solely on the fact that the applicants had such a market share to support its finding of a dominant position. At paragraph 533 of the contested decision the Commission states expressly that the TACA parties' market share 'gives rise to a strong presumption of a dominant position'. Furthermore, according to paragraphs 534 to 549 of the contested decision, the Commission finds that this presumption is borne out by other factors, namely:

— the fact that the TACA maintains a discriminatory price structure, since the Commission considers at paragraphs 534 to 537 that the system of pricing differentiated, in particular, according to the value of the products or

quantities, the purpose of which is to maximise revenues, is normally found only in market situations where one or more undertakings has a substantial degree of market power;

— the limited possibilities for customers to switch to other providers, since the Commission considers that that situation is the consequence of the capacities held by the TACA (paragraph 539), the existence of service contracts (paragraph 540), the price leadership of the TACA (paragraphs 541 and 548), the role of follower of competitors on prices (paragraphs 541 and 544), the TACA's capacity to impose regular, albeit modest, price increases during the relevant period (paragraph 543) and the substantial barriers to entry on the trade (paragraphs 545 to 547).

905 Consequently, as the Commission did not base its finding that the TACA parties hold a dominant position on the relevant trade solely on their market shares on that trade, the applicants' present pleas and complaints must be taken to criticise the Commission for having inferred 'a strong presumption of a dominant position' from such market shares.

906 In this case, the Commission stated in the contested decision, at paragraph 533, that the TACA parties had approximately 60% of the relevant market in 1994, 1995 and 1996, that is, as stated at paragraphs 592 and 594, during the period covered by the infringements of Article 86 of the Treaty established in the contested decision. The Commission also observed that this market share reached 70% in the most important segment of the market, namely, as indicated in Table 3 at paragraph 86, to which paragraph 533 makes reference, the segment of trade between northern Europe and the east coast of the United States of America, and in the segment of trade between northern Europe and the west coast of the United States of America.

907 As the Commission has rightly observed, such a market share is likely to give the TACA parties the power to prevent the maintenance of effective competition on the relevant market by providing them with the possibility of engaging in independent conduct to a significant extent vis-à-vis their competitors and shippers, thus conferring on them a dominant position within the meaning of Article 86 of the Treaty (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 38). It has been held that although the existence of a dominant position may be the outcome of a number of factors which, considered separately, would not necessarily be determinative, in the absence of exceptional circumstances extremely large market shares are in themselves evidence of the existence of a dominant position (*CEWAL I*, cited at paragraph 568 above, paragraph 76 and the case-law cited there). Market shares of more than 50% have been held to constitute extremely large market shares (*AKZO*, cited at paragraph 95 above, paragraph 60; Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 89; and Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 109). Thus, the Court of First Instance has already held that a market share of between 70% and 80% is in itself a clear indication of the existence of a dominant position (*Hilti*, cited above, paragraph 92).

908 In those circumstances, it must be held that the Commission was entitled to conclude, at paragraph 533 of the contested decision, that the fact that the TACA parties held a market share of 60% on the trade in question gave rise to 'a strong presumption of a dominant position'.

909 None of the pleas and arguments put forward by the applicants in these proceedings is capable of upsetting that conclusion.

910 As regards, first, the allegation that the data relating to market shares relied on in the contested decision are inaccurate, the applicants begin by criticising the Commission for having wrongly included the shipments made by the TACA parties via the Canadian ports.

911 In that regard, the Court observes that at paragraphs 265 to 273 of the contested decision the Commission considered that the TACA parties' market share for services provided via the Canadian ports should be added to the share they held for direct services and not treated as though it belonged to a competitor. Consequently, for the purpose of determining the TACA parties' share of the relevant market during the period covered by the contested decision, the Commission took account, as indicated at paragraphs 85 and 533 of the contested decision, of the TACA parties' freight passing through the Canadian ports.

912 Without its being necessary at this stage to decide whether the Commission was wrong to take account of the freight passing through the Canadian ports in order to determine the TACA parties' share of the relevant market, since that question is the subject of separate pleas examined later in the context of the examination of external competition, it should be observed that in any event the TACA parties' market share between 1994 and 1996, as calculated by the applicants and omitting that freight, is only slightly less than that indicated in the contested decision, since it comes to 58.1%, 57.6% and 56.2% for the years in question, instead of 60.6%, 61.5% and 59.8%.

913 A market share of 56% is quite clearly still an extremely high market share which, as held in the case-law cited above, is in itself, in the absence of exceptional circumstances, proof of the existence of a dominant position.

914 In those circumstances, even on the assumption that it is well founded, the applicants' complaint must be regarded as irrelevant.

915 Next, the complaint that on the relevant market as defined by the applicants the TACA parties' market share is below 50%, and indeed below 40%, is entirely unfounded, as the applicants' complaints concerning the definition of the relevant market have been rejected above.

916 The plea alleging that the calculation of the TACA parties' market share is inaccurate must therefore be rejected.

917 As regards, second, the plea alleging that the analysis of the TACA parties' market share is incomplete and incorrect, the applicants begin by complaining that the Commission did not examine those market shares over a sufficiently long period.

918 The Court observes that at paragraph 533 of the contested decision, the Commission states that the TACA parties held a market share of some 60% in 1994, 1995 and 1996, that is, as may be seen from paragraphs 592 and 594 of the contested decision, during the three years corresponding to the period covered by the infringements of Article 86 of the Treaty established in the contested decision. At the same paragraph, the Commission states that the contested decision does not consider whether that market share was maintained in 1997.

919 Admittedly, a high market share held over a very short period may not, in certain circumstances, suffice to give rise to a presumption of a dominant position.

920 In this case, however, the holding of a market share in the order of 60% over a period of three years, corresponding to the first three years of the operation of the TACA agreement, cannot be regarded as prima facie insufficient to give rise to a presumption of a dominant position. Furthermore, although the applicants maintain generally that a period of three years is insufficient, they do not explain how that is so in this case.

921 Contrary to the applicants' contention, moreover, the TACA parties did not hold a market share as large as that established in the contested decision for just three years. As the Court held in *TAA* (paragraph 326), the TAA, to which the TACA succeeded in 1994, had, on the transatlantic trade between northern Europe and the United States of America, a market share of some 75% in 1992 and 65% to 70% in 1993. Since in 1992 and 1993 the TAA consisted of most of the TACA parties, the TAA/TACA parties held a market share in excess of 60% for at least five years. In their written submissions to the Court, the applicants themselves have accepted that holding a high market share for five years was sufficient to give rise to a presumption of a dominant position.

922 It follows that the applicants are wrong to maintain that the presumption of a dominant position referred to in the contested decision was based on data relating to too short a period.

923 Furthermore, in so far as by this complaint the applicants are criticising the Commission for not having taken account of the reduction in the market share held by the TACA parties after 1996, that complaint coincides with the pleas and arguments relating to the examination of potential competition examined later. A significant reduction in the TACA parties' market share after 1996 might indicate the existence of significant potential competition between 1994 and 1996 which might in appropriate circumstances call in question the existence of a dominant position during that period. That question is dealt with later, at paragraphs 1009 to 1037.

924 Next, as regards the complaint that the Commission failed to examine the position of the TACA parties' competitors, it should be observed that at paragraphs 538 to 544 of the contested decision the Commission stated that the presumption of a dominant position resulting from the market share held by the TACA parties during the relevant period was confirmed by the limited

opportunities which their customers had of switching to alternative suppliers. The Commission observed at paragraph 539 of the contested decision that between 1993 and 1995 the TACA parties held over 70% of available capacity on the direct northern Europe/United States of America trades, while their largest competitor, Evergreen, held 11% of available capacity, and that there was no reason why those figures should change in 1996. As regards the other main competitors, the Commission referred at the same paragraph to the analysis made at paragraphs 244 to 264 of the contested decision.

925 Whilst that shows that for the purpose of establishing that the TACA parties held a dominant position on the relevant market the Commission assessed the position of their competitors by reference not to their market shares but to the share of available capacity on the relevant market held by those competitors, it cannot be inferred on that ground alone that the Commission failed, as the applicants maintain, to consider the position of the TACA parties' competitors by comparison with the TACA parties.

926 The applicants themselves have stated in their written submissions to the Court that on the maritime transport market, market shares in principle reflect capacity.

927 Furthermore, at paragraphs 244 to 264, to which paragraph 539 makes express reference, the Commission studies in detail the competitive position of each of the TACA's competitors with a market share of over 1%, namely, in addition to Evergreen, Lykes, Atlantic Cargo Service, Independent Container Line and Carol Line. In that context, the Commission considers not only the market share of each of those competitors but also all other relevant matters, in particular their capacity and the other agreements by which they are bound, in order to assess the intensity of the competition from that source.

928 The Commission also emphasised, at paragraphs 540 to 544 and 548 of the contested decision, the foreclosing effect caused by the contracts for services and the fact that the TACA parties' competitors set their rates by reference to the TACA and are therefore price takers.

929 Contrary to the applicants' claims, it follows that the Commission did indeed examine in the contested decision the position of the TACA parties' competitors and that it was therefore in a position to assess, in accordance with the case-law (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 48) whether those competitors were in a position to provide effective competition for the TACA parties.

930 The complaint alleging failure to examine the position of the TACA parties' competitors must therefore be rejected.

931 As regards the complaint that, unlike the situation prevailing in the case of an individual dominant position, a market share in excess of 50% cannot suffice to found a presumption of a collective dominant position, it has been held that the concept of a dominant position relates to a position of economic strength which enables the entity holding that position to prevent effective competition on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 38).

932 It is quite clear that an entity which holds more than 50% of the market, whether it is an individual entity or a collective entity, is capable of enjoying such independence.

933 As the applicants rightly observe, a collective entity is of course composed of undertakings between which a certain amount of competition may subsist and whose market shares may be somewhat asymmetrical. However, although such a circumstance is capable where appropriate of precluding a collective assessment of the position of those undertakings on the relevant market (see, to that effect, *Kali und Salz*, cited at paragraph 595 above, paragraphs 226 and 233), it is of no relevance for the purpose of determining whether that collective position is dominant. The dominant nature of a market position is to be assessed by reference to the degree of dependence vis-à-vis competitors, customers and suppliers, so that only the latter factors relating to external competition must be taken into account.

934 In any event, in this case the market share held by the TACA throughout the relevant period was significantly in excess of the market share threshold of 50%. In the contested decision, the Commission established that the TACA parties had a market share of approximately 60%. Furthermore, at paragraph 533 of the contested decision, the Commission stated that on the most important segment of the relevant market the TACA's market share was approximately 70% during the relevant period. Last, as stated above, according to the data supplied by the applicants themselves in support of their actions the TACA's market share is still more than 56%.

935 In those circumstances, it must be held that, even accepting the applicants' misplaced argument that the market share threshold from which the existence of a collective dominant position may be inferred is higher than in the case of a simple individual dominant position, that would be so in this case.

936 The applicants' complaint on this point must therefore be rejected.

937 As regards, last, the argument that liner conferences must have high market shares in order to play the stabilising role imputed to them by Regulation

No 4056/86, it is clear that a liner conference by its nature restricts competition between its members and can attain the stabilising objective imputed to it by Regulation No 4056/86 only if it has an appreciable market share. The fact that Regulation No 4056/86 provides for a block exemption for liner conferences does not therefore justify the automatic conclusion that any liner conference holding a 50% market share does not satisfy the fourth condition of Article 85(3) of the Treaty, namely the elimination of competition (*TAA*, paragraph 324).

938 It cannot be inferred, however, that in the area of maritime transport the fact that a liner conference holds a high market share is not an indication of the existence of a dominant position.

939 Although eliminating competition may preclude the application of the block exemption provided for by Regulation No 4056/86, the mere holding of a dominant position has no effect in that regard. As the concept of eliminating competition is narrower than that of the existence or acquisition of a dominant position, an undertaking holding such a position is capable of benefiting from an exemption (*United Brands*, cited at paragraph 853 above, paragraph 113; *Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 39; and *TAA*, paragraph 330). Thus, under Article 8 of Regulation No 4056/86, it is only where a liner conference abuses its dominant position that the Commission may withdraw the benefit of the block exemption provided for in that regulation. Furthermore, unlike the possibility of eliminating competition, the mere holding of a dominant position is not in itself prohibited by the competition rules laid down in the Treaty, since only the abuse of that position is prohibited.

940 It follows that, even in the area of maritime transport, the fact of holding a high market share is capable of indicating the existence of a dominant position within the meaning of Article 86 of the Treaty.

941 This argument based on Regulation No 4056/86 must therefore be rejected.

942 It follows from the foregoing that the pleas and complaints relating to the market share held by the TACA parties must be rejected in their entirety.

2. Effective external competition

(a) Arguments of the parties

943 By this plea, the applicants allege that the contested decision, at paragraphs 243 to 275 (Section X: 'External competition') and paragraphs 543 and 566 (Section XXIII: 'Assessment under Article 86'), erroneously concludes that they eliminated actual external competition. In the alternative the applicants claim that as the Commission stated during the written procedure that the second abuse identified by the contested decision did not eliminate actual external competition, that should be borne in mind in assessing the proportionality of the fines imposed.

944 The applicants submit first that in finding that the TACA parties' aggregate market share was relatively stable the Commission failed to recognise that a small numerical change in market share could give rise to a substantial change in freight movement. Thus, when Evergreen increased its market share by 1.2% from 1994 to 1995, this represented an increase in freight of 36 466 TEU. The applicants add that there are more than 20 independent operators of containerised vessels on the northern Europe-USA trade which cumulatively exert competitive pressure on the TACA parties.

945 Second, the rate of increase in cargo transported by other carriers from 1994 to 1996 and from 1994 to 1997 exceeded theirs. For example, on the westbound trade for the period 1994 to 1996 cargo transported by the TACA fell by 8.3% whilst that of other carriers increased by 6.7%. The applicants also point out that newcomers to the market have significantly increased their share in the carriage of certain commodities. Furthermore, the capacity offered by independent carriers on that trade increased by 41% between July 1996 and July 1997, and between July 1995 and July 1997 the increase was 47%. That increase is accounted for by the arrival in the market in February 1997 of Cosco, K Line and Yangming.

946 Third, the applicants stress the significance of competition from the independent container carriers Evergreen and Lykes on the direct transatlantic trade.

947 Competition between the applicants and Evergreen is evidenced by the switching by shippers of all or part of their cargo from the TACA to Evergreen and by the gain in market share of the latter between 1994 and 1996 from 10.8% to 12%. Furthermore, in October 1997 Evergreen announced plans to invest in the construction of 25 new vessels. That answers the allegation at paragraph 251 of the contested decision that 'the pressure from Evergreen is limited by the fact that given the current high capacity-utilisation levels in the transatlantic trade, Evergreen could only compete to win market share by introducing new vessels'. In any event, the applicants claim, even if it were not to invest in any new capacity, Evergreen has the potential to increase its capacity on the transatlantic trade at no extra cost simply by transferring vessels from other trades.

948 The applicants consider that competition against the TACA from Lykes is also evidenced by the switching of cargo from the applicants to Lykes and the volume

of cargo carried by Lykes on that trade between 1994 and 1996. In response to the Commission's allegation that many of the examples of switching do not relate to all of the shippers' requirements, the applicants argue that such switching shows that shippers regard non-TACA lines as offering effective competition against the conference since shippers often split their requirements in this way precisely in order to exert greater pressure when negotiating rates.

949 Fourth, the applicants stress the existence of competition from cargo transported via the Canadian ports, whether by TACA members operating on that trade (ACL, DSR-Senator, Hapag-Lloyd, MSC, Mærsk, NOL, NYK, OOCL, P&O Nedlloyd, POL and Sea-Land) or by non-members (CAST and Canadia Maritime, Bolt Canada Line and Norasia). The cargo passing through the Canadian ports to destinations in the United States is not subject to collective rate-fixing authority, so that the TACA members operating on that line do so as independent carriers. The applicants claim that the competition from carriers operating through the Canadian ports is recognised by industry commentators and is demonstrated by the examples of shippers who elected between 1993 and 1998 to switch cargo from TACA members to other carriers operating via the Canadian ports.

950 The competition from TACA members is evidenced by the fact that the rates charged on the trade via the Canadian ports and the rates charged on the direct trades are different. Moreover, the shippers themselves confirm the existence of that competition since they treat the TACA carriers operating via the Canadian ports as independent carriers. The applicants claim that those factors contradict the findings at paragraphs 269 and 270 of the contested decision.

951 As regards competition from non-member carriers, the applicants claim that, contrary to the suggestion at paragraph 268 of the contested decision, the Canadian authorities are in no way 'preoccupied' with competitive conditions on

the northern Europe/Canada trade. In an order relating to the merger between CAST and CP Ships, the Canadian Federal Court of Appeal found that competition would not be reduced by that merger because of the intensity of competition on the trade, as evidenced by the announcement by Sea-Land, Mærsk and P&O Nedlloyd that they would also enter the trade. The applicants go on to stress the strong competition exerted by the group made up of CP Ships, Bolt Canada Line and Norasia. The CP Ships group has a capacity of 85 000 TEU and a fleet of 46 ships, and is a powerful competitor on the trade via the Canadian ports. Cargo moved to the US also represents a significant proportion of the total volume of freight carried by it. Moreover, Canada Maritime intends to increase its presence on the trade following the acquisition of new containers. Bolt Canada Line operates three ships on the trade. Finally, Norasia, which is based in Switzerland, launched a new service between northern Europe and Canada in June 1998. Norasia's ships have a capacity of 1 388 TEU and its aim is to differentiate itself from the competition by calling at just three ports.

952 The Commission, supported by the ECTU, contends that these pleas and complaints are unfounded.

(b) Findings of the Court

953 The applicants deny that the TACA eliminated effective external competition. They claim that the TACA has a significant number of competitors whose market share increased during the relevant period, that the market share of those competitors increased more than the TACA's did and that the capacity offered by independent shipping lines increased following the entry on to the market of Cosco, K Line and Yangming. Furthermore, some shippers switched all or some of their freight from the TACA to Evergreen and Lykes and Evergreen is in a position to increase its capacity in the future. The applicant in Case T-213/98 denies that the TACA leadership in pricing matters is capable of being an

indication of a dominant position in the area of maritime transport. The applicants further maintain that the Commission incorrectly assessed the competition from the freight shipped via the Canadian ports.

954 As a preliminary point, it should be observed that the Commission did not find in the contested decision that effective external competition for the TACA was eliminated, but only that it was limited. At paragraph 538 of the contested decision, the Commission states that one of the factors demonstrating TACA's dominant position is the 'limited' ability of its customers to switch to alternative suppliers, making the TACA an unavoidable trading partner even for its disaffected customers. The Commission mentions the following factors in relation to external competition: the fact that the TACA has 70% of available capacity on the direct trade between northern Europe and the United States of America, while its main competitor has 11%, the foreclosing effect created by the contracts for services, the leadership of the TACA and the role of taker played by its competitors in pricing matters and the regular, albeit modest, price increases imposed by the TACA between 1994 and 1996.

955 It follows that it is not the complete absence of competition that led the Commission to conclude that a dominant position existed but the weakness of external competition. It must be further borne in mind that, according to the case-law, a dominant position does not necessarily preclude some competition, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which the competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 39).

956 In that context, it is therefore necessary to consider whether the pleas and complaints raised by the applicants in respect of the analysis of external competition in the contested decision show not only that external competition exists but also that it is significant.

(1) The number of competitors of the TACA parties and the increase in their market share

957 The applicants claim that the TACA faced cumulative competition from some 20 shipping lines and that the increase in their market share, albeit modest, reflected high quantities in terms of volume.

958 As regards, first, the number of competitors, it has already been stated at paragraphs 927 to 929 that at paragraphs 244 to 262 of the contested decision the Commission examined the competitive position of five carriers independent of the TACA, namely Evergreen, Lykes, Atlantic Cargo Service, Independent Container Line and Carol Line. The Commission considered that these undertakings were the TACA's 'five main competitors'. At paragraph 244 of the contested decision, the Commission states that the individual market shares of these competitors in 1995 were 10.2%, 5.7%, 3.2%, 2.7% and 1%.

959 It is true, as the applicants observe, that the Commission did not examine the position held by the other 12 competitors active on the relevant market.

960 However, it is common ground between the parties that during the relevant period none of the other competitors held a market share higher than 1%. It cannot seriously be denied that a shipping line with a market share of below 1% is not in a position to offer significant competition to the TACA parties. Nor do the applicants dispute the Commission's findings at paragraphs 253 to 263 of the contested decision that the applicants faced no effective competition from Atlantic Cargo Service, Independent Container Line and Carol Line, although those undertakings held market shares of between 2% and 3%. Furthermore, it has consistently been held that the weaker and smaller the competitors, the less

they are in a position to provide real competition for the dominant undertaking (*United Brands*, cited at paragraph 853 above, paragraphs 111 and 112, *Hoffmann-La Roche*, cited at paragraph 765 above, paragraphs 51 to 58, and *TAA*, paragraph 341). As regards the relevant market, the Court of First Instance has thus already held that 'none of the independent companies was able, on account of smaller market shares and more limited resources than Evergreen, to supply sufficient services to subject TAA members to real competition' (*TAA*, paragraph 343).

961 Furthermore, even taking into account the cumulative position held by the competitors in question, the data provided by the applicants themselves show that those competitors taken together represented at the most 2.3% of the relevant market in 1996. Such a market share is clearly not capable of providing significant competition for an entity holding 60% of the market. Nor do the applicants explain how the alleged cumulative pressure from the competitors in question actually affected the position held by the TACA parties.

962 It follows that the Commission was therefore right not to take account of competitors whose market share was below 1% in determining whether the TACA parties held a dominant position on the relevant market. The applicants' complaint on this point must therefore be rejected.

963 Second, the allegation that a modest increase in market share reflects large quantities in terms of volume is manifestly unfounded. The fact that an undertaking increases its sales volumes is in itself of no relevance for the purpose of assessing its competitive position by comparison with the other operators

active on the market in question if the increase in sales volume is not compared with the overall volume of the market in order to determine the share which it represents in that market.

964 The applicants' complaint on this point must therefore be rejected.

(2) The rate of increase in the volume of freight carried by the TACA's competitors

965 The applicants maintain that the TACA parties' competitors succeeded in taking a significant part of the increase in demand between 1994 and 1996. Between 1994 and 1996 the volume of freight carried by the TACA rose by 2%, whereas that carried by its competitors rose by 11%.

966 It must be observed, however, that in spite of that the TACA's market share remained essentially at the same level during the three years covered by the contested decision. Accordingly, even if the TACA parties' competitors increased the volume of freight carried, they were not in a position to gain significant market shares to the detriment of the TACA parties.

967 It must be borne in mind, moreover, that, as stated above, the market share held by the TACA parties remained high. Thus, even on the applicants' estimates, the TACA parties' market share between 1994 and 1996 remained at over 56%, while the market share of Evergreen, the TACA parties' largest competitor, did not exceed 12%. Such a gap between the market share held by the TACA parties

and that held by its main competitor is clearly a significant indication of the existence of a dominant position (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 48), particularly when the nearest competitors held marginal market shares (*United Brands*, cited at paragraph 853 above, paragraphs 111 and 112, *Hoffmann-La Roche*, cited at paragraph 765 above, paragraphs 51 to 58, and *TAA*, paragraph 341).

968 As regards the alleged circumstance that the capacities offered by the TACA parties' competitors increased following the entry on to the market of Cosco, K Line and Yangming, it is sufficient to observe that, since those independent shipping lines entered the market after the period covered by the contested decision, it is of no relevance when considering the existence of effective external competition.

969 For those reasons, the applicants' complaints on this point must be rejected.

(3) The effective competition from Evergreen and Lykes

970 In order to demonstrate the external competition which they faced from Evergreen and Lykes the applicants submit first that freight was switched to those shipping lines and second that Evergreen is in a position to increase its capacity.

971 It should be observed that Evergreen is the only independent company with a relatively high market share — 10.5% in 1995, according to paragraph 244 of

the contested decision. However, as may be seen from paragraphs 249, 250, 539 and 544 of the contested decision, a number of factors are likely to result in a significant reduction in the competition which Evergreen was able to provide for the TACA members. Thus, Evergreen's market share is five times lower than the market share of the TACA parties. It follows from paragraph 539 of the contested decision, moreover, that between 1993 and 1995 Evergreen had 11% of the capacity available on the direct trade between northern Europe and the United States of America, while the TACA parties held more than 70%. It is also common ground that Evergreen was a party to the Eurocorde agreement, to the Southern Europe America Conference and to agreements on the non-utilisation of capacity such as the Transpacific Stabilisation Agreement and the Europe Asia Trades Agreement, to which certain TACA parties were also party, which indicates a community of interests with the applicants. It should also be borne in mind that Evergreen was initially supposed to participate in the TAA, the TACA's predecessor, and that even though it remained independent the Court of First Instance has already found that it none the less maintained regular contacts with certain TAA members and was very well informed of the TAA's price policy, which enabled it to modify its tariff schedule in order to follow, with a slight difference, the changes made by the parties to the TAA (*TAA*, paragraph 342). At paragraph 249 of the contested decision the Commission thus found, and the applicants have adduced no firm evidence capable of upsetting that finding, that Evergreen had announced price rises identical to the TACA's for 1996 and that it had therefore to be regarded as a follower of the TACA on price matters.

972 In those circumstances, it is apparent that Evergreen, which was the only independent company with a certain power on the market for scheduled transport services on the transatlantic route, was not in fact able to exert real competitive pressure on the TACA members (see, to that effect, *TAA*, paragraph 342).

973 As regards Lykes, the second largest independent operator on the relevant market, it is apparent from paragraph 244 of the contested decision that its share of the relevant market in 1995 was only 5.7%. Furthermore, at paragraph 252

the Commission stated, without being contradicted by the applicants on that point, that Lykes had filed for bankruptcy protection under US law in 1995, thereby inhibiting its commercial freedom on the relevant market.

974 It follows that neither Evergreen nor Lykes was capable of bringing significant external competition to bear on the TACA parties.

975 None of the evidence adduced by the applicants in these proceedings is capable of upsetting that finding.

976 As regards the allegation that certain shippers switched freight to Evergreen and Lykes, it is sufficient to observe that although the data provided by the applicants unquestionably show that some competition was provided by those independent shipping lines, a fact which, moreover, is not disputed by the Commission, they do not show that that competition related to significant quantities of freight. Furthermore, at paragraph 544 of the contested decision, the Commission stated, without being contradicted by the applicants on that point, that examination of the examples chosen by the TACA parties in their response to the statement of objections, most of which are identical to those submitted in these proceedings, showed that 'the switching to Evergreen which occurred represented only a portion, and sometimes only a very small portion, of that shipper's requirements'.

977 As regards the possibility that Evergreen would increase its capacities in 1997, the fact that Evergreen envisaged increasing its capacities after the period covered by the contested decision does not prove the existence of effective external competition over the period covered by the decision, but at most, should it do so, the existence of some potential competition. The applicants' argument is therefore irrelevant for the purpose of challenging the findings in the contested

decision concerning effective external competition. In any event, the data provided by the applicants do not make it possible to determine the share represented by the increases in capacity decided on by Evergreen compared with all capacity available on the relevant market and, accordingly, have no probative value.

978 Consequently, the applicants' complaints relating to the effective external competition brought to bear by Evergreen and Lykes must be rejected.

(4) The TACA's leadership in pricing matters and the role of follower played by the independent competitors

979 Although the applicants do not really dispute the TACA's leadership in pricing matters established at paragraphs 249, 541 and 548 of the contested decision, the applicant in Case T-213/98 submits that the Commission cannot infer that that situation points to a dominant position, since the fact that the non-conference shipping lines tend to follow the TACA by using the uniform tariff as a reference point is one of the aspects of the stability to which the conferences contribute in maritime transport.

980 It is indeed true, as the applicants observe, that the leadership held by liner conferences in pricing matters can allow them to ensure the objective of trade stability envisaged by Regulation No 4056/86. However, it cannot be inferred that the TACA's leadership in pricing matters does not for that reason point to the existence of a dominant position within the meaning of Article 86 of the Treaty.

981 As stated at paragraphs 937 to 940 above, in the context of the examination of the market shares held by the TACA parties, holding a dominant position is not in itself prohibited by Article 86 of the Treaty and does not prevent the grant of an exemption under Article 85(3) of the Treaty. Furthermore, it has consistently been held that the existence of a dominant position may be inferred from any objective factor showing that the undertaking in question has the capacity to behave independently of its customers, competitors and suppliers, including factors positive in themselves, such as the existence of effective research and development programmes (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 48). Therefore, the fact that TACA's leadership in pricing matters contributes to the objective of stabilisation of the trade cannot prevent the Commission from relying on it in order to establish the existence of a dominant position.

982 The applicants' complaints on these points must therefore be rejected.

(5) Competition from the Canadian Gateway

983 The applicants maintain that freight shipped via the Canadian ports, either by the TACA parties operating on that trade or by shipping lines which are not parties to the TACA, provides significant external competition for the TACA parties. They maintain that freight passing through the Canadian ports for destinations in the United States of America is not subject to joint tariff setting, so that the TACA parties operating on that trade do so as independent carriers. They also claim that the competition from freight passing through the Canadian ports is recognised by the specialist press and demonstrated by the incidences between 1993 and 1998 of freight being switched by shippers from TACA parties to other carriers operating on the trade via the Canadian ports.

984 Before examining these arguments, it should be observed that in the contested decision the Commission did not find that freight to or from the United States of America passing through the Canadian ports did not provide the TACA parties with any competition, but only that the competition was relatively limited. At paragraph 265 of the contested decision the Commission concedes that freight originating in or destined for the mid-west of the United States of America may travel to and from northern Europe either by United States ports or by Canadian ports, mainly Montreal and Halifax. The Commission also notes that Canadian Gateway freight does not fall within the scope of either United States or Canadian antitrust exemptions. Consequently, it accepts at paragraph 266 of the contested decision that for certain shippers the Canadian Gateway may be substitutable for United States east coast ports.

985 However, as may be seen from paragraphs 269 to 272 of the contested decision, the Commission is of the view that this competition remains limited because, first, a number of members of the Canadian conferences, namely OOCL, Hapag Lloyd, ACL and POL, are also TACA parties and, second, the members of the Canadian conferences are informed of the TACA parties' price-setting practices. It therefore concludes, at paragraph 273 of the contested decision, that 'the market share of the TACA parties for services provided through the Canadian Gateway should be aggregated with the market share of the TACA parties for direct services and not treated as a distinct competitor'. Accordingly, paragraphs 85 and 533 of the contested decision indicate that the data relating to market share on which the Commission based its presumption of a dominant position include freight passing through the Canadian ports.

986 It must be emphasised that none of the evidence adduced by the applicants in the context of these proceedings is capable of upsetting those findings by demonstrating the existence of significant competition from freight passing through the Canadian ports.

987 As regards, first, the competition from the TACA members operating via the Canadian Gateway, the applicants submit data intended to show that the rates charged by those members on the direct trade are different from those applicable on the trade via the Canadian ports.

988 However, those data are irrelevant, since the different rates charged on the direct trade and on the trade via the Canadian ports may be explained by other reasons, to do with the nature of the services provided on the two routes. As the Commission rightly states at paragraph 270 of the contested decision, 'it is a question of the cross-price elasticity between the two services and not the level of price...; the TACA parties have provided no evidence of the degree of cross-price elasticity between the two routes'. Furthermore, at paragraph 269 of the contested decision the Commission stated, without being contradicted by the applicants, that Hapag Lloyd, ACL and POL did not offer separate services on the Canadian Gateway, since the same slots were used for direct shipments and for shipments via the Canadian ports. As the Commission rightly observes at the same paragraph, 'it is unrealistic to believe that one line will compete with itself to sell the same slot depending on the inland route of the cargo. Although some competition may exist, that competition is likely to be diminished because some of the TACA parties also have a significant influence on competitive conditions on the trades between northern Europe and Canada'.

989 The Commission was therefore right to consider that the TACA parties operating via the Canadian Gateway did not provide significant external competition for the TACA parties operating on the direct trade in question.

990 As regards, second, the competition from the shipping lines which are not TACA members, the applicants submit that CP Ships carries significant quantities of freight via the Canadian Gateway and that it intends to increase its presence in

the future. Bolt Canada Line is also active on that trade, with three vessels, and Norasia began a new service between northern Europe and Canada in 1998.

991 It is clear that although those factors unquestionably attest to the existence of a degree of competition from the Canadian Gateway for the direct trade to the United States of America, which, moreover, is not disputed, they are not capable of invalidating the Commission's conclusion that that competition is limited.

992 First of all, even though the freight passing through the Canadian Gateway was included by the Commission in the relevant market, it represents a relatively modest part of the total freight shipped between northern Europe and the United States of America. It is apparent from the data set out at paragraph 85 of the contested decision that the freight passing through the Canadian ports to the United States of America or to northern Europe represents between 15% and 17% of all freight carried between northern Europe and the United States of America. In those circumstances, the competition which the Canadian conferences, which have only a part of the freight passing through the Canadian Gateway, provide for the carriers operating on the direct trade is necessarily limited.

993 Next, the applicants did not deny that the Canadian conferences, even though they do not enjoy exemption on collective price fixing, follow the pricing practices of the TACA on the transatlantic trade, as the Commission states at paragraphs 271 and 272 of the contested decision. Therefore, even if the Canadian conferences were capable of bringing significant competitive pressure to bear on the TACA, it is clear that they essentially declined to do so.

994 Last, none of the evidence adduced by the applicants is conclusive. Thus, the increased capacity envisaged by CP Ships and that introduced by Norasia in 1998

do not show that there was real external competition during the period covered by the contested decision. Moreover, the presence of three vessels owned by Bolt Canada Line, in the absence of any details of its market share, is purely anecdotal. As regards the freight carried by CP Ships, the applicants merely provide a range of disparate data intended to emphasise the importance of that shipping line, without its being possible to infer therefrom the volume of freight which it carries on the segment in question and the market share which that volume represents.

995 Consequently, the Commission was entitled to consider that the non-TACA shipping lines operating via the Canadian Gateway did not provide significant external competition for the TACA parties on the trade in question.

996 As regards, third, the fact that freight was switched from the TACA to members of the Canadian conferences, the majority of examples given by the applicants relate to years before or after the period covered by the contested decision. Furthermore, although those data establish that certain shippers switched part of their cargo to the Canadian conferences, thus demonstrating the existence — which is not disputed — of some competition from the Canadian Gateway, they do not establish that that competition is significant. Quite to the contrary, it follows from a comparison of those data with the data set out at paragraph 85 of the contested decision that the examples of cargo-switching provided by the applicants represent marginal quantities not exceeding 0.8%, 0.9% and 2.3% of all freight passing through the Canadian ports in 1994, 1995 and 1996.

997 The applicants' complaints relating to the failure to take the effective external competition from the Canadian Gateway into account must therefore be rejected.

(6) Conclusion on effective external competition

998 It follows from the foregoing that all the pleas and arguments put forward by the applicants concerning the assessment of external competition must be rejected.

3. Potential competition

(a) Arguments of the parties

999 The applicants allege that the Commission erred in finding, at paragraphs 276 to 306 of the contested decision, that the TACA members eliminated effective potential competition. In the alternative, in so far as the Commission now recognises that potential competition has not been eliminated, the applicants claim that that fact should be taken into account in assessing the gravity of the second abuse identified by the contested decision and the proportionality of the fines imposed.

1000 The applicants allege first that the entry costs to the transatlantic trade are not as high as the Commission claims. The Commission's conclusions at paragraphs 288 and 545 are contradicted by the Dynamar Report, according to which the initial investment in establishing an operating service is about USD 355 million, whilst a niche service would only require an investment of USD 100 million, in either case considerably less than the USD 500 million claimed in the contested decision. According to the same report, by space-chartering a newly-established carrier could commence service as a niche operator for an investment of USD 21 million. Furthermore, the necessary investment could also be reduced by the redeployment of vessels from other trades or by leasing. The Commission's allegation that

the figures cited in the contested decision concern the situation where the entrant wishes to offer a level of service comparable to that of the TACA parties disregards the fact that several of the TACA members do not own the vessels they operate but charter space from other operators (see paragraph 182 of the contested decision). Consequently, the comparability of the service does not depend on the fact of vessel ownership.

1001 Secondly, the applicants submit that the recent entry into the market of several shipping lines operating independently demonstrates that the TACA members were subject to potential competition during the period covered by the contested decision. The applicants refer in this respect to the appearance of K Line, Yangming and Cosco in February 1997 and of APL and Mitsui in March 1998 by chartering space from Lykes, and to the new service from Compagnie Générale Maritime from Philadelphia from 2 December 1997. The applicants claim that those events show that the Commission made an error of fact in finding at paragraph 113 of the statement of objections that the TACA parties do not face any effective potential competition on the ground that APL, Mitsui, Yangming and K Line will probably enter the route in question by joining the TACA. It is irrelevant in that respect that APL and Mitsui are members of New World Alliance since that fact does not affect their competition with the TACA.

1002 Thirdly, the applicants deny that service contracts form a barrier to entry to the market (paragraphs 135, 225 and 564 of the contested decision). The evidence they put forward shows that the majority of shippers do not satisfy all of their requirements under a single service contract. Shippers often exceed the minimum quantity commitments laid down by service contracts by more than 60%, which proves that they retain the option to ship cargo with other carriers at competitive

rates. The applicants also deny that the foreclosing effect of service contracts is greater at the beginning of the year. Furthermore, Cosco, K Line and Yangming successfully entered the market in February 1997 and rapidly built up market share.

1003 Fourthly, the applicants point out that since 1997 a number of them (Hanjin, NOL, Cho Yang, DSR-Senator, TMM, Tecomar and Hyundai) have resigned from the TACA to operate as independents on the transatlantic trade.

1004 The applicant in Case T-213/98 also claims, separately, that the TACA parties are not capable of eliminating competition.

1005 It is clear from the provisions of Regulation No 4056/86 (see the eighth recital) that as long as some competition, either actual or potential, is present, the benefits of conferences for shippers and consumers justify the restrictions inherent in conference agreements and that any excess of market power could be controlled through the Commission's powers under Article 7(2)(b)(i). In those circumstances it would be illogical for the Commission to be able to categorise as an abuse the mere enlargement of an existing conference by the addition of new member lines so long as competition in the relevant market is not eliminated. The Commission confuses the elimination of competition with the elimination of a source of potential competition (Hanjin and Hyundai). The facts show that after Hanjin and Hyundai joined the TACA, competition in the market prevented the TACA from exercising any market power.

1006 The applicant in Case T-213/98 further submits that the lines operating on other trades can enter the transatlantic trade by achieving economies of scale. They stress that lines may use their operational and administrative infrastructures on other trades, take over lines operating on the transatlantic trade or merge with them and that most of the major carriers are engaged in a process of network expansion, completing their main east-west trades and extending into north-south ones.

1007 The applicant concludes that in those circumstances the TACA parties are not able to eliminate competition. An illustration of that is that the market shares of the TACA and non-TACA lines on the trade fluctuated continuously between 1996 and 1998 and that independent lines entered the market (Cosco, Yangming and K Line). The applicant also refers to the competition from the Mediterranean ports for the carriage of goods originating in or destined for Spain, Italy, southern and central France and other regions of southern Europe (Switzerland, Austria, the Czech Republic etc.). It claims that in such cases the longer sea haul is compensated for by a shorter inland haul. It also stresses the competition from the Canadian Gateway. Contrary to the assertion in paragraph 269 of the contested decision it is not unusual for undertakings to position themselves on the market in such a way that their products compete with each other. The applicant also notes that the proceedings before the Canadian authorities concerning the acquisition of CAST referred to at paragraph 268 of the contested decision say nothing about the competition of CP Ships, CAST and OOCL on the US market. Furthermore, entry to the transatlantic trade does not necessarily require vessels of 4 000 TEU, as asserted by paragraph 287, since that is a relatively short route.

1008 The Commission, supported by the ECTU, contends that this plea is unfounded.

(b) Findings of the Court

1009 The applicants contend that the Commission erred in finding that the TACA members eliminated potential competition. First, they allege that the costs of entry on to the transatlantic trade are not as high as the Commission claims. Second, they maintain that a number of shipping lines have recently entered the trade in question as lines independent of the TACA. Third, they deny that service contracts constitute an obstacle to entry on to the market. Fourth, and last, they claim that a number of them resigned from the TACA after 1997. At the hearing the applicants stated, however, in response to a question put by the Court on the last point, that they were not claiming that those withdrawals were evidence of the existence of significant potential competition for the TACA parties and, accordingly, there is no need to examine that complaint.

1010 It should be observed, as a preliminary point, that, contrary to what the applicants allege, the Commission did not find in the contested decision that the potential competition faced by the TACA parties was eliminated, but only that it was limited. At paragraph 538 of the contested decision, the Commission states that one of the elements demonstrating TACA's dominant position is the 'limited' ability of its customers to switch to alternative suppliers, which makes the TACA an unavoidable trading partner even for its disaffected customers. The Commission states in regard to potential competition that the barriers to entry are substantial, owing to the high costs of market entry (paragraph 545), the reduced mobility of the fleets on the trade in question — that is, the reduced opportunities for actual competitors to increase their capacity or for potential competitors to enter the trade (paragraph 546) — and the specialised nature of the vessels (paragraph 547).

1011 It follows that it is not the complete absence of potential competition that led the Commission to conclude that a dominant position existed but rather the fact that it is weak.

1012 In that context, it is appropriate to consider whether the pleas and arguments put forward by the applicants in respect of the analysis of potential competition in the contested decision demonstrate, in addition to the existence of such potential competition, that it was significant.

(1) The costs of market entry

1013 At paragraph 545 of the contested decision the Commission states that the investment necessary to enter the market may vary between USD 400 million and USD 2 billion. Thus, at paragraph 288 the Commission states that an investment in the region of USD 500 million is necessary in order to be able to provide a fixed-day weekly service calling at three or four ports in northern Europe and the same in the United States; such a service requires a fleet of five vessels of similar speed and capacity together with a complement of containers of three times the capacity of the fleet.

1014 It must be held that none of the arguments put forward by the applicants in these proceedings is capable of upsetting those findings in the contested decision.

1015 As regards, first, the argument that the Dynamar report concludes that the initial investment to set up an operational service by a shipowner is approximately USD 355 million, it is sufficient to observe that such an amount, although lower than the estimates in the contested decision, is none the less still considerable. Furthermore, the Commission has indicated, without being contradicted on this point by the applicants, that the estimates made in the Dynamar report did not take account of the sunk costs which do not accrue until the second year.

1016 Nor, contrary to the contention of the applicant in Case T-213/98, does the Commission assert that entry on to the transatlantic trade requires vessels of 4 000 TEU. At paragraph 287 of the contested decision, the Commission merely observes that 'the costs savings per slot are 30% to 40% for a 4 000 TEU ship as against a 2 500 TEU ship'.

1017 As regards, next, the other estimates, all below USD 355 million, submitted by the applicants on the basis of the Dynamar report, those estimates concern the setting up of niche services on the basis of vessel-leasing agreements. In order to assess the importance of the barriers to entry on the relevant market, it is necessary to determine the essential costs of setting up a service of a level comparable with that of the TACA parties. Only in such a situation might a newcomer be in a position to subject the TACA parties to significant competition. Since it is common ground that the TACA parties do not confine their activities to niche services but are active globally on all the trade in question, the data provided by the applicants are irrelevant. Furthermore, although it is true, as the applicants emphasise, that certain TACA parties operate their liner services by chartering space on vessels belonging to other TACA parties, new independent entrants who do not wish to join the TACA cannot avail themselves of that opportunity to the same extent as TACA parties, since competition external to the TACA is limited. In any event, the applicants stated at the hearing that it was not possible to determine the cost of entering the market by means of space chartering, since that cost depended on the terms negotiated with the charterer.

1018 As regards, last, the argument that a new entrant could reduce the necessary investment by redeploying vessels operating on other trades, the Commission stated in the contested decision that the mobility of fleets recognised by Regulation No 4056/86 was limited on the trade in question. First, the

Commission observed at paragraph 287 of the contested decision that the special features of the transatlantic trade substantially reduced the likelihood of potential competition, emphasising in that regard that this trade was a high-volume trade and needed regular, high-capacity services, which meant a large number of big, modern vessels providing a weekly service, calling at a sufficient number of ports. Second, the Commission stated at paragraph 290 of the contested decision that almost all of the major liner shipping companies were already present on the transatlantic trade. Third, it stated at paragraphs 291 to 298 that between 1993 and 1995 every significant potential competitor had entered this trade by joining the TACA. Fourth, the Commission stated at paragraph 299 that the cost of withdrawing from the transatlantic trade, with the resultant damage to reputation and to competitive positions elsewhere, and lower prospects of returning to the trade, reduced the incentive to enter. Fifth, and last, it observed at paragraph 547 that it was necessary to deploy vessels of a relatively high standard and specialised in the carriage of containers.

1019 As the applicants have not challenged any of those assessments in the contested decision it must be taken as established that fleet mobility is limited on the trade in question.

1020 The argument that a new entrant could reduce the costs of entry on to the market by deploying vessels active on other trades must therefore be rejected.

1021 On those grounds, all the applicants' arguments relating to the costs of entry on to the market must be rejected.

(2) Recent non-TACA entries to the relevant market

1022 The applicants state that a number of shipping lines entered the transatlantic trade between 1997 and 1998 without joining the TACA.

1023 It is common ground between the parties that K Line, Yangming and Cosco entered the trade in question on 16 February 1997 under consortium agreements. Likewise, it is not disputed that APL and Mitsui entered the trade in March 1998 on the basis of space-chartering agreements with Lykes, while Compagnie Générale Maritime introduced a new service from Philadelphia on 2 December 1997.

1024 It is clear that these entries on to the market directly contradict the Commission's finding in the statement of objections — or in the course of the period during which, according to the contested decision, the TACA parties held a dominant position on the relevant market — that, in view of the links existing between the TACA parties on other trades, it was probable that if those shipping lines entered the transatlantic trade, they would do so by becoming members of the TACA.

1025 Contrary to what the Commission maintains, the fact that all these entries took place after the period covered by the contested decision is irrelevant. Potential competition must not be confused with actual external competition. By definition, potential competition refers to a competitive pressure which has not materialised at the time of the events in question but which may be foreseen in the short or medium term, on the basis of precise and consistent indicia, with some degree of certainty at the time of those events. In fact, during the administrative procedure, the applicants produced various articles from the specialist press stating that APL and Cosco intended to enter the market in the short term.

1026 However, the fact that a number of shipping lines, in spite of their links with the TACA parties on other trades, entered the transatlantic trade outside the TACA between 1997 and 1998 does not necessarily show that those lines represented significant potential competition during the period covered by the contested decision.

1027 In that regard, the Commission stated at paragraph 264 of the contested decision, without being contradicted by the parties on that point, that on the basis of the capacity on the trade in mid-1995, the new capacity represented by the Cosco-K Line-Yangming consortium would have given Cosco a 2.8% share of eastbound capacity and 2.7% of westbound capacity on the direct trades and 2.3% and 2.2% respectively on the trades including Canadian trades, while the other lines would each have had exactly half that capacity. As regards the entry of Mitsui and APL, the Commission stated at paragraph 244 of the contested decision, again without being contradicted by the applicants, that these two new operators entered the transatlantic trade without introducing any new capacity.

1028 Furthermore, the Commission stated at paragraph 249 of the contested decision, without being contradicted by the applicants on this point, that the independent competitors were likely to follow the TACA's leadership on prices. In its written submissions, the applicant in Case T-213/98 itself stated, moreover, that this tendency to follow the prices fixed by the TACA was one of the aspects of the stability recognised by Regulation No 4056/86 to which liner conferences contribute in the area of maritime transport.

1029 In those circumstances, the Commission was entitled to consider that K Line, Yangming, Cosco, APL and Mitisui were not likely to constitute a source of significant potential competition for the TACA parties.

1030 The applicants' arguments on this point must therefore be rejected.

(3) Service contracts

1031 The applicants deny that service contracts form a barrier to entry to the market. They claim that the majority of shippers do not satisfy all of their requirements under a single service contract. Shippers often exceed the minimum quantity commitments laid down by service contracts by more than 60%, which proves that they retain the flexibility to ship cargo with other carriers at competitive rates.

1032 It is common ground between the parties that a service contract, whether individual or joint, is a contract in which a shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed period and the conference or carrier commits to a certain rate and to a defined service level. The Commission stated at paragraph 135 of the contested decision that shippers would normally seek a service contract for as great a volume as they thought they were reasonably likely to acquire, since that allowed them to get a bigger discount from the tariff rate. For that reason, the Commission considers, at paragraph 540 of the contested decision, that shippers who require regular maritime transport services over a period of one year or more are unlikely to switch part of their requirements to smaller carriers, since this would reduce their minimum volume commitment under a service contract with the conference and lead to a smaller discount.

1033 Far from invalidating those assertions, the figures submitted by the applicants in these proceedings confirm them on all points. It follows from those data that, during the three years covered by the contested decision, the volumes of freight

forming the subject-matter of a minimum commitment under a service contract represented, respectively, 59.2% (1994), 60.6% (1995) and 61.2% (1996) of the total freight carried by the shippers indicated by the applicants. Even if those data do not concern all the shippers and do not appear to be limited to the relevant market, in so far as the applicants submit them as being representative of the conduct of all shippers, it may be inferred that approximately 60% of the freight carried on the relevant market was covered by an obligation for a carrier to carry minimum quantities under a service contract. Having regard to the market share of approximately 60% held by the TACA parties on the trade in question during the period covered by the contested decision, it may be inferred that approximately 36% of that freight was linked with the TACA parties.

1034 It must be held that such a threshold of dependence is capable of significantly restricting access by competitors to the relevant market (see, to that effect, Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 81). Admittedly, as the service contracts do not, in legal terms, impose an exclusive service obligation, a shipper is in principle free to switch the quantities covered by such a contract to another carrier. However, in so far as compliance with the obligation to carry minimum quantities is sanctioned by the payment of significant standard compensation, the service contracts are manifestly capable of providing an incentive for shippers to give priority to having the quantities concerned carried by the carrier with which they have entered into a contract.

1035 For those reasons, the Commission was entitled to consider that the service contracts constituted a barrier to significant entry by potential competitors.

1036 The applicants' arguments on this point must therefore be rejected.

(4) Conclusion on potential competition

1037 It follows from all of the above considerations that the applicants' pleas and arguments relating to potential competition must be rejected.

4. Internal competition within the TACA

(a) Arguments of the parties

1038 The applicants complain that the Commission failed to take into account competition between the TACA members when analysing their collective power on the relevant market.

1039 They assert that even if it were legitimate to assess the undertakings in question collectively, evidence of internal competition on pricing or otherwise is relevant in assessing their capacity for collective action independently of competitors (whether internal or external), customers and consumers. The applicants consider that internal competition acts as a restraint on the collective action of the undertakings concerned. For example, internal price competition inhibits the undertakings from collectively setting prices at abnormally high levels. The Commission has admitted that the collective dominance of the TACA members does not exclude the possibility of individual departures from the common commercial strategy. It should therefore take account of such departures in assessing whether the undertakings in question hold a dominant position. The applicants here refer to the evidence adduced above at the stage of assessing collective dominance.

1040 The Commission, supported by the ECTU, claims that this plea should be rejected.

(b) Findings of the Court

1041 It was stated at paragraph 735 above that the degree of internal competition between the TACA parties did not make it possible to preclude a collective assessment of the position held by those parties on the relevant market. By these pleas, the applicants none the less contend that internal competition between the TACA parties was sufficient to negate their dominant position on that market.

1042 In that regard, it is sufficient to observe that, in accordance with the case-law (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 38), the question whether the TACA parties together hold a dominant position on the transatlantic trade depends solely on the capacity of those parties to conduct themselves independently by reference to the external competitive pressure resulting, in particular, from the activities of their non-conference competitors and of shippers. Therefore, although the degree of internal competition between the undertakings in question is capable, where it exists, of precluding a collective assessment of their position on the relevant market (*Kali und Salz*, cited at paragraph 595 above, paragraph 233), it is of no relevance when determining whether that collective position is a dominant one.

1043 As the applicants maintain, internal competition among undertakings whose position has been the subject of a collective assessment may have the effect of restricting the extent of the price increases decided by those undertakings. None the less if such price increases are decided by those undertakings in complete independence without having to take account of external competitive pressure, they must be regarded as constituting the act of undertakings together holding a dominant position. At the most, if the internal competition in question should

have the effect of restricting the extent of those price increases, the prices thus set might prove not to be excessive and therefore not to constitute an abuse within the meaning of Article 86 of the Treaty. The applicants' argument therefore shows that they are confusing the existence of a dominant position with its abuse.

1044 The applicants' arguments relating to internal competition between the TACA parties must therefore be rejected.

5. The development of rates on the trade in question

(a) Arguments of the parties

1045 The applicants allege that the development of rates on the transatlantic trade is inconsistent with a finding of dominance.

1046 First, the applicants claim that if they had not faced external competition they would have had no incentive to carry cargo otherwise than at the conference's 'ordinary' tariff under TVRs or service contracts. The volume and proportion of cargo carried by the TACA at 'ordinary' rates fell consistently between 1994 and 1997. Conversely, the volume and proportion of cargo carried at TVRs and under all service contracts (conference, joint and individual contracts) increased during that period. Furthermore, the volume and proportion of cargo carried under conference service contracts fell in 1996 and 1997 by comparison with 1994,

whilst the volume of cargo carried under joint and individual service contracts increased. The applicants also stress the fact that service contract rates payable in 1996 and 1997 represented a larger discount on the 'ordinary' tariff than that payable in 1994. They infer from this that conference service contract rates decreased between 1994 and 1997.

1047 The applicants note that the Commission confines itself to claiming that TVRs and service contracts are not in themselves evidence of external competition. The Commission does not explain, however, why the volume and proportion of cargo carried under the 'ordinary' tariff decreased or why the volume and proportion of cargo moving under TVRIAs and individual service contracts increased in the relevant period.

1048 The Commission confines itself in the defence to criticising the Mercer Report for concluding that rate cutting in a competitive liner shipping trade may occur in advance of actual cost reductions. However, the Commission does not deny the existence of anticipatory rate cutting, but nevertheless rejects the inference that there is intense price competition on the market. The rejection of this inference is based on a hypothesis for which there is no support, namely that the applicants' rates were excessive.

1049 The Commission's finding that in the first quarter of 1995 40% of all TACA cargo moved at the tariff rate does not distinguish between conference class tariff rates and other rates which appear in the tariff, namely TVRs and independent action.

1050 Second, the applicants claim that analysis of the rates in 75% of their service contracts demonstrates that between 1993 and 1998 westbound rates in European currencies fell on average by over 15% (when adjusted for inflation).

1051 As for the method they used, contrary to the Commission's allegation the results of that analysis are expressed not only in national currencies but also in US dollars. The figures have also been weighted according to the minimum quantity commitment in each contract to reflect the relative significance of each service contract to the overall assessment. Contrary to the Commission's criticisms, that weighting does not disguise the effect of their market power on smaller shippers. Finally, the applicants have rightly adjusted the rate data in order to reflect the general level of inflation and deflation in the value of the relevant currencies to which they and the shippers were subject during the relevant period.

1052 The downward trend identified in their analysis confirms the pressure on rates exerted between 1983 and 1993. The report by Drewry Shipping Consultants (*Global Container Markets, Prospects and Profitability in a High Growth Era*, London, 1996) states in this connection that transatlantic rates had fallen in real terms.

1053 In the contested decision (paragraph 324 and Table 11), the Commission concludes as a result of its analysis of the evolution of rates that over a five-year period (1993 to 1997) maritime transport rates increased by 8% whilst those for inland transport in the Community fell by 4%. The Commission does not provide any explanation, however, for the discrepancy between that finding and the allegation made by the complainant (the ESC) and mentioned in paragraphs 118 and 119 of the statement of objections that the increases imposed in 1995 give an overall increase over a period of three years in excess of 80%. Furthermore, the

applicants point to the contrast between the conclusions at paragraph 324 and Table 11, on the one hand, and those in paragraphs 325 and 328, on the other, which refer to 'the most market dominance' and 'substantial rate rises on both... routes'.

1054 In the defence the Commission questions whether price comparisons serve any useful purpose in the case of undertakings in a monopoly position unless it is shown that in a competitive market the rates would have been lower than those of the undertakings in question. However, in the contested decision, the Commission relies on an analysis of rate changes to support its finding of dominance but at the same time fails to show that in a competitive market rates would have been lower.

1055 The applicants also consider that the method adopted in the rate analysis at paragraphs 320 to 328 of the contested decision is flawed for several reasons. First, the sample of service contracts was too small: the service contracts examined concerned 10 shippers out of a total of 500 and the largest number of shippers surveyed for any one period was eight. Furthermore, the Commission does not explain the basis on which it selected those 10 shippers as opposed to any other shippers which might have satisfied its selection criteria. Second, the volume of cargo carried under the service contracts analysed represents a relatively small quantity of the total cargo carried by the applicants (the volume of cargo of the 10 shippers chosen represents 6.4% of the total cargo carried by the applicants under service contracts in 1993, 5.1% in 1994 and 7% in 1995). Third, the percentage increases are not weighted to take account of the relative importance (in terms of volume) of the service contracts examined. Fourth, the choice of 1992 as the base year lacks objectivity since that was the year in which rates on the transatlantic trade fell dramatically. Fifth, the analysis does not take account of ancillary freight charges.

1056 In any event, even if the Commission's study were reliable, the applicants consider that it does not demonstrate the existence of a dominant position. For example, the Commission finds that from 1993 to 1997 ocean rates increased by 8% (Table 11 in the contested decision) and inland rates fell by 4%. Those movements take no account of inflation, however.

1057 The Commission's analysis of rate developments based on the data supplied by the applicants as part of their study of 75 TACA member service contracts is also flawed because the data are not adjusted for inflation, are not weighted by reference to volume and exclude surcharges and terminal handling charges. Furthermore, contrary to the Commission's own methodology, it omits the shippers which had entered into service contracts in 1993 and service contracts or TVRs in 1996.

1058 The applicants also complain that the Commission has not disclosed the arithmetical method or the raw data used to calculate the rate increases for service contracts at paragraphs 320 to 328 (Annex VI to the decision contains only the results of those calculations). Next, they complain that the Commission's analysis of price variations in TAA/TACA service contracts at paragraph 320 of the contested decision is based on a small fraction of the conference's service contracts and takes no account of inflation.

1059 The applicant in Case T-213/98 submits a number of further pleas alleging error of assessment and/or in the reasoning.

1060 First, the Commission cannot use price differentiation based on the value of the goods to support a presumption of dominance (paragraph 534 of the contested decision) since this is a long-established practice in the maritime sector which is

expressly required by the Unctad Code (Article 12(b)). Similarly, the Commission's statement that in a less concentrated market transport rates are fixed 'on the basis of the actual costs, in line with market forces' (paragraph 535) is incorrect because varying prices may be justified on the basis of customers' ability to pay, as is frequently the case in the air transport sector. In any event, the lack of a link between differentiated prices and dominance is shown by the fact that almost all lines, on all trades, offer tariffs which differ according to the value of the commodity.

1061 Second, the Commission relied on the fact that the currency adjustment factor ('CAF') adopted by the TACA discriminated on the basis of the port of destination or embarkation (paragraph 536 of the contested decision). The applicant points out first that the Commission's reasoning is confused and contradictory, since after stating that the differences in CAF cannot be economically justified, the Commission nevertheless states that the contested decision does not address the issue whether the TACA parties' agreement on CAF meets the conditions of Article 4 of Regulation No 4056/86, which is precisely the provision dealing with the issue of whether there is economic justification for different CAFs. The applicant further criticises the Commission for not explaining why an alleged discrimination in 1997 is relevant in determining whether there was a dominant position between 1994 and 1996.

1062 Third, the applicant criticises the Commission for relying on the fact that the TACA was able to exercise 'price leadership' (paragraphs 541 and 542 of the contested decision). As the Commission acknowledged at paragraph 329 of the contested decision, the fact that the lines which are not members of a conference tend to follow the conference by adopting the uniform rate which serves as a 'reference point for the market' constitutes a source of stability to which conferences contribute in the maritime transport sector. In those circumstances, the fact that the TACA agreement was 'one of the most restrictive' or that the

TACA acquired 'a reputation as a price leader' are irrelevant in determining whether the TACA is in a dominant position. The same is true of the statement at paragraph 548 that, because of that 'leadership', it is unlikely that any competitor would risk destabilising the market by competing aggressively against the TACA on price.

1063 The Commission, supported by the ECTU, contends that these pleas are unfounded.

(b) Findings of the Court

1064 By these pleas, the applicants claim that the development of rates on the transatlantic trade is incompatible with the existence of a dominant position. In that regard they state, first, that the quantity of freight carried at the ordinary rates provided for in the tariff has consistently fallen in favour of TVRs and service contracts and, second, that the rates charged by the TACA fell during the relevant period.

(1) The proportion represented by freight carried at the ordinary rates compared with freight carried under TVRs and service contracts

1065 It is not disputed that, during the period covered by the contested decision, some 60% of the freight carried by the TACA was shipped under TVRs and service contracts. In its written submissions to the Court, the Commission itself recognised that this amounted to a 'considerable' share. It is common ground that TVRs and service contracts allow the members of a liner conference to grant their customers reductions on the ordinary tariff rates. As stated at paragraphs 457 and

459 of the contested decision, although the TVRs result in all shippers being granted a reduction on a common and uniform basis according to volumes and quantities carried, service contracts are capable of leading to such reductions being granted on an individual basis according to the terms negotiated between the conference and the shipper concerned.

1066 It may be taken as established, therefore, that during the period covered by the contested decision more than half the freight carried by the TACA parties was carried at reduced rates compared with the highest rates of the TACA tariff.

1067 Contrary to what the applicants claim, however, that circumstance does not in itself show that the TACA parties did not hold a dominant position during the period in question. The fact that an undertaking grants rebates to its customers does not in any event indicate that it does not enjoy a dominant position on the relevant market. As the Commission rightly stated at the hearing in response to a question put by the Court on this point, it is often the case that an undertaking holding a dominant position on a given market grants rebates to its customers, for example, in order to pass on savings in efficiency and economies of scale or in order to ensure their loyalty (see, in particular, *Hoffmann-La Roche*, cited at paragraph 765 above, paragraphs 90 and 91, and *Michelin*, cited at paragraph 337 above, paragraph 71). The existence of a dominant position has more to do with an undertaking's ability to fix its prices in complete independence, without having to take external competitive pressure into account, than with the ability to fix the highest prices.

1068 In the present case, therefore, without its being necessary to adjudicate on the precise nature of the rebates granted by the TACA parties, it must be held that, in order to challenge the dominant nature of their position on the relevant market, the applicants cannot rely on the fact that the TACA parties grant rebates to shippers under TVRs or service contracts.

1069 On the contrary, in the contested decision the Commission established that the rebates granted under TVRs and service contracts confirmed the dominant position held by the TACA parties, because they reflected their ability to discriminate between shippers on prices.

1070 Thus, at paragraphs 203 to 213 of the contested decision, the Commission stated that the TACA parties aimed to charge what each different shipper would bear, in order to enhance revenues without increasing costs. In that regard, the Commission observed that the TACA parties practised three degrees of discrimination. Under the first, according to paragraph 206, a customer pays a specific price for a specific unit or service and a different price for subsequent units or services. According to paragraph 207, the second, which takes the form of TVRs and service contracts, involves setting prices on the basis of the quantity purchased. Last, the third, under which the tariff is divided into codes and independent actions are taken, consists, according to paragraphs 208 to 213, in separating customers into several classes and in setting a different price for each customer class.

1071 At paragraph 534 of the contested decision, the Commission expressed the view that that ability to discriminate was capable of confirming the dominant position inferred from the market shares of the TACA parties. The Commission observes first of all that 'the TACA tariff for maritime transport services sets different rates for different products on a basis related to their value', that 'although the range of tariffs is considerably narrower than the range of commodity values, prices can vary as much as five-fold' and that 'in other words, although the cost of transporting a container is almost entirely unrelated to the type of goods transported, freight rates are up to five times higher for high value commodities than for low value commodities'. As stated at paragraph 535 of the contested decision:

'This system of differentiated pricing, the purpose of which is to maximise revenues, is normally only found in market situations where one or more

undertakings has a substantial degree of market power. In transport markets where there was no significant concentration of market power, the transport price would probably be fixed by reference to the type of service on offer and not by reference to the goods transported, on the basis of the actual costs in line with market forces.'

1072 Next, at paragraphs 536 and 537, the Commission states that a further example of discrimination imposed by the TACA relates to CAFs, which vary considerably according to the ports of destination and of origin.

1073 Those findings are not called in question by the circumstance underlined by the applicant in Case T-213/98 that almost all liner companies offer on all trades prices which vary according to the value of the goods. The applicant itself stated that one of the aspects of the stability envisaged by Regulation No 4056/86 to which the liner conferences contribute in the area of maritime transport was the fact that shipping lines which are not members of a conference tended to follow the conference by using the uniform tariff as a 'market reference point'. Thus, on the trade in question, the Commission states at paragraph 548 of the contested decision, without being contradicted by the applicants on that point, that 'the fact that the TACA is the price leader makes it unlikely that any competitor would wish to risk destabilising the market by competing aggressively against the TACA on price'.

1074 In those circumstances, the fact that on other trades shipping companies not in a dominant position adopt, like the dominant companies, a discriminatory tariff policy vis-à-vis shippers does not show that price discrimination is not a relevant criterion on which to establish the existence of a dominant position on a given market, but at the most reveals that the non-dominant companies tend to follow the tariff policy of the dominant companies.

1075 The circumstance, alleged by the same applicant, that the discriminatory nature of the CAF referred to at paragraph 536 of the contested decision is based on figures relating to 1997, a year which came after the period covered by the contested decision, is irrelevant. Since the Commission does not state in the operative part of the contested decision that that discrimination is prohibited, but merely refers to it as an example of the TACA parties' ability to discriminate on prices, an ability which is not disputed by the parties, the Commission was at liberty to rely on figures subsequent to the period covered by the contested decision to illustrate its argument.

1076 In so far as the applicant alleges that the contested decision is incorrectly reasoned, moreover, it is sufficient to observe that the allegations on that point coincide with the pleas alleging error of assessment and that they therefore seek to challenge the merits of the assessment made in the contested decision (*Commission* v *Sytraval and Brink's France*, cited at paragraph 746 above, paragraph 67). Those allegations are therefore of no relevance in the context of the assessment of compliance with the obligation to state reasons (*FEFC*, cited at paragraph 196 above, paragraphs 425 and 431).

1077 It follows that none of the evidence adduced by the applicants based on the existence of discounts on the highest tariff rates is capable of upsetting the Commission's finding that the position held on the relevant market by the TACA parties was a dominant one.

(2) The increase in the rates charged by the TACA parties

1078 By these pleas, the applicants dispute the results of a survey of price movements in the maritime and Community inland legs of TAA/TACA service contracts from 1992 to 1997, which are set out at paragraphs 320 to 328 of the contested

decision ('the service contract rates survey'). At paragraph 324 of the contested decision, the Commission states that 'the clearest conclusion to be drawn from the survey is that the price increases from 1993 to 1996 in the maritime legs of the journey are 10.4 percentage points greater than increases for the Community inland legs'.

1079 It follows from the contested decision that the Commission relied on those results for its assertion, at paragraph 543, that the limited opportunities for shippers to switch to the TACA's competitors were demonstrated by the fact that the TACA had been in a position 'to impose regular, albeit, modest price increases over the period 1994 to 1996, in stark contrast to the two other world arterial trades'.

1080 The Court agrees with the applicants that the results of the service contract price survey are somewhat inconclusive. While it is true that, for the period 1993 to 1996, the survey finds an increase in the maritime rate of 15.5 percentage points against an increase of only 5.1 percentage points in the inland rate, it does not emerge from the contested decision that the survey specifically examines price movements during the period covered by the contested decision, namely 1994 to 1996. It cannot be inferred from the other results presented by the survey that price movements during that period were the same as between 1993 and 1996. Thus, for the period 1992 to 1996, the survey finds that the maritime tariff rose less than the inland tariff, whereas for the period 1992 to 1997 the increase in the maritime tariff is slightly higher than the increase in the inland tariff. It is clear that no conclusions can be drawn from these varying results for the purpose of establishing the existence of a dominant position.

1081 However, whatever the flaws in that survey, it must be noted that the Commission's finding at paragraph 543 of the contested decision that the TACA parties imposed regular price increases is also based on the results of another

survey set out at paragraphs 307 to 319 of the contested decision, before those of the service contracts price survey. Following that survey, of movements in average TACA revenue per TEU between 1992 and 1996 ('the average revenue survey'), the Commission concludes, as stated at paragraphs 318 and 319, first, that 'taken as an average, the TACA parties increased their revenues per TEU (that is, the average price paid by shippers for the maritime transport of 1 TEU) between 1992 and 1996 by 8% eastbound and 18% westbound' and, second, that 'a number of TACA parties have been able to increase average revenues per TEU substantially without suffering any loss in market share'. Furthermore, paragraphs 314, 315 and 317 of the contested decision indicate that the increase in average revenue would have been even more substantial if the TACA parties had not been forced by the FMC to reduce their 1995 tariff and service contract rates to 1994 levels.

1082 It is significant that the applicants do not dispute the results of the average revenue survey. In those circumstances, it must be taken as established that the finding at paragraph 543 of the contested decision that the TACA parties imposed regular price increases is sufficiently supported in the contested decision by the average revenue survey.

1083 Consequently, the fact that the results of the service contract rate survey do not support the finding at paragraph 543, if established, is irrelevant.

1084 In any event, the finding at paragraph 543 of the contested decision that the TACA parties imposed regular price increases is only one of the many factors used at paragraphs 532 to 549 of the contested decision to demonstrate the existence of a dominant position. Although the ability to impose regular price increases unquestionably constitutes a factor capable of pointing to the existence of a dominant position, it is by no means an indispensable factor, as the independence which a dominant undertaking enjoys in pricing matters has more

to do with the ability to set prices without having to take account of the reaction of competitors, customers and suppliers than with the ability to increase prices (see, to that effect, *AKZO*, cited at paragraph 95 above, paragraphs 70 to 72).

1085 In this case, it must be held that it follows from an examination of the foregoing pleas and arguments that the dominant position of the TACA parties is sufficiently made out by the other evidence relied on in the contested decision, which relates not only to their extremely high market share but also to their ability to discriminate on prices and to the absence of effective external competition as evidenced by their share of available capacity on the trade in question, by the foreclosure effect created by the service contracts, by the TACA's leadership in pricing matters and by the role of follower played by their competitors in pricing matters.

1086 On those grounds, the applicants' pleas and arguments relating to movements in rates on the trade in question must be rejected.

6. Conclusion on the pleas relating to the existence of a dominant position on the relevant market

1087 It follows from all of the foregoing considerations that the applicants' pleas relating to the existence of a dominant position held by the TACA parties must be rejected in their entirety.

C — Conclusion on the second part

1088 For the reasons set out above, all of the pleas and arguments relating to the second part, concerning the dominant nature of the position held by the TACA parties, must be rejected.

Part three: no abuse

1089 By their pleas under the present part, the applicants challenge the Commission's two findings of abuse recorded in the contested decision, namely, the placing of restrictions on the availability and content of service contracts and the alteration of the competitive structure of the market.

A — The first abuse: placing restrictions on the availability and content of service contracts

1090 The applicants' pleas and arguments against the contested decision in respect of the first abuse are of two types. First, the applicants allege that each of the practices constituting that abuse is objectively justified. Second, they submit that the contested decision does not contain an adequate statement of reasons in various regards.

1. Objective justification of the practices constituting the first abuse

(a) Arguments of the parties

1091 The applicants allege first in relation to conference service contracts that the terms imposed by the TACA relating to contingency clauses, the duration of service contracts, the prohibition of multiple contracts and the level of liquidated damages, referred to in paragraph 556 of the contested decision, are justified on objective grounds. They deny that those terms are justified simply because they are in their own interests. They consider that their objective nature is shown by the numerous references to the situation in US law. The fact that the TACA parties notified a revised version of their agreement no longer containing the unfair conditions and other restrictions of competition identified by the contested decision in relation to service contracts reflects not a lack of belief on the part of the applicants in the validity of their agreement, but their desire to bring the dispute with the Commission to an end.

1092 First, in relation to contingency clauses, the applicants state that that type of clause generally provides that if the tariff rate drops below the shipper's service contract rate, or if the conference enters into another service contract with a smaller volume commitment and a lower rate, the shipper which signed the first contract is automatically entitled to the lower rate.

1093 The applicants claim that the prohibition of contingency clauses is justified by the need to preserve stable rates and services. Contingency clauses are liable to undermine the stabilising role of liner conferences which is precisely the objective of block exemption under Regulation No 4056/86. Thus, during a dispute between Lykes and a shippers' association in 1995, the US authorities recognised that contingency clauses could be anti-competitive in that they might encourage

Lykes not to grant favourable rates to competitors of the shippers' association in question. It is also clear from the settled case-law of the US authorities that 'most-favoured nation' clauses are anti-competitive. It is therefore inaccurate to claim that it is an exception for that type of clause to be held to be anti-competitive.

1094 Second, as regards the duration of contracts, the applicants state first that the provision in the TACA is that the TACA members undertake to maintain a stable price for at least one calendar year, enabling both carrier and shipper to plan forward and to budget revenue and expenditure. That benefit is consistent with those described by paragraph 473 of the contested decision. Next, the clause in question results in administrative efficiency for the carriers and contributes to equality of treatment between shippers in the same position. Furthermore, the period of one year imposed by the TACA is in line with the usual practice in relation to service contracts, due to the fact that, given the changing conditions in international liner trades and the trend towards lower rates, shippers are reluctant to commit to a specific minimum volume at a stated rate for more than one year. Finally, the Commission has not shown that terms of one, two or three years under the TACA have had any appreciable restrictive effect on competition. The Commission claims at paragraphs 225 and 564 of the contested decision that service contracts act as effective barriers to entry, and this would be even more so were carriers and shippers at liberty to enter into service contracts for a duration exceeding that permitted under the TACA.

1095 Third, in relation to multiple contracts, the applicants point out that the TACA prohibits a carrier from entering into several service contracts with the same shipper only where those contracts cover, in whole or in part, the transportation of the same cargo over the same route or any segment of the same route. The applicants claim that that prohibition accords with general commercial practice. First, they point out that if such contracts were permitted it would in fact amount

to allowing the TACA parties to amend conference contracts unilaterally. Next, a conflict of interest would arise if a party were permitted to negotiate and agree on a conference contract and subsequently to breach that contract by entering into its own contract with the same shipper for the same cargo but on different terms. It is the applicants' view that conference carriers should be required to choose whether to participate in a conference contract or to establish a TVR or to take independent action or (since 1996) to conclude their own individual (or joint individual) service contract. Lastly, the applicants note that service contracts (whether conference or individual) may be amended, so that a term imposed by the TACA does not irrevocably bind the parties. For example, the parties could decide to add further commodities or destinations.

1096 Fourth, as regards liquidated damages the applicants consider that it is inherent in the right to enter into conference service contracts that the parties be permitted to provide for the legal consequences of any breach of obligations under such contracts. They stress that liquidated damages clauses are a pre-estimate of the loss suffered by the carrier in the case of non-performance by the shipper of its minimum quantity commitment under the service contract. The reasonableness of such clauses is borne out by the 10th recital to Regulation No 4056/86, which provides that conference members may agree to 'impose penalties on users who seek by improper means to evade the obligations of loyalty required in exchange for the rebates, reduced freight rates or commission granted to them by the conference'. The applicants further claim that liquidated damages clauses are lawful under US law. In particular, FMC Circular 1-89 states that damages should be meaningful so as to prevent the use of service contracts to avoid the tariff. Lastly, the applicants observe that if a contract does not provide for liquidated damages, a carrier has no option in the event of a breach by the shipper but to re-rate the cargo moving under the contract at the conference tariff, which would represent a higher amount than the liquidated damages provided for in the TACA.

1097 Second, the applicants submit that the prohibition of individual service contracts is an objectively justifiable conference practice.

1098 In the first place, the requirement under Regulation No 4056/86 that a liner conference operate under uniform or common freight rates (Article 1(3)(b)), and to fix rates and conditions of carriage (Article 3), entitles (but does not require) the members of the liner conference to prohibit individual service contracts. The applicants consider that the prohibition of individual service contracts is a traditional conference mechanism to preserve the integrity and uniformity of the tariff. Thus, since 1 January 1999, when confidential individual service contracts were introduced by the TACA parties, rates on the transatlantic trade fell sharply (by 21% eastbound and by 14% westbound compared with the year before). The Commission does not explain how an unfettered right to enter into individual service contracts would be compatible with the requirement to operate uniform or common freight rates.

1099 Secondly, the applicants note that conferences operating on the transatlantic trade have traditionally prohibited their members from entering into individual service contracts. Thus, paragraph 126 of the contested decision acknowledged that those conferences 'never openly permitted individual service contracts until their introduction by the TACA parties in 1996'. Restrictions on entering into individual service contracts remain the rule rather than the exception on other trades.

1100 Thirdly, the applicants consider that the prohibition of individual service contracts is consistent with US law. Section 4(a)(7) of the US Shipping Act permits the prohibition of the use of service contracts by conference members. That situation was not altered by the settlement agreement of 1995, in which the FMC did not provide that as a matter of US law conferences must permit individual service contracts; rather it required the TACA parties to permit individual service contracts in 1996. It did not, on the other hand, require that such contracts be permitted in 1997 and subsequent years, so that the applicants would have been entitled in accordance with the terms of the settlement agreement to prohibit individual service contracts.

1101 Third, as regards the application of the conference rules on service contracts to individual service contracts, the applicants allege that when they authorised individual service contracts in 1996 they were permitted under the terms of the US Shipping Act (section 4(a)(7)) to regulate or prohibit their use. The application of the TACA rules on individual service contracts was therefore lawful under US law. Furthermore, the application of the TACA service contract rules to individual service contracts was a requirement of the settlement agreement with the FMC in 1995. The FMC's order required that the TACA permit individual service contracts for 1996 and provided that such contracts must be made subject to the TACA rules (namely, Article 14.2 of the TACA).

1102 Fourth, as regards the confidentiality of individual service contracts, the applicants claim that the disclosure of the essential terms of individual service contracts (including those agreed jointly) is obligatory under US law (section 8(c) of the US Shipping Act). Although the essential terms listed in the US legislation do not include the name of the shipper, any well-informed operator in the maritime carrier trade would be able to deduce the shipper's identity from the published terms (that is, from the distances moved, the commodity involved, the minimum volume, the line-haul rate, the duration, service commitments and the liquidated damages for non-performance). In those circumstances, the applicants consider that the mutual disclosure of information on individual service contracts may be reasonable given the conditions of transparency arising from the US Shipping Act.

1103 The applicant in Case T-213/98 submits that a dominant undertaking does not, in the absence of some additional factor, commit an abuse by adopting commercial practices that could be adopted by non-dominant undertakings (*Hoffmann-La Roche*, cited at paragraph 765) unless those practices have the effect of reinforcing its dominance or reducing the level of competition on the market. The practices in question in relation to service contracts are also adopted by

independent lines, and further, the Commission has not shown that those practices reinforced the alleged dominance of the TACA parties. Moreover, as regards the prohibition on individual service contracts, the applicant points to its initiatives on tariffs during the relevant period, in the form of independent action, TVRs and Canadian Gateway services.

1104 The Commission, supported by the ECTU, considers that those pleas and arguments are unfounded.

(b) Findings of the Court

1105 In order to assess the present pleas and arguments, by which the applicants submit that the practices constituting the first abuse are objectively justified, it should be recalled that, under Article 6 of the operative part of the contested decision, the Commission found that the TACA parties abused their collective dominant position by entering into an agreement placing restrictions on the availability and content of service contracts.

1106 It is apparent from paragraphs 551 to 558 of the contested decision, as the Commission confirmed at the hearing in reply to questions from the Court, that the first abuse is made up of the following practices:

— the outright prohibition of individual service contracts in 1994 and 1995 (paragraphs 554 and 557) and, where they were authorised with effect from

1996, the application of certain terms and conditions collectively agreed by the TACA (paragraphs 554 to 556) and the mutual disclosure of their terms (paragraph 552);

— the application in conference service contracts of certain terms collectively agreed by the TACA (paragraphs 554 to 556).

1107 It is apparent from paragraph 556 of the contested decision that the terms in question collectively agreed by the TACA are those concerning the prohibition of contingency clauses, the duration of service contracts, the ban on multiple contracts and the amount of liquidated damages. Those terms are laid down by Article 14(2) of the TACA.

1108 The applicants claim that each of those practices is objectively justified in the light of Article 86 of the Treaty. They put forward essentially three types of justification concerning, respectively, the need for those practices in order to meet certain objectives, their conformity with standard practice in the maritime transport sector and their conformity with US law.

1109 Before considering those grounds for justification, it must be noted at the outset that there is no exception to the principle in Community competition law prohibiting abuse of a dominant position. Unlike Article 85 of the Treaty, Article 86 of the Treaty does not allow undertakings in a dominant position to seek to obtain exemption for their abusive practices (Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 32, and *CEWAL I*, cited at paragraph 568 above, paragraph 152). Furthermore,

according to the case-law, dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market (*Michelin*, cited at paragraph 337 above, paragraph 57, and *Irish Sugar*, cited at paragraph 152 above, paragraph 112). Consequently, there can be no exceptions to the prohibition of abuse by dominant undertakings.

1110 It is in the light of those principles that the grounds for justification put forward by the applicants in the present actions must be assessed.

(1) Justifications on the basis of the necessity of certain of the practices in question

1111 The applicants submit that the prohibition of individual service contracts, restrictions as to duration and the prohibition of contingency clauses are necessary to maintain the stability of uniform or common freight rates qualifying for block exemption under Article 3 of Regulation No 4056/86. They also submit that the restrictions as to duration are necessary to ensure equality between shippers and to improve administrative efficiency. Finally, the applicants consider that the prohibition on multiple contracts and the liquidated damages clause are necessary, essentially, to preserve the integrity of conference service contracts.

1112 However, because Article 86 of the Treaty does not provide for any exemption, abusive practices are prohibited regardless of the advantages which may accrue to the perpetrators of such practices or to third parties.

1113 It is true that, according to the case-law, the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its interests, provided however that the purpose of such behaviour is not to strengthen this dominant position and abuse it (see, for example, *United Brands*, cited at paragraph 853 above, paragraph 189; *CEWAL I*, cited at paragraph 568 above, paragraphs 107 and 146; and *Irish Sugar*, cited at paragraph 152 above, paragraph 112). It follows therefore that a dominant undertaking may seek to rely on grounds to justify the practices it adopts.

1114 However, the justifications permitted by the case-law in respect of Article 86 of the Treaty cannot result in creating exemptions from the application of that provision. The sole purpose of those grounds of justification is to enable a dominant undertaking to show not that the practices in question should be permitted because they confer certain advantages, but only that the purpose of those practices is reasonably to protect its commercial interests in the face of action taken by certain third parties and that they do not therefore in fact constitute an abuse.

1115 In the present case the justifications put forward by the applicants seek to demonstrate not that the practices in question concerning service contracts do not constitute an abuse, but only that those practices are necessary in order to achieve certain benefits, namely preserving the stability of uniform or common freight rates and the integrity of conference service contracts, maintaining equality between shippers and improving administrative efficiency. According to the applicants, the need for the conference practices in question relates not to the action of third parties threatening the TACA's commercial interests, but to the risk that the TACA's own members may, by their conduct, infringe the rules adopted by the conference, such as the collective price-fixing agreement setting a uniform or common freight rate and conference service contracts, or the efficient functioning thereof.

1116 It follows that, by the present justifications, the applicants thus seek in fact to obtain an exemption for the abuse in question on the ground that those practices are necessary to achieve certain advantages resulting from the conference system.

1117 Although that is sufficient reason to reject all of the justifications alleging that the rules in question are necessary, it must also be stated that even if such justifications could be upheld under Article 86 of the Treaty, the applicants fail to show why the practices in question are necessary to bring about the alleged advantages.

1118 Thus, with regard to the alleged need to maintain the stability of the uniform or common freight rates, the mere fact that the collective agreement of those rates qualifies for block exemption under Article 3 of Regulation No 4056/86 cannot by itself justify the practices in question with regard to Article 86 of the Treaty. First, Article 8(2) of Regulation No 4056/86 expressly provides that Article 86 of the Treaty applies to the conduct of maritime conferences qualifying for block exemption laid down by Article 3 of that regulation (*CEWAL I*, cited at paragraph 568 above, paragraph 64). Second, having regard to the wholly exceptional nature of the block exemption provided for by Article 3 of that regulation, it cannot be applied beyond its sphere of application (see, to that effect, *FEFC*, cited at paragraph 196 above, paragraph 254).

1119 A fortiori, with regard to the alleged necessity not to infringe conference service contracts, the applicants cannot rely on that objective to justify the restrictive practices in question under Article 86 of the Treaty when conference service contracts are not, for the reasons set out below at paragraphs 1381 to 1385, covered by the block exemption provided for in Article 3 of Regulation No 4056/86. It should also be noted, as regards the liquidated damages clause, that whilst, as the applicants rightly point out, the 10th recital in the preamble to Regulation No 4056/86 states that conference members may agree to 'impose penalties on [shippers] who seek by improper means to evade the obligations of loyalty required in exchange for the rebates, reduced freight rates or commission

granted to them by the conference', nothing in the regulation lays down the amount of those penalties that the conference may impose. It is apparent from paragraph 556 of the contested decision that only the penalty as set by the TACA parties, namely USD 250 per TEU, is regarded as abusive in that decision.

1120 As for the alleged need to ensure equality between shippers and to improve administrative efficiency, it suffices to note that in the light of their special responsibility not to allow their conduct to impair competition, the onus is on the dominant undertakings to behave in a way which is proportionate to the objectives they seek to achieve. Clearly, no ground based on the TACA's internal administrative organisation can justify an infringement of Article 86 of the Treaty. Similarly, in relation to the alleged need to ensure equality between shippers, the applicants cannot rely on their desire to avoid infringing Article 86(c) of the Treaty, which prohibits dominant undertakings from imposing discriminatory terms on their commercial partners, in order to justify another infringement of Article 86 of the Treaty.

1121 Finally, and in any event, the applicants cannot rely on the fact that certain TACA parties might fail to fulfil the obligations arising from the agreement fixing uniform or common freight rates or conference service contracts to justify under Article 86 of the Treaty practices intended to prevent such failures. The simple fact that compliance with the agreement fixing rates and conference service contracts deprives the practices on service contracts in question of all practical effect suffices to show that those practices are not necessary (see, to that effect, *FEFC*, cited at paragraph 196 above, paragraph 389).

1122 The justifications based on the alleged advantages produced by the practices on service contracts in question must therefore be rejected.

(2) Justifications based on the conformity of certain practices in question with standard practice in the maritime transport sector

1123 The applicants submit that the prohibition of individual service contracts and the restrictions on duration conform to standard practice in the sector.

1124 However, conduct cannot cease to be abusive merely because it is the standard practice in a particular sector; to hold otherwise would deprive Article 86 of the Treaty of any effect. Dominant undertakings within the meaning of Article 86 of the Treaty have a special responsibility not to allow their conduct to impair genuine undistorted competition on the relevant market (*Michelin*, cited at paragraph 337 above, paragraph 57). Contrary to the submission of the applicant in Case T-213/98, that responsibility is not limited solely to conduct likely to reinforce the dominance of the undertaking concerned or reduce the level of competition on the market, since Article 86 of the Treaty concerns not only practices which hinder effective competition but also those which, as in this case, may cause damage to consumers directly (*Europemballage and Continental Can*, cited at paragraph 779 above, paragraph 26).

1125 Even if the practices on service contracts in question represent the standard practice of maritime carriers, therefore, Article 86 of the Treaty prevented the TACA parties, given their special responsibility as a collective dominant unit on the transatlantic trade, from adopting such practices, notwithstanding the fact that they were adopted by most, if not all, of their competitors.

1126 That conclusion cannot be undermined by the fact that under Article 86(d) of the Treaty making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations is only prohibited where those obligations

'by their nature or according to commercial usage' have no connection with the subject of those contracts. The need to take account of commercial usage in that context comes from the analysis of tied sales, since the finding that such sales exist necessarily requires that the circumstances be determined in which commercial sales are not tied. For the reasons set out above however, reference to commercial usage in that context cannot be extended to other abuses in order to justify them, particularly where their purpose is precisely to strengthen a dominant position and abuse it (*United Brands*, cited at paragraph 853 above, paragraph 189).

1127 Consequently, the justifications based on commercial usage must be rejected.

(3) Justifications based on the conformity of some of the practices in question with US law

1128 The applicants submit that the liquidated damages clause, the prohibition of contingency clauses, the prohibition of individual service contracts, the application of collectively agreed terms by the conference to individual service contracts and the mutual disclosure of the terms of service contracts are practices which comply with US law.

1129 It must be noted at the outset that the TACA, as a liner conference operating on the transatlantic trade, is governed both by Community competition law under Articles 85 and 86 of the Treaty and by US law, in particular the US Shipping Act. It follows that the TACA parties must ensure that their conduct on the market in question complies not only with Community competition law but also with US law.

1130 According to the case-law, Articles 85 and 86 of the Treaty apply only to anti-competitive conduct in which undertakings engage on their own initiative. If anti-competitive conduct is required of undertakings by national law or if the latter creates a legal framework eliminating any possibility of competitive conduct on their part, Articles 85 and 86 of the Treaty do not apply. In such a situation, the restriction of competition is not attributable, as is implied by those provisions, to the autonomous conduct of the undertakings. Articles 85 and 86 of the Treaty may apply, by contrast, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 33; Case C-198/01 *Consorzia Industrie Fiammiferi* [2003] ECR I-8055, paragraphs 52 to 55, and Case C-207/01 *Altair Chimica* [2003] ECR I-8875, paragraphs 30, 35 and 36; Case T-111/96 *ITT Promédia* v *Commission* [1998] ECR II-2937, paragraph 96; *Irish Sugar*, cited at paragraph 152 above, paragraph 130; Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* v *Commission* [2000] ECR II-1807, paragraphs 58 and 59; and Case T-154/98 *Asia Motor France and Others* v *Commission* [2000] ECR II-3453, paragraphs 78 to 91). Consequently, if a national law merely allows, encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to the Treaty competition rules (see inter alia Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström* v *Commission* [1988] ECR 5193, paragraph 20, and *Consorzia Industrie Fiammiferi*, cited above, paragraph 56).

1131 In this case, in so far as the applicants point out that certain of the practices mentioned are permitted or even made easier by US law, it is therefore to be observed that that circumstance alone has no bearing on the application of Article 86 of the Treaty to those practices, since in such a case it remains possible for the TACA parties to adapt their conduct to comply with both Community competition law and US law.

1132 Thus, with regard to the liquidated damages clause, the fact that such clauses are permissible in US law cannot serve to justify them for the purposes of Article 86

of the Treaty, especially as it is apparent from paragraph 556 of the contested decision that only the amount of the liquidated damages as fixed by the TACA parties, rather than the inclusion of such a clause itself, is regarded as an abuse in that decision.

1133 Similarly, with regard to the prohibition of contingency clauses, it is sufficient to observe that the applicants' complaint may be rejected in view of the fact that they merely allege that, according to US case-law, contingency clauses are likely to be anti-competitive, so that prohibiting them is permitted; they do not submit however that the prohibition is required.

1134 Finally, as regards the practices on individual service contracts, it is not in dispute between the parties that the lifting of the ban on individual service contracts in 1996 gives effect to the FMC's order of 4 April 1995 terminating the proceedings instituted in the United States against the TACA practices, in particular the excessive level of its tariff rates, after the TACA parties undertook to reduce the 1995 tariff rates to 1994 levels. That order states inter alia that:

'... the proposed settlement agreement... is approved on the condition that the TACA agreement is amended by adding a new Article 14.4 reading as follows:

...

Notwithstanding the provisions of Article 14.3 any Party, either individually or jointly with another Party or Parties, may enter into an individual Contract with any shipper or shipper's association for the transportation of cargo within the trade; provided that such Contract [must]:

(i) commence no sooner than January 1, 1996, and terminate on or before December 31, 1996...

(ii) comply with the Contract Guidelines contained in Article 14.2(a) - (h)'.

1135 The applicants submit that the FMC order does not show that the prohibition of individual service contracts in 1994 and 1995 is contrary to US law, since the order did not prevent the TACA parties from reintroducing the prohibition with effect from 1997.

1136 It is true, as the applicants submit, that it is apparent from the terms of the FMC order that it only provided for the lifting of the ban on individual service contracts in respect of 1996.

1137 That fact is however irrelevant for the purposes of the present plea. At most, it shows that US law permitted the TACA parties to prohibit individual service contracts in 1994 and 1995 or to reintroduce that prohibition from 1997. In accordance with the case-law cited above at paragraph 1130, such a fact does not show that the practice in question is lawful under Article 86 of the Treaty, since nothing prevented the TACA parties from laying down such a prohibition in 1994 and 1995 or from not proceeding to reintroduce it with effect from 1997.

1138 Furthermore, it is not in dispute that the TACA parties did not re-introduce the prohibition of individual service contracts after 1996, which is sufficient to show that that prohibition was not necessary in order to comply with US law.

1139 Consequently, the applicants cannot rely on the FMC order as objective justification for the prohibition of individual service contracts from 1996.

1140 In so far as the applicants allege that some of the practices concerned are required by US law, it may be remarked that having regard to the fact, emphasised above, that the TACA parties are subject as regards their activities on the transatlantic trade to both Community competition law and US law it is possible that conduct prohibited by Community law is required by US law, so that in order to comply with Community law the TACA parties have no other choice than to infringe US law. Article 9 of Regulation No 4056/86 expressly envisages such situations of conflict with the law of a third country, moreover. According to that provision, in such a case it is for the Commission to undertake negotiations with the third country concerned in order to reconcile as far as possible the interests involved.

1141 In this case, however, it must first be determined to what extent the practices in question are in fact the result of legal obligations imposed on the TACA.

1142 As regards the application to individual service contracts of the rules collectively agreed by the conference, the applicants are right to point out that the FMC order referred to at paragraph 1134 above stated expressly in its operative part that the TACA parties could enter into individual service contracts 'provided' that they comply with Article 14(2) of the TACA, from which it is apparent that the application of those rules to individual service contracts was not only permitted but also required by the FMC.

1143 In order to assess the scope of the FMC order in that regard, however, it is necessary to consider its nature and purpose.

1144 As regards, first, the nature of the FMC order, it must be emphasised that it is not an abstract legislative measure of general application, but a judicial decision the purpose of which is to approve a draft agreement concluded between the TACA parties and the FMC in order to bring an end to dispute proceedings commenced by the FMC.

1145 It follows that the obligations laid down by that order are not wholly attributable to circumstances external to the applicants. First, the order originates in the TACA parties' own conduct, in the present case the fact that they charged excessive prices to the detriment of the shippers, and second, its terms result, as is apparent from the documents produced by the applicants in reply to a written question from the Court on that point, from negotiations with the FMC in which the TACA parties were involved.

1146 It is true that it is apparent from the Court's file that the application of Article 14(2) of the TACA to individual service contracts was added by the FMC in the final stage of the proceedings as a condition for approval of the draft settlement agreement submitted to it. The Commission was therefore wrong to submit at the hearing that the application of the rules collectively agreed by the TACA to individual service contracts was negotiated between the TACA parties and the FMC.

1147 However, it remains apparent from the grounds of the order that whilst that condition of approval was not negotiated between the TACA parties and the FMC it was not unilaterally imposed by the latter. The FMC expressly made that condition subject to acceptance by the TACA parties, which occurred on 9 March

1995 by the notification to the FMC of an amended version of the TACA. Although the refusal to accept that condition within the allotted period would, according to the order, have resulted in the draft settlement agreement lapsing, the TACA parties accepted it on their own initiative, taking account of the various interests involved. It should be noted moreover that in any event the lapsing of the draft settlement agreement would not have prejudiced the outcome of the FMC's proceedings as to the legality of the TACA practices in question.

1148 Next, as regards the purpose of the FMC order, the condition of approval imposed by the FMC was essentially intended not to apply the TACA rules to individual service contracts, but to remove the TACA's ban on entering into such contracts, and thereby responded to the fear expressed by shippers following the publication of the draft settlement agreement that the TACA parties would compensate for the reduction in the 1995 tariff rates by excessive increases in the 1996 tariff rates. According to the FMC, the increased competition resulting from the introduction of individual service contracts on the trade deprived the TACA parties of any such possibility.

1149 In the light of that objective, it appears that, rather than being a considered objective, the application of the TACA rules to individual service contracts was inserted by the FMC in order to enable the TACA's customers to enter into individual service contracts on the same basis as conference service contracts. Moreover, none of the grounds of the order indicates that the FMC considered that the application of the rules collectively agreed by the TACA on individual service contracts was indispensable for achieving the objective sought and, therefore, that failure by the TACA parties to apply such rules necessarily would have constituted an infringement of that order. As the intervener rightly observed at the hearing, Decision 2003/68, in particular paragraphs 24(2) and 64, makes it clear that the revised TACA in no way now restricts the freedom of the TACA parties to enter into individual service contracts with shippers on terms freely agreed by the parties to such contracts.

1150 For all of those reasons, the Court finds that the FMC order in no way required the applicants to apply the TACA rules to individual service contracts from 1996. Consequently, the applicants' complaint in that respect being based on a false premiss, it must be rejected.

1151 As regards the mutual disclosure of the terms of service contracts, it is apparent from paragraph 498, to which paragraph 551 refers, and paragraph 552 of the contested decision that the abuse of which the Commission complains concerns the fact that the TACA parties disclosed the existence of individual service contracts and the content of those contracts to shipping companies that were not party thereto.

1152 However, it is not in dispute between the parties that the US Shipping Act requires the TACA parties to notify their individual service contracts to the FMC, which must also be given a summary of the 'essential terms' of those contracts, that is, according to the legislation in force at the time of the relevant facts, the clauses on the origin and destination port ranges or geographic areas, the commodity or commodities involved, the minimum volume, the line-haul rate, the duration, the service commitments and the liquidated damages for non-performance, if any. The summary is then published by the FMC. The Commission does not deny that the summary includes all the relevant information contained in the 'essential terms', so that, since it is published, it is available to the public, including not only the shippers but also all TACA parties. As the Commission pointed out at paragraph 112 of the contested decision, the TACA parties are required by US law to offer the same terms to all shippers in the same situation.

1153 In those circumstances, therefore, the Court finds that, contrary to what the applicants have maintained, the practice in question is not required by US law. The US legislation does not require the TACA parties to mutually disclose the availability and content of their individual service contracts; it merely requires

them to notify such contracts to the FMC, which then publishes a summary of their 'essential terms'.

1154 Nevertheless, it should be noted that the result of the publication in the United States of such a summary is that the content of the 'essential terms' of individual service contracts is in the public domain. That being so, the Commission was wrong to take the TACA parties to task, in paragraph 552 of the contested decision, for having agreed to 'disclose' such information to each other. Since the content of the 'essential terms' is published, communication between the TACA parties of the availability and content of their individual service contracts constitutes an exchange of public information. It has been held that such a system for exchanging information cannot infringe the Treaty competition rules (see inter alia Case T-35/92 *John Deere* v *Commission* [1994] ECR II-957, paragraph 81, upheld on appeal in Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraphs 89 and 90).

1155 In response to the written questions from the Court on that point the Commission argued, however, that the TACA parties mutually disclosed additional information over and above that to be published under the US Shipping Act. Pressed on that point at the hearing, however, the Commission admitted that the only clause of individual service contracts which does not need to be published as an essential term under US law is that concerning the identity of the shipper or shippers concerned.

1156 However, as the applicants rightly pointed out in their written pleadings, the identity of the shipper or shippers concerned may easily be inferred by the TACA parties from the essential terms published in accordance with US law. Since the TACA parties have access, in respect of each individual service contract concluded by one of them, to information such as the port ranges or geographic areas, the commodities involved and the service commitments, it may reasonably be considered that, given the numerous links between them within the shipping conference, they are able to determine the identity of the shipper or shippers

bound by the service contracts in question. The Commission moreover did not challenge that fact, going only so far as to claim that the identity of the shipper or shippers concerned was disclosed by the TACA parties prior to the publication of the essential terms. That claim, put forward for the first time at the hearing, is unsupported by any evidence in the file, and so cannot be held to have been made out.

1157 It follows therefore that during the period covered by the contested decision each of the TACA parties was in a position, owing to the publication provided for under US law of the essential terms of individual service contracts, to know of the existence of the individual service contracts entered into by one of their members and all the relevant terms of those contracts.

1158 In those circumstances, the contested decision wrongly found that the applicants agreed on the mutual disclosure of the availability and content of individual service contracts.

1159 Consequently, the applicants' complaints on that point must be upheld.

2. The statement of reasons in the contested decision with regard to the first abuse

(a) Arguments of the parties

1160 The applicants make four criticisms of the reasoning in the contested decision concerning conference service contracts.

1161 The first is that the contested decision does not explain why the members of a conference should not be permitted to determine the terms on which they exercise the power to enter into conference service contracts ('conference service contract authority'), when the exercise of that power is itself compatible with Community law.

1162 The applicants point out that whilst the Commission finds that conference service contract authority does not fall within the scope of Regulation No 4056/86 it does not rule out the possibility of individual exemption for such authority. The applicants refer here to paragraph 582 of the contested decision, which states that 'this Decision does not require shippers to renegotiate their joint service contracts, nor does it impose any deadline within which any re-negotiation should take place'. Since the members of a conference may together agree to enter into conference service contracts, they must also be permitted to determine the terms on which they may enter into such contracts. If this is not the Commission's position it should explain why the applicants' agreement on those terms constitutes an abuse of a dominant position.

1163 In their reply the applicants note the Commission's assertion in the defence that the first finding of abuse in the contested decision relates not to the agreement on the terms on which conference service contract authority was exercised but to the restrictions on entering into individual service contracts (or joint individual service contracts) either at all or except on terms collectively agreed.

1164 The second criticism is that there is no reasoning in the contested decision to support the statement that the terms imposed by Article 14.2 of the TACA, to which paragraph 556 of the contested decision refers (namely, contingency clauses, the duration of service contracts, the prohibition of multiple contracts

and the amount of liquidated damages), are unfair within the meaning of Article 86(a) of the Treaty. The Commission does not explain why an agreement as to the terms of conference service contracts is an abuse of a dominant position. Furthermore, there is no analysis of those terms and there is no consideration of the commercial or economic context in which the terms have been agreed. In any case, the Commission does not explain the relevance of the appraisal made under Article 85(3) of the Treaty, referred to in paragraph 551 of the contested decision.

1165 The third criticism concerns the fact that the contested decision does not explain why the terms on which the applicants supplied services were unreasonable. It has been held that a refusal to deal is only abusive if it is not objectively justified. The contested decision contains no such analysis but merely states at paragraphs 553 and 554 that, as a result of the rules contained in Article 14 of the TACA, service contracts were not available other than in accordance with those rules.

1166 The applicants' fourth criticism is that, contrary to what was indicated in the judgment in *Flat glass*, cited at paragraph 594 above, paragraph 360, the Commission has recycled findings made under Article 85 of the Treaty for the purposes of a finding of abuse under Article 86 of the Treaty. As the contested decision acknowledges at paragraph 551, the first abuse found consists in the same conduct alleged to constitute the infringement of Article 85 of the Treaty which is 'more fully described at paragraphs 487 to 502'. It is apparent from this reference that, from the Commission's point of view, because the service contract terms do not have sufficient positive benefits, in terms of improving the production or distribution of services or promoting technical or economic progress, to satisfy the conditions for individual exemption set out at paragraphs 487 to 502, those terms are also abusive and unreasonable within the meaning of Article 86 of the Treaty.

1167 The applicants argue, in the reply, that that reasoning constitutes an error of law. They submit that an assessment of a practice with respect to the conditions for the grant of individual exemption under Article 85(3) of the Treaty cannot, without more, constitute reasoning sufficient to justify the conclusion that that practice is also an abuse within the meaning of Article 86 of the Treaty. Given that the legal tests for the application of Articles 85 and 86 of the Treaty are different and serve different economic goals, a mere reference to the reasoning used in relation to Article 85 of the Treaty cannot constitute sufficient reasoning for a finding of abuse under Article 86 of the Treaty. The contested decision does not, any more than the defence, contain any reasoned explanation as to why those restrictions on competition amount to an abuse within the meaning of Article 86(a) and (b) of the Treaty.

1168 The applicants consider that the Advocate General's Opinion in *CEWAL II*, cited at paragraph 595 above, is irrelevant here. At points 28 and 35 of the Opinion, the Advocate General addressed not the issue of reliance on the reasoning used in relation to Article 85(3) of the Treaty in finding an abuse under Article 86, but the separate issue of whether, in order to establish the economic links necessary for the purpose of a collective assessment, the Commission may rely on facts capable of amounting to an agreement or a concerted practice under Article 85 of the Treaty.

1169 The Commission, supported by the ECTU, considers that the contested decision contains a sufficient statement of reasons on all of those points and therefore contends that the Court should reject the applicants' pleas and arguments on this point.

(b) Findings of the Court

1170 By the present pleas and complaints the applicants submit that the contested decision does not explain why the conditions for the exercise of conference

service contract authority are contrary to Article 86 of the Treaty. Furthermore, they allege essentially that the Commission does not explain to the required legal standard why the practices constituting the first abuse are an abuse within the meaning of Article 86 of the Treaty and are not objectively justified.

1171 As regards first the complaint alleging failure to explain why the conditions for the exercise of conference service contract authority constitute an abuse, it has already been stated above at paragraphs 1106 and 1107 that, in respect of conference service contracts, the first abuse according to the contested decision consisted in the fact that the TACA parties applied to those service contracts certain terms laid down by Article 14(2) of the TACA, namely, according to paragraph 556 of the contested decision, those concerning the prohibition of contingency clauses, the duration of service contracts, the ban on multiple contracts and the amount of liquidated damages.

1172 It follows that, contrary to the applicants' submission, the contested decision does not state that the mere fact of collectively agreeing the conditions for the exercise of conference service contract authority is in itself an abuse, but only that the application of some of those conditions laid down by the TACA is abusive.

1173 The applicants' complaint in that regard is thus without purpose.

1174 Second, with regard to the complaint alleging failure to state reasons as to why the practices constituting the first abuse are an abuse, the applicants complain that in the contested decision the Commission did not explain why those practices fall within Article 86 of the Treaty, but 'recycled' the reasoning adopted to exclude those practices from Article 85(3) of the Treaty.

1175 As a preliminary point it should be noted that, as is apparent from the express terms of their application, the applicants are merely relying on infringement of Article 190 of the Treaty, in the sense that the contested decision is vitiated by a failure to state any or adequate reasons. Contrary to the applicants' suggestion at the hearing in reply to a question from the Court, it cannot therefore be accepted that by the present complaint the applicants also seek to criticise the Commission for having erred in its reasoning in that regard. Such a plea, which goes to the substantive legality of the contested decision and as such is concerned with infringement of a rule of law relating to the application of the Treaty, should not be confused with the separate plea alleging absence of reasons or inadequacy of the reasons stated, which concerns the infringement of essential procedural requirements (*Commission* v *Sytraval and Brink's France*, cited at paragraph 746 above, paragraph 67). Therefore, if a plea alleging an error of reasoning is to be inferred from the terms of the reply, it must be declared inadmissible, as a new plea, under Article 48(2) of the Rules of Procedure.

1176 In the present case, in order to assess the merits of the applicants' complaint it is therefore only necessary to consider whether the contested decision contains an adequate statement of reasons as to why the practices constituting the first abuse are an abuse.

1177 According to Article 6 of the operative part of the contested decision, the first abuse consisted in the fact that the TACA parties entered into an agreement placing restrictions on the availability of service contracts and their content. As was stated above at paragraphs 1106 and 1107, it is apparent from paragraphs 551 to 558 of the contested decision that the first abuse consists in the outright prohibition of individual service contracts in 1994 and 1995 and, when they were authorised with effect from 1996, in the application therein of certain terms and conditions collectively agreed by the TACA and the mutual disclosure of their terms, and in the application of certain terms collectively agreed by the TACA to conference service contracts.

1178 Contrary to the applicants' submission, the contested decision does not recycle the grounds set out at paragraphs 487 to 502 justifying the refusal to grant individual exemption under Article 85(3) of the Treaty to those practices as the reasoning for finding that those practices are an abuse. Under paragraph 551 of the contested decision, on which the applicants base their 'recycling' allegation, the Commission merely states:

'The importance to shippers of service contracts is examined in some detail in recitals (122) to (126) and recitals (472) to (476). The TACA parties have an agreement between themselves to impose a number of restrictions on the contents of the service contracts and, in the past, have agreed that they will not enter into individual service contracts. One of the purposes of imposing these restrictions has been to prevent price competition (see recital (479)). These restrictions are more fully described in recitals (487) to (502).'

1179 It is thus apparent from the express wording of the last sentence of that paragraph that the reference to paragraphs 487 to 502 concerns not the grounds justifying the refusal to grant individual exemption but the full description given therein of the restrictions on the content of service contracts imposed by the TACA rules. The applicants' allegations of 'recycling' are therefore unfounded on that ground alone.

1180 However, it is still necessary to consider whether the contested decision contains an adequate statement of reasons as to why the practices in question constitute an abuse.

1181 In paragraph 553 of the contested decision, the Commission states that an agreement to place restrictions on the availability and content of service contracts amounts to a refusal to supply services other than in accordance with unfair terms and a restriction on the supply of transport products so that such an agreement

falls within Article 86(a) and (b) of the Treaty. Next, in paragraph 554 of the contested decision, the Commission states with regard to the prohibition of individual service contracts that the effect of the prohibition was that the TACA parties refused in 1995 to supply 'services adapted to the needs of individual customers, in accordance with the individual capabilities of individual carriers', since this refusal deprives the shippers 'of any additional services which individual TACA parties may have been in a position to offer'. As regards the application to individual service contracts (from 1996) and conference service contracts of certain conditions collectively agreed by the TACA parties, the Commission states in the same paragraph that 'the TACA parties have refused to supply shippers with maritime and inland transport services pursuant to a service contract except on the basis of certain terms which have been chosen by the TACA parties collectively'. A similar point appears in paragraph 555 of the contested decision.

1182 It is thus apparent from the terms of the contested decision that the Commission considered, in that decision, that the practices constituting the first abuse are an abuse within the meaning of Article 86 of the Treaty because they are unfair and restrict the supply of transport products to the extent that the purpose of those practices was, for the reasons set out at paragraphs 554 and 555 of the contested decision, to restrict the availability and content of service contracts.

1183 Such a statement of reasons, which mentions the type of abuse prohibited by Article 86 of the Treaty, which includes the practices in question, and gives specific reasons as to why those practices constitute such an abuse clearly provides the applicants with an adequate indication as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged, and enables the Community judicature to review the legality of the contested decision (*Van Megen Sports*, cited at paragraph 548 above, paragraph 51).

1184 Consequently, the contested decision is supported by an adequate statement of reasons on that point.

1185 The present plea must therefore be rejected.

1186 Finally, as regards the statement of reasons as to whether the practices constituting the first abuse are objectively justifiable, it has been held that where the Commission finds that an undertaking has abused its dominant position it is for the undertaking in question to justify by reference to objective factors, if it may, the abuses alleged against it (Case 395/87 *Tournier* [1989] ECR 2521, paragraph 38).

1187 In their response to the statement of objections the applicants did not put forward any evidence to justify the abuse alleged against them by the Commission in the statement of objections in relation to service contracts.

1188 Clearly the Commission cannot be criticised in terms of its obligation to state reasons for not having adopted a position in the contested decision based on evidence which was not submitted to it before that decision was adopted, but which is put forward for the first time during the present proceedings (*FEFC*, cited at paragraph 196 above, paragraphs 426 and 427).

1189 Consequently, the applicants' complaint on that point must be rejected.

3. Conclusion on the first abuse

1190 It follows from all those considerations that the applicants' pleas and complaints in relation to the first abuse must be upheld only in so far as they concern the mutual disclosure by the TACA parties of the availability and content of service contracts. The remainder of the present pleas and complaints must be rejected.

1191 As a result, Article 6 of the operative part of the contested decision in so far as it applies to the mutual disclosure by the TACA parties of the availability and content of service contracts and, consequently, Article 7 thereof in so far as it requires the applicants to put an end forthwith to, and to refrain in the future from, any action having the same object or effect should be annulled.

B — The second abuse: the abusive alteration of the competitive structure of the market

1192 The applicants put forward four types of pleas and complaints against the findings of the contested decision in relation to the second abuse. The first concerns the evidence of the practices constituting the second abuse. The second concerns the appreciable effect of those practices. The third concerns their duration. The fourth and final type concerns the question whether Hanjin and Hyundai may be held responsible for those practices.

1. The evidence for the practices constituting the second abuse

(a) Arguments of the parties

(1) Preliminary observations

1193 As a preliminary point, the applicants note that the second abuse identified in the contested decision is based entirely on the finding that the conference actively induced two lines, Hanjin and Hyundai, to join the TACA.

1194 The applicants claim, however, that the Commission advances a new argument in the defence to the effect that in addition to the events surrounding the admission to the TACA of Hanjin and Hyundai (which are only illustrations), the applicants adopted a 'policy' to neutralise competition and expressed a willingness to provide inducements in order to alter the structure of the market.

1195 The applicants submit that Article 86 of the Treaty does not apply in such circumstances and that *Europemballage and Continental Can* (cited at paragraph 779 above), on which the Commission relies at paragraphs 559 and 560 of the contested decision, is not authority for the application of Article 86 of the Treaty to the policy or willingness of the TACA members. In the absence of evidence of improper coercion of the new member to join the conference, it should be concluded that the new member joined the conference on the basis of its assessment of its commercial interests. In contrast to a merger situation (as in the judgment just cited), the parties to a liner conference remain free to compete

on price and other matters and to leave the conference upon expiry of the agreed notice period. If the structure of competition is seriously impeded by the admission of new members to the conference, the Commission is empowered to withdraw the benefit of the block exemption pursuant to Article 7 and/or Article 8 of Regulation No 4056/86.

1196 The Commission does not explain how the 'policy' to neutralise competition or the supposed 'willingness' to offer inducements to the carriers to enter the transatlantic trade as parties to the TACA had any adverse consequences on the market. As the Court of Justice has made clear, abuse is an objective concept which envisages practices which may cause damage to consumers or to the competitive structure of the market (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 91, *Europemballage and Continental Can*, cited at paragraph 779 above, paragraph 26, and *BPB Industries and British Gypsum*, cited at paragraph 346 above, paragraph 70). In any event the applicants consider that the Commission has not demonstrated that the TACA policy to neutralise competition had any effect on the structure of competition.

1197 The applicant in Case T-213/98 observes that admission to and departure from liner conference membership is not at all exceptional. The Commission's analysis in the present case could have the effect of 'freezing' the existing membership, contrary to the objectives of Regulation No 4056/86. Furthermore, open conferences governed by US law are obliged to admit new members whilst closed conferences must also admit new members provided they fulfil certain objective criteria, pursuant to Article 1(1) of the Unctad Code.

1198 The applicant in Case T-213/98 essentially criticises the Commission for failing to identify clearly in the contested decision the conduct alleged to have constituted

the abuse. It claims that Article 5 of the contested decision may be read as suggesting that the abuse complained of consists either in the admission of Hanjin and Hyundai as TACA members or in the measures taken by the applicants to induce those two lines to join the TACA, or in both.

1199 The first case is unsound in principle: conferences cannot be legally required to admit any new applicant and be found to have committed an abuse in doing so. In order to fulfil their function of providing stability pursuant to Regulation No 4056/86, the conferences must hold a sufficient level of market share. On the facts, the admission of lines such as Hanjin and Hyundai could not have appreciably affected competition since their combined market share barely exceeds 1%. Furthermore, the Commission cannot infer from the fact that the admission of those two lines eliminated 'this source of competition' (paragraph 566) that the TACA intended to eliminate price competition. The applicant points out that independent lines entered the market subsequently.

1200 The second case logically implies that the admission of Hyundai and Hanjin to the TACA does not in itself constitute a prerequisite for the finding of abuse. The Commission has not explained how the alleged inducements in the second case altered the structure of the market. Indeed the Commission attaches no significance to the form which the inducement took. In any event, if the inducements given by the liner conferences to encourage admissions amount to an abuse, the applicant wonders how the conferences could increase their membership whilst also providing the benefits foreseen in Regulation No 4056/86 for their members and for the trade in general.

1201 The applicant in Case T-213/98 states that its observations in relation to the first and second cases apply equally to the third case.

1202 In the reply the applicant in Case T-213/98 adopts the arguments of the other applicants concerning the Commission's new case as to the nature of the second abuse. It claims that the Commission provides no details of the policy or the willingness of the TACA parties to eliminate competition and does not produce a single document in support of its case. The applicant asserts that it had no such policy or willingness and points out that its admission to the TACA occurred shortly before that of Hanjin. In any event, the Commission's new case must be rejected for the simple reason that it is not the abuse identified in Article 5 of the contested decision.

1203 The Commission stresses that the second abuse which it alleges the applicants committed is extremely serious in that it seeks to eliminate potential competition by inducing potential competitors to enter the market as TACA parties. The events surrounding the admission of Hanjin and Hyundai to the conference are only illustrations of the TACA parties' policy. The contested decision gives other examples of inducements offered by the TACA to potential competitors, not confined to Hanjin and Hyundai, such as dual-rate contracts and the fact that the former structured members of the TAA refrained from competing for NVOCC service contracts (paragraph 565). Accordingly, even if the applicants succeeded in proving that the conference did not induce Hyundai and Hanjin to join the TACA, that would not be sufficient to counter the second abuse identified by the contested decision.

1204 The Commission submits that the open conferences doctrine does not prevent conference members from seeking dispensation from the FMC from the obligation to accept any new member where a carrier is not proposing to use its own vessels on the trade. Furthermore, in the light of the Unctad Liner Code, the Commission interprets Regulation No 4056/86 as permitting (without requiring) closed liner conferences. One of the grounds for refusing a new member permitted by the Code is that the new member is not introducing its own vessels. To the extent that Article 7.1 of the TACA expressly borrows from the wording of the Unctad Code in describing the conditions under which new members may be admitted, the Commission considers that it is pertinent to point out that new TACA parties such as Hyundai and Hanjin have entered the trade without introducing their own tonnage.

1205 In any event, the Commission considers that the open conferences doctrine is irrelevant in the present case as the contested decision does not find that the TACA parties committed an abuse in admitting new members. There may well be circumstances in which a conference occupies so strong a position that any addition to its numbers may constitute an abuse. That is not so in the present case, however. The contested decision finds only that the TACA parties embarked on a course of conduct specifically designed to subvert potential competition by inducing lines to join TACA which would otherwise have acted independently. That strategy echoed the two-tier tariff structure in issue in the TAA case.

1206 The ECTU submits that to prevent or delay the entry of independent competitors is one of the most serious abuses of a dominant position as it is likely to undermine the structure of competition by preventing the emergence of effective competition.

1207 The ECTU submits that the Commission's approach is in line with the case-law of the Court of Justice. The Court has already held in *Europemballage and Continental Can*, cited at paragraph 779, that conduct which leads to the strengthening of a dominant position is caught by Article 86 of the Treaty because it is capable of having an adverse effect on the structure of actual competition. The Court considers that the 'means and procedure' used for that purpose by the dominant undertaking are unimportant. In the *CEWAL* judgments, cited above, the Court of Justice also upheld those principles in applying the competition rules to the maritime transport sector (*CEWAL I*, cited at paragraph 568 above, paragraphs 106 and 107, and *CEWAL II*, cited at paragraph 595 above, paragraphs 112 to 114).

1208 The ECTU argues that it does not matter that the behaviour in question does not lead to a further increase, or leads to a decline, in market share of the dominant undertaking (*CEWAL I*, cited at paragraph 568 above, paragraph 77). Indeed, in

the absence of the TACA's abusive conduct, competition would have been more effective and the TACA's dominance would have been reduced. Similarly, the ECTU considers that it is immaterial that the shippers had requested some of the allegedly abusive practices (such as dual-rate contracts). Besides the point that that allegation has no factual basis, it is established that it is no defence that anti-competitive pricing policies were negotiated by dominant undertakings in response to customers' demands where there is evidence of intent to commit an abuse (Commission Decision 91/300/EEC of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty, IV/33.133-D, Soda-ash — ICI, OJ 1991 L 152, p. 40).

1209 The exemption laid down in Article 3 of Regulation No 4056/86 is far-reaching in that it permits collective price fixing for an indefinite period. In those circumstances it is for the Commission to examine carefully the conduct of the parties to such legalised cartels in order to establish that the conditions for such an exemption are satisfied at all times and that the parties do not abuse a position of dominance.

(2) The measures specifically addressed to Hanjin and Hyundai

1210 The applicants' first complaint is that, contrary to the findings at paragraphs 563 and 564 of the contested decision, the facts concerning the entry by Hanjin and Hyundai to the transatlantic trade and the contacts between the TACA and other operators concerning the possible entry of those operators into the trade are inconsistent with a finding of abuse in that they show that the TACA members did not induce potential competitors to enter the transatlantic trade by joining the TACA.

1211 The applicants stress that in admitting Hanjin and Hyundai to the conference the TACA members acted strictly in accordance with their obligations under US law. Under section 5(b) of the US Shipping Act the TACA is an 'open' conference which admits new members on the basis of the reasonable and equal terms set out in Article 7(1) of the TACA. In support of their assertions, the applicants attach a statement of Mr Benner, a former General Counsel to the FMC, in which he states that he is unaware of any support or precedent for the Commission's claim in the defence that the applicants could have applied to the FMC for permission not to admit an ocean carrier as a member of the conference where the applicant carrier was not proposing to use its own vessels on the trade covered by the conference.

1212 As regards, first, Hanjin's membership, the applicants dispute the findings in paragraphs 563 and 564 of the contested decision to the effect that 'before it became a party to the TACA, Hanjin requested details of "all relevant documents and statistics by TACA (including tariff, service contracts, port call, lifting and performance)"' (letter from Hanjin to the TACA dated 19 August 1994) and that 'the statement of the TACA secretariat demonstrates a collective willingness to "enable" Hanjin to build up a market share consistent with its slot capacity in the trade' (TACA secretariat briefing of 15 February 1996).

1213 The first contact between Hanjin and the TACA was on 23 August 1994, the date of that line's application for membership. It is apparent from that document that (i) Hanjin's application for membership was made following discussions with its partners in the Tricon consortium (DSR-Senator and Cho Yang Shipping) and not with the TACA members; (ii) its application for admission was made pursuant to the open conference doctrine of US law; (iii) Hanjin's request for information was motivated by the need to prepare its commercial activity; and (iv) much of the information requested was publicly available. The applicants point out that in its letter in reply dated 24 August 1994 the TACA secretariat stated that the information requested by Hanjin would not be made available to it until after it had joined the conference on 31 August 1994. It is also clear from that document

that the TACA was aware of its obligations under the open conference doctrine in US law. Following that exchange of correspondence Hanjin joined the TACA with effect from 31 August 1994. On 1 September 1994 the TACA sent it a copy of the eastbound tariff, as well as further information over the following days.

1214 On the basis of that information the applicants submit that the Commission wrongly concluded at paragraph 563 of the contested decision that the disclosure of information to Hanjin constituted a 'powerful inducement to Hanjin to enter the transatlantic trade'. It is apparent from Hanjin's letter of 23 August 1994 that it had already decided to join the conference. Indeed, it is illogical for the Commission to find that a request by Hanjin for information can have served as an inducement to it to join the TACA without considering when and in what context the conference responded to that request.

1215 Furthermore, the applicants submit that under the open conference doctrine, US law required the conference to supply Hanjin with information concerning the tariff and service contracts. The applicants attach the statement of Mr Benner in that connection in which he states that there is no lawful basis in US law for a new conference member to be precluded from participating in existing conference service contracts. It was therefore entirely legitimate for a new member to seek the kind of information Hanjin requested in its membership application.

1216 The Commission appears to concede that the conference did not provide Hanjin with the information requested by it before it became a party to the conference when it states in the defence that the letter of 24 August 1994 indicated that the information desired by Hanjin would not be provided unless and until Hanjin became a party to the TACA.

1217 The applicants point out that since the letter dated 30 January 1996 from the Chairman of TACA to Hanjin, reproduced in part at paragraph 561 of the contested decision, was written 17 months after Hanjin had joined the conference in August 1994 it could not logically have been concerned with the issue of Hanjin's entry to the transatlantic trade. The applicants claim that the letter addresses the steps proposed by Hanjin, as a TACA member already present on the transatlantic trade, which were perceived to constitute a threat to the conference's stabilising role. The letter in question is thus more concerned with Hanjin's expansion as an operator on the relevant trade.

1218 It is in that context that the secretariat briefing paper of 15 February 1996 should be understood. The applicants explain that it follows the letter of 30 January 1996 from the TACA Chairman. It was drafted by the British secretariat for a meeting which took place on 29 February 1996 between the Chairman and Managing Director of the conference and Hanjin's executives. The purpose of the paper was to respond to Hanjin's price policy by setting out the possible options for fixing its competing prices within the conference structure without undermining the stabilising role of the conference. In any event the applicants do not see how that statement of the TACA secretariat, drafted some 17 months after Hanjin joined the TACA, could have induced Hanjin to take that step.

1219 Second, as regards the admission of Hyundai, the applicants dispute the finding at paragraph 564 of the contested decision that Hyundai's ability to participate immediately in conference service contracts 'would have acted as a powerful inducement to Hyundai to enter the transatlantic trade as a party to the TACA'.

1220 The applicants maintain that the first contact from Hyundai concerning its entry to the transatlantic trade took place with an independent line, concerning a proposed vessel space-chartering arrangement in a three-way partnership also

involving another independent line. However, those negotiations broke down. Shortly before that breakdown Hyundai also contacted MSC in May 1995 with a view to entering into a chartering arrangement. It was in the course of those negotiations that, in June 1995, the question of Hyundai's membership of the conference arose (letter of 19 June 1995). The applicants claim that the first contact between Hyundai and the conference was in a telephone call in late July 1995. On 30 August 1995 Hyundai enquired about the possibility of participating in existing conference service contracts for the remainder of 1995. With effect from 11 September 1995 Hyundai became a member of the conference. It is apparent from the TACA internal communication of 29 September 1995 that Hyundai chose to be included in all 1995 conference service contracts.

1221 The applicants submit that it is apparent from those documents that (i) Hyundai's first choice was to enter the transatlantic trade through an arrangement with an independent line, not with the TACA; (ii) the discussions to that end fell through for reasons unrelated to the conference; (iii) following that breakdown, Hyundai entered into discussions with MSC, a TACA member, with a view to entering into a space-charter arrangement; (iv) once the terms of the arrangement with MSC were clear, Hyundai contacted the conference in late July 1995 with a view to joining the TACA; (v) Hyundai's arrangement with MSC was signed a month before it became a member of the conference; (vi) although the membership application was lodged in July 1995, it was not until 30 August 1995 that Hyundai first raised the question of its participation in 1995 conference service contracts and (vii) in response to that enquiry, Hyundai was informed that it was entitled to participate in those contracts.

1222 The applicants claim that there is therefore no evidence that the conference encouraged Hyundai to join the TACA or that the latter induced it to do so by permitting it to participate in conference service contracts. On the contrary, it is apparent from the foregoing that the first contacts concerning membership were initiated by Hyundai and that it was on Hyundai's instructions that the TACA included it in conference service contracts.

1223 The applicants further submit that US law requires the TACA parties to admit Hyundai to existing conference service contracts. Under the open conference doctrine, the TACA had no ground for opposing Hyundai's decision to participate in service contracts on the same terms as other conference members from the date of its membership. The applicants refer here to the statement of Mr Benner mentioned above.

1224 Thirdly, as regards the admission of other potential competitors, the applicants claim, first, that although United Arab Shipping Company ('UASC') had some contact with the TACA in June 1996 with a view to possible membership, it did not join the TACA and did not enter the transatlantic trade, and, second, APL had no contact with the TACA about membership. In 1998, NOL resigned from the conference and purchased APL. NOL now operates as a non-conference carrier under APL's name. Lastly, in February 1997 Cosco, Yangming and K Line entered the transatlantic trade not as TACA parties but as independents.

1225 Finally, the applicant in Case T-213/98 denies that it was party to, or had any knowledge of, any inducements to encourage Hanjin or Hyundai to join the TACA. The applicant only became a TACA member in 1993, shortly before Hanjin in 1994. More specifically, it rejects the allegation at paragraph 293 that it was 'allowed' by 'certain arrangements with the TACA parties' to 'enter and obtain a foothold in the market without facing the competition which would normally be expected in such circumstances'.

1226 It also alleges that the Commission's argument in the defence is flawed because it makes it practically impossible for any conference to increase its membership without committing an abuse. It is standard commercial practice in the course of

membership negotiations for the partners to offer inducements. The applicant fails to understand why the Commission now seeks to prohibit conferences from persuading non-member lines to become members even though Regulation No 4056/86 recognises the advantages of liner conferences. It stresses that in the present case, the market share of the TACA is less than that of many other conferences and it repeats that the admission of Hanjin and Hyundai resulted in only a slight increase in that market share. In reply to the allegation that the TACA ceded market share to Hanjin (paragraphs 533 and 535 of the contested decision), the applicant again points out that, even if such behaviour were proven, it could not be held to be an abuse since Regulation No 4056/86 permits freight-sharing arrangements; there is no reason why that type of inducement could not be offered to a candidate member prior to its admission, as it can be after admission. The applicant claims that such an approach would ruin the negotiation process.

1227 In reply to the ECTU's submissions, the applicants repeat that there is no evidence that the TACA attempted to persuade independent lines to join the conference. They also note that the ECTU refers to a document from 1992 as evidence of the TACA's alleged intention to eliminate independent competitors. They consider that the contested decision contains no finding to the effect that the TACA maintained its dominant position.

1228 The Commission maintains as regards, first, Hanjin's membership that it is clear that that line was able to enter the relevant market independently, since it was not a party to any conference agreements. Contrary to the applicants' submission, Hanjin's letter of 19 August 1994 makes it clear not that it had decided to join the TACA but merely that it had decided to enter the trade in question.

1229 The Commission considers that the letter from the TACA of 24 August 1994 confirms that Hanjin had not made up its mind at the time of its request for

information and that 'further discussions concerning [Hanjin's] membership can be held'. The letter also makes it clear that the information desired by Hanjin will not be provided unless and until Hanjin becomes a party to the TACA. Some of the information concerned the contents of existing service contracts, the volumes carried and the performance of the TACA parties, which is confidential and commercially sensitive information the disclosure of which would have enabled Hanjin to identify a significant part of the customer base of the TACA parties. The Commission considers that that information exceeds what was necessary for a shipping line wishing to become a conference member. It maintains that knowledge of the willingness of the TACA parties to disclose such information to Hanjin on its entry to the TACA operated as an additional inducement to Hanjin to join the conference.

1230 The Commission considers that the secretariat briefing paper of 15 February 1996 demonstrates that there was a collective willingness on the part of the TACA members to cede market share to Hanjin. That collective willingness was an inducement to Hanjin to join the TACA. The same attitude is apparent from the letter from the Chairman of the TACA on 30 January 1996. Although that letter dates from 1996 it remains relevant in that it records the situation as it then was. The Commission points out that, contrary to the applicants' explanation, the statement of the TACA Chairman offering help to 'every line concerned trying to enter the market' is hard to read as not applying to lines wishing to enter the trade.

1231 The Commission takes the view that even in the context of a block-exempted liner conference, it cannot be considered normal commercial behaviour for members of the conference to work together to ensure that new entrants are able to obtain a level of market share sufficient to sustain their operations at the expense of the members of the conference. In the context of the TACA, such a guarantee can only have made sense if the view was that the benefits of elimination of potential competition would outweigh the loss of market share.

1232 Second, as regards Hyundai's admission the Commission considers that the fact that Hyundai considered entering into partnership with an independent line cannot disprove the suggestion that the willingness of the TACA parties to admit Hyundai to service contracts would have acted as a powerful inducement to it in weighing up its options. As far as the contacts with MSC are concerned, the applicants admitted in their response to the statement of objections that Hyundai's decision to charter space from MSC was related to its decision to join the TACA. Furthermore, the Commission denies the suggestion that US law requires the immediate admission of all new members of a conference to service contracts.

1233 Third, as regards the admission of other operators, the Commission considers that UASC and APL were not in any way comparable to Hanjin and Hyundai as potential competitors. Furthermore, in the first place it would have been surprising if the UASC and APL had joined the TACA after the adoption of the statement of objections in May 1996, and secondly the evidence the applicants presented concerning contacts between UASC, APL and the conference would appear to be incomplete since it does not deal with the discussions which took place within the TACA secretariat or between the TACA secretariat and the TACA parties.

(3) The general measures addressed to all potential competitors

(i) Dual-rate service contracts

1234 The applicants' second complaint is that the Commission's finding at paragraph 565 of the contested decision that the applicants' dual-rate service contracts acted as an inducement to new entrants to join the conference is vitiated by errors of fact and assessment.

1235 The applicants submit that in each case the dual-rate service contract has been at the shipper's request, based on its perception of the different service capabilities of the carriers concerned. It is apparent from paragraph 450 of the contested decision that the Commission itself accepted that the shippers may be offered different rates where varying qualities of service are provided. Contrary to the Commission's assertion at paragraph 154 of the contested decision, the applicants consider that the exchanges of correspondence between the shippers and carriers at the time the service contracts were negotiated are evidence for their allegations. The Commission did not ask the applicants to furnish such evidence. The applicants cannot be criticised for not having done so on their own initiative since they had no reason to suppose that the Commission had any concerns as to the way in which the service contracts were negotiated. The applicants point out that that question was the subject of a meeting with the Commission on 3 May 1995 (six months before the admission of Hyundai), when the Commission raised no objections on that point.

1236 In any event, the applicants deny that dual-rate contracts induced potential competitors to join the conference. They point out that a minority of conference service contracts contained dual-rate tariffs, that there was no prior agreement between the applicants as to the identity of the parties to whom shippers would pay lower rates and that there was no prior agreement as to the size of any rate differential.

1237 The applicants note that in the infringement period, only Hanjin and Hyundai joined the conference. There is no evidence in the contested decision that dual-rate conference service contracts acted as an inducement to those two companies to join the TACA.

1238 In Hanjin's case, the correspondence referred to above contains no indication of any such inducement. Furthermore, of all the cargo carried by Hanjin under

service contracts in 1995 and 1996 only 5.5% and 6.9% respectively was carried by it under dual-rate service contracts.

1239 In the case of Hyundai, the evidence shows that when that line was informed of the existence of dual-rate tariff structures in service contracts prior to joining the conference, it was told clearly that all carriers had the same status within the conference, with the same rights and obligations (letter of 8 September 1995). Furthermore, it is clear from an e-mail of 2 October 1995 from the TACA secretariat at the time of Hyundai's joining that whenever a service contract contained a dual rate, Hyundai would join at the higher rate. Lastly, the applicants point out that of all the cargo carried by Hyundai under service contracts in 1995 and 1996 only 7% and 14.7% respectively was carried by it under dual-rate service contracts.

1240 The applicants also find it surprising that the ECTU makes no observation on the evidence adduced by the applicants to show that dual-rate contracts were requested by shippers.

1241 The Commission maintains its findings at paragraphs 565 and 152 of the contested decision that in 1995 almost a third of the TACA's service contracts contained a dual rate structure.

1242 The Commission observes that the applicants attempt to minimise the incidence of such dual-rate service contracts by including in their calculations service contracts with NVOCCs. The traditional members of the conference were rarely party to service contracts with NVOCCs in 1996 (and not at all in 1995). It was

not therefore necessary for such contracts to contain dual rates. In any event, the fact that a minority of conference service contracts contain a dual rate is irrelevant, according to the Commission. Shippers might have one service contract with one (or more) member(s) at one rate and another contract with one (or more) other member(s) at another rate. In such circumstances there was no need for dual-rate contracts.

1243 The Commission's review of service contracts for 1995 also shows that the differential between the dual rates was in most cases either USD 50 or USD 100. Since the contracts were put to the vote of the conference, the Commission considers that the applicants' contention that there was no prior agreement as to the size of the differential has no force.

1244 The Commission repeats that no evidence has been provided that the initiative for dual-rate contracts came from the shippers. The continuation of dual rates only emerged after the Commission had asked for copies of the service contracts. In any event, most of the requests the applicants cite appear to be for the continuation of dual-rate contracts from the previous year and not for the insertion of such a provision in a new contract. It would be extraordinary if the prevalence of dual-rate contracts could result solely from the shippers' independent perceptions of the different service qualities offered by the TACA parties.

1245 As for the applicants' allegation that neither Hyundai nor Hanjin was induced to join the TACA by such contracts, the Commission observes that those contracts were just one of the inducements offered by the TACA. It claims that in 1995, 68.5% of Hanjin's total carriage under service contracts was carried pursuant either to a dual-rate contract or to a contract with an NVOCC. In the same year, the equivalent figure for Hyundai was 73%.

(ii) Service contracts with NVOCCs

1246 The applicants' third complaint is that the Commission's finding at paragraphs 150 and 565 of the contested decision that the former structured TAA members did not compete for service contracts with NVOCCs is unsupported by the facts.

1247 The applicants make the preliminary observation that the Commission does not explain the basis for the view expressed in footnote 53 to the contested decision that Cho Yang, DSR-Senator, MSC, Hanjin, POL, Tecomar and TMM were former unstructured members of the TAA.

1248 Moreover, there is no evidence in the contested decision of any agreement or concerted practice between the traditional conference parties to reserve NVOCC service contract business to traditional independent lines. The Commission merely relies on a comparison of the carriage effected by former independent TACA parties under NVOCC service contracts with that of the traditional TACA parties. The applicants consider that the letter from POL to Hanjin dated 28 December 1995 does not prove that service contracts with NVOCCs were reserved by the traditional conference members to new entrants and traditional independent lines since it is a letter from a former independent to a new entrant.

1249 The applicants stress that the decision to carry NVOCC cargo is a unilateral one made independently by each applicant. They point here to the explanation they gave to the Commission during the administrative procedure, reproduced at footnote 55 to the contested decision.

1250 The applicants observe that whilst in 1994 and 1995 the traditional conference members (with the exception of Hapag-Lloyd) concentrated on the carriage of the cargo of proprietary shippers, from 1996 almost all of the applicants carried NVOCC cargo. Thus, in 1996 and 1997 the traditional conference members carried 22% and 29% respectively of all NVOCC cargo. In those circumstances the applicants consider that the Commission has not adduced a firm, precise and consistent body of evidence of the existence of a prior concertation and has not established that that concertation constitutes the only plausible explanation of the applicants' NVOCC carriage.

1251 The Commission, supported by the ECTU, observes that the applicants conceded by implication in their application that the traditional conference members did not compete for NVOCC service contracts in 1994 and 1995.

1252 The Commission adds that the applicants attempt to conflate the NVOCC service contracts in question in the contested decision with NVOCC cargo carried under the tariff. The evidence shows that in 1996 the formerly independent members of the TACA carried 94.7% of all NVOCC goods carried pursuant to a TACA service contract. Since the value of the transatlantic NVOCC market in 1995 was in excess of USD 300 million it is not a plausible explanation that the traditional conference members decided unilaterally that that business was not worth pursuing. The Commission considers that those factors show that contracts with NVOCCs were reserved to the non-traditional members and to new entrants to the market.

1253 As regards the commercial reasons cited by the applicants, the Commission understands that the traditional TACA conference members did not compete for NVOCC cargo because they regarded the NVOCCs as competitors. The applicants do not explain, however, why those same members now convey a substantial part of all cargo carried under service contracts with NVOCCs. The

applicants' explanations are thus not credible. The Commission considers that the change in business strategy of the traditional TACA conference members has come about because of the measures taken by the Commission to reduce the effect of the anti-competitive practices of the TACA parties.

1254 Lastly, the Commission points to the terms of the letter from POL to Hanjin dated 28 December 1995 concerning service contracts with NVOCCs, which is set out at paragraph 180 of the contested decision. Far from addressing a purely bilateral issue between POL and Hanjin, the letter stresses that the whole issue of NVOCCs was very delicate and sensitive and required handling with full harmony in the TACA, collectively and without individualism, so as to maintain the position so carefully built up by the group throughout the years. That is far from suggesting an issue which was of no concern to the conference as a whole.

(b) Findings of the Court

1255 Before examining the present pleas concerning the evidence of the practices constituting the second abuse, it should be noted that in Article 5 of the operative part of the contested decision the Commission found that the TACA abused its dominant position by 'altering the competitive structure of the market so as to reinforce the dominant position of the [TACA]'.

1256 It is apparent from paragraph 562 of the contested decision that, in the Commission's view, 'the intention of the TACA parties was... to ensure that if a potential competitor wished to enter the market it would only do [so] after it had

become a party of the TACA'. The Commission states at paragraph 563 of the contested decision that 'the TACA parties actively took measures to assist those potential competitors successfully to enter the market as parties to the TACA'. In paragraph 566 of the contested decision, the Commission states that:

'Each of these acts would have constituted inducements to potential competitors to enter the transatlantic trade, not as independent carriers but as parties to the TACA. In so far as the existence of potential competition may have worked as a restraint on the TACA's market power (theory of contestable markets), the elimination of this source of competition would have worked in two ways: the elimination of potential competition and the anticipatory elimination of actual competition. The Commission considers that such behaviour, which was not disclosed in the Application for Exemption, has damaged the competitive structure of the market and amounted to an abuse of the TACA parties' collective dominant position in 1994, 1995 and 1996.'

1257 It is apparent in this connection from paragraphs 563 to 565 of the contested decision that the Commission identifies specific measures intended to induce Hanjin and Hyundai and general measures intended to induce all potential competitors. According to paragraphs 563 and 564, the first consist in the disclosure to Hanjin of confidential information concerning the TACA, the collective willingness of the TACA parties to allow Hanjin to build up a market share consistent with its slot capacity on the trade and the immediate participation of Hyundai in conference service contracts. As for the general measures, it is apparent from paragraph 565 that they consist in the conclusion of a large number of dual-rate service contracts and in the fact that the former structured TAA members did not compete for certain service contracts with NVOCCs.

1258 By the present pleas, the applicants challenge both the specific measures to induce Hanjin and Hyundai and the general measures to induce all potential competitors.

(1) The specific measures to induce Hanjin and Hyundai

1259 The applicants consider essentially that the Commission misread the facts surrounding the accession of Hanjin and Hyundai to the TACA. They submit first that US law required the TACA parties to admit Hanjin and Hyundai. Next, they submit that they did not induce Hanjin and Hyundai to enter the TACA but that they freely chose to apply for membership.

(i) The obligations under US law

1260 The applicants stress that in admitting Hanjin and Hyundai to the conference the TACA acted strictly in accordance with its obligations under US law. They submit that under section 5(b) of the US Shipping Act the TACA is an 'open' conference which admits new members on the basis of the reasonable and equal terms set out in Article 7(1) of the TACA.

1261 The present plea is based on the premiss that the contested decision alleges that the TACA parties abused their collective dominant position by admitting new members to the conference.

1262 It is true that, according to the case-law, abuse of a dominant position within the meaning of Article 86 of the Treaty may occur if an undertaking in a dominant position strengthens that position in such a way that the degree of dominance reached substantially fetters competition, so that only undertakings remain in the market whose behaviour depends on the dominant one (*Europemballage and*

Continental Can, cited at paragraph 779 above, paragraph 26). It is thus possible in certain circumstances, as the Commission rightly points out in its pleadings, for the fact that a liner conference in a dominant position accepts new members to constitute an abuse in itself.

1263 However, that is not the abuse recorded in the contested decision in the present case. As already stated above, it is apparent from paragraphs 562 to 566 of the contested decision, as the Commission confirmed in its written pleadings and at the hearing in reply to a question from the Court in that regard, that the second abuse recorded in that decision consisted not in the fact that certain potential competitors joined the TACA between 1994 and 1996, but in the fact that the TACA parties took certain measures to induce those potential competitors to join the TACA, the contested decision finding solely that the TACA embarked on a course of conduct specifically designed to subvert potential competition by inducing lines to join the TACA which would otherwise have entered the market as independent lines in competition with the conference.

1264 Furthermore, in paragraph 576 of the contested decision the Commission expressly states that whilst the contested decision 'addresses certain steps taken by the TACA parties to induce potential competitors to enter the market as parties to the TACA', it 'does not address and therefore does not prejudice the ability of liner conferences whose activities fall within the scope of the group exemption contained in Article 3 of Regulation (EEC) No 4056/86 to admit new members on the same terms as existing members or the ability of the members of such liner conferences to exchange information necessary for the purposes of the activities falling within the scope of that group exemption'.

1265 It follows that the contested decision does not criticise the TACA parties for accepting new conference members, but solely for adopting certain measures with a view to inducing such new membership.

1266 Whilst the applicants submit by the present plea that US law requires them to accept any new member of the conference, they do not submit that it requires them to adopt measures inducing parties to join.

1267 Consequently, the arguments advanced under the present plea relating to US law are irrelevant and must therefore be rejected.

(ii) Evidence of the measures addressed to Hanjin and Hyundai

1268 The applicants allege that the TACA parties did not induce Hanjin and Hyundai to enter the conference. They consider that the abuse recorded on that point has not been proved to the requisite legal standard.

1269 It is common ground that Hanjin and Hyundai joined the TACA with effect from 31 August 1994 and 11 September 1995 respectively.

1270 It is not in dispute that before joining the TACA Hanjin and Hyundai did not operate on the transatlantic trade and that their maritime transport activities were carried out on other trades, not as members of liner conferences, but as independent lines. At paragraph 563 of the contested decision the Commission thus stated, without being contradicted by the applicants, that in their reply to the statement of objections in the TAA case the applicants portrayed Hanjin and Hyundai as independent shipowners which exerted 'significant competitive pressure' on the TAA parties because they threatened to enter that trade.

1271 It follows that the Commission was entitled to consider in the contested decision that Hanjin and Hyundai represented a source of potential competition for the TACA parties, to the extent that those lines, as independent lines on other trades, were likely to enter the transatlantic trade without joining the TACA. Since Hanjin and Hyundai did join the TACA, however, it must be found that the source of potential competition which they represented was thereby eliminated.

1272 However, as stated above at paragraph 1265, the second abuse recorded in that decision consisted not in the fact that Hanjin and Hyundai joined the TACA, but in the fact that the TACA parties took measures to induce them to become members of the conference rather than entering transatlantic trade as independent lines.

1273 Consequently, in order to determine whether the Commission was right to find that the elimination of potential competition resulting from the admission of Hanjin and Hyundai to the TACA was the result of abusive conduct on the part of the TACA parties, it is necessary to consider whether in the contested decision the Commission established to the requisite legal standard that those TACA parties adopted measures to induce Hanjin and Hyundai to join the conference.

Hanjin's accession to the TACA

1274 In the contested decision the Commission considered that Hanjin was induced by the TACA parties to join the conference, first, according to paragraph 563, by the disclosure of confidential information contained in the documents and statistics produced by the TACA and, second, according to paragraph 564, by the collective willingness of the TACA parties to enable it to build up a market share

consistent with its slot capacity on the trade. It is apparent from those paragraphs that the Commission considers that those measures of inducement are demonstrated by Hanjin's letter to the TACA of 19 August 1994 and by the TACA briefing paper of 15 February 1996 respectively.

1275 It has already been held, at the end of the discussion of the pleas alleging infringement of the rights of the defence at paragraph 187 above, that Hanjin's letter of 19 August 1994 and the TACA briefing paper of 15 February 1996 were used by the Commission in contravention of the applicants' rights of defence and that consequently those inculpatory documents must be excluded as evidence.

1276 In so far as the allegation that the TACA induced Hanjin to join the conference by the abovementioned measures is based entirely on those two documents, which the Commission confirmed to be the case at the hearing in reply to a question from the Court in that regard, that allegation in the contested decision must therefore be regarded as unsubstantiated by any evidence.

1277 Furthermore, in so far as the Commission seeks to use the letter of 30 January 1996 from the TACA to prove those measures of inducement addressed to Hanjin, to which the contested decision refers in general terms at paragraph 561, it must also be found that for the reasons set out in relation to the pleas alleging infringement of the rights of the defence, since that letter was used in breach of the rights of the defence it must likewise be excluded as evidence.

1278 It follows that in so far as the second abuse consists in the fact that the TACA parties adopted specific measures to induce Hanjin to join the conference it has not been proved to the requisite legal standard.

1279 In any event, it must be held that, contrary to the Commission's submission, neither Hanjin's letter of 19 August 1994 nor the TACA briefing paper of 15 February 1996 shows that Hanjin's accession to the TACA is not the result of an autonomous decision but was induced by the abovementioned measures adopted by the TACA parties.

1280 First, as regards the letter of 19 August 1994, the Commission found at paragraph 563 of the contested decision that in that letter Hanjin requested details of 'all relevant documents and statistics by TACA (including tariff, service contracts, port call, lifting and performance)'. In paragraph 563 of the contested decision the Commission considers that 'the disclosure of [such] information, much of which constitutes confidential business secrets of significant value (customer identities, prices, transport patterns) and is not necessary for enabling a shipping line to become a member of a liner shipping conference engaged in activities falling within the scope of the group exemption, would have acted as a powerful inducement to Hanjin to enter the transatlantic trade as a party to the TACA and not as an independent carrier'.

1281 Before considering the merits of those assessments in the contested decision, it must first be observed that Hanjin's letter of 19 August 1994 contains that company's application to join the TACA. In that letter Hanjin informs the TACA that a slot-chartering agreement with DSR-Senator and Cho Yang, its partners in the Tricon consortium, was entered into for that purpose, so that Hanjin will be able to use the capacity already available on the trade rather than using its own vessels. Hanjin therefore proposes to the TACA to continue with its required notification of the Commission and the FMC, whilst raising certain questions pertaining to its admission.

1282 The Commission cannot validly maintain that that letter merely states Hanjin's intention not to join the TACA, but to enter the transatlantic trade. Whilst it is true that the slot-chartering agreement entered into with DSR-Senator and Cho

Yang did not perhaps prejudice Hanjin's capacity to operate on the transatlantic trade as an independent line, the terms of the correspondence produced by the applicants concerning Hanjin's admission to the TACA do not justify the conclusion that that option was the one chosen by Hanjin when the letter of 19 August 1994 was sent. Thus, Hanjin expressly states in the letter that it is 'applying for membership of the [TACA] as filed with the FMC and the European Commission'. Furthermore, Hanjin concludes the letter by stating that it hopes to receive a positive response to the questions raised in its 'membership application'. It should also be noted that Hanjin's letter was interpreted in that way by the TACA. By a fax of 24 August 1994 the TACA acknowledged receipt of Hanjin's 'application for membership', whilst by letter of the same date the TACA informed Hanjin of the admission procedure. In addition, by fax of 24 August 1994 the TACA Chairman congratulated Hanjin on its decision to join the TACA and asked it to contact its legal adviser in order for its admission to be notified to the appropriate authorities. Furthermore, since the letter of 19 August 1994 was addressed to the TACA, it is difficult to believe that its purpose could have been to inform the latter that Hanjin wished to enter the market as an independent line.

1283 It is therefore established that the letter of 19 August 1994 constitutes Hanjin's application for membership of the TACA.

1284 The Commission adduces no evidence to show that the TACA made any approach to Hanjin before 19 August 1994. Thus, the Court's file does not contain any correspondence prior to that date regarding Hanjin's admission and the content of the subsequent correspondence contains no evidence that Hanjin's application for membership was induced by the TACA.

1285 In those circumstances, it does not appear that Hanjin's decision to become a member of the TACA was induced by the TACA parties.

1286 It is true, as the Commission points out at paragraph 563 of the contested decision, that by the letter of 19 August 1994 Hanjin requested details of all relevant documents and statistics by TACA relating to the tariff, service contracts, port call, lifting and performance.

1287 However, it must be remembered that the Commission stated at paragraph 576 that the contested decision did not prejudice the ability of liner conferences whose activities fell within the scope of the group exemption contained in Article 3 of Regulation No 4056/86 to admit new members on the same terms as existing members or the ability of the members of such liner conferences to exchange information necessary for the purposes of the activities falling within the scope of that exemption. Indeed, as the Commission confirmed at the hearing, the contested decision does not challenge the new admissions to the TACA *per se* but the fact that the TACA parties adopted certain measures to induce potential competitors to become conference members. If the disclosure of the information necessary for the exercise of the activities falling within Article 3 of Regulation No 4056/86 was considered to constitute an inducement to join the TACA, the assumption would be that it is the admission to the TACA itself which constitutes the abuse. In such a case the measure of inducement imputed to the TACA would reside in the very fact that the new TACA members qualified for the block exemption laid down by Regulation No 4056/86, which authorises restrictions on competition the exceptional nature of which has already been emphasised by the Court of First Instance (*TAA*, paragraph 146).

1288 In the present case, it is not in dispute that Hanjin obtained the information sought in the letter of 19 August 1994 after it joined the conference. It is apparent from the letter from the TACA to Hanjin of 24 August 1994, the terms of which are not challenged by the Commission, that the information in question was made available to Hanjin during the meeting which took place after 1 September 1994.

1289 Under Article 3 of Regulation No 4056/86 the members of a liner conference qualify for block exemption in respect of agreements fixing uniform or common freight rates and in respect of agreements on the coordination of shipping

timetables, sailing dates or dates of calls, determination of the frequency of sailings or calls, coordination or allocation of sailings or calls, regulation of the carrying capacity offered by each member and allocation of cargo or revenue among members.

1290 The Commission does not explain why disclosure of the information sought by Hanjin in the present case concerning the tariff, service contracts, port call, lifting and performance was not necessary for the exercise of those activities falling within Article 3 of Regulation No 4056/86 and therefore was not required to enable Hanjin to join on the same conditions as the existing members. The disclosure of information relating to the tariff seems inherent in the conclusion of any agreement fixing uniform or common freight rates. It is not in dispute that, as the contested decision states at paragraph 99, the tariff is published. Similarly, the conclusion of agreements coordinating timetables and the frequency of port calls or their allocation requires a priori the communication by conference members of certain information on port calls. As for the disclosure of information on service contracts, lifting and performance, it may appear prima facie necessary for the conclusion of agreements regulating capacity or the allocation of cargo or revenue.

1291 Again in respect of service contracts, as the Commission confirmed at the hearing, the contested decision does not prohibit the TACA parties from entering into conference service contracts. In order to take part in such contracts, all new TACA members must be party to information concerning them.

1292 Accordingly, the Commission has not established to the requisite legal standard that the disclosure by the TACA parties of confidential information to Hanjin was a measure intended to induce that line to join the conference, by allowing it

access to information which is not necessary for the exercise of activities covered by the block exemption.

1293 Consequently, the applicants' complaints on that point must be upheld.

1294 Second, as regards the TACA briefing paper of 15 February 1996, the Commission states at paragraph 564 of the contested decision that that paper demonstrated a collective willingness to 'enable Hanjin to build up a market share consistent with its slot capacity in the trade...'. According to the Commission, 'such a willingness on the part of the other TACA parties would have substantially reduced the commercial risks of entering a new market and thereby acted as an inducement to Hanjin to enter the transatlantic trade as a party to the TACA'.

1295 However, the TACA briefing paper of 15 February 1996, which postdates by more than 17 months Hanjin's admission to the TACA, does not relate to that admission, but concerns the solutions to be applied to a dispute between the TACA and Hanjin as a conference member.

1296 It is apparent from the Court's file that that briefing paper follows the letter of 30 January 1996 from the TACA, in which the conference Chairman, Mr Rakkenes, expressed concern to Hanjin about recent price initiatives taken by that TACA party on the transatlantic trade. In the letter the TACA Chairman informed Hanjin that a price war would be likely to 'destroy the foundation upon

which the TACA was built'. For that reason he proposed to call a meeting shortly of the Hanjin directors, before concluding, in a passage of the letter cited at paragraphs 292 and 561 of the contested decision,

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

1297 It is apparent from the Court's file that a meeting thus took place between Hanjin and the TACA on 13 February 1996.

1298 The TACA briefing paper of 15 February 1996 stated that its purpose was also to prepare for another meeting with Hanjin on 29 February 1996. In that paper the British secretariat of the TACA states that Hanjin, whose market share on the transatlantic trade was restricted in 1995, engaged in a significant amount of independent action which had to be restrained in order to maintain price stability on the relevant trade. In order to achieve that objective, the British secretariat of the TACA puts forward inter alia the following recommendations to the conference:

'1 Encourage Hanjin, giving the assurance that other Carriers are similarly being encouraged, to bring commercial problems to the table for joint discussion and collective resolution. In this way, [independent action] becomes a tool of last resort rather than one of first action.

2 Encourage and persuade all Carriers to collectively find a way to enable Hanjin to build up a market share consistent with its slot capacity in the trade, which does not have a negative knock-on effect.

3 If [independent actions] continue to be required, Hanjin should be encouraged to find ways and means [of] structuring them on a narrower basis, thus minimising the fall-out effect, and to separately indicate Inlands and Accessorial Charges.

4 Indicate to Hanjin that if it persists with [independent actions], it will only add pressure on other Carriers who are competing at the same service level, and are concentrating on the same market segments, to do the same by stepping up their activity. This will lead to a complete collapse of TACA's Tariff.'

1299 It is clear from the foregoing that the collective willingness of the TACA parties to allow Hanjin to build up a market share consistent with its slot capacity on the trade had no bearing at all on its admission to the conference. Questioned on this point at the hearing, the Commission admitted moreover that the TACA briefing paper of 15 February 1996 was unrelated to Hanjin's admission.

1300 Furthermore, the TACA briefing paper of 15 February 1996 cannot be interpreted as demonstrating a permanent collective willingness on the part of the TACA parties to allocate a certain market share to Hanjin after its admission to the conference. The fact that the willingness to enable Hanjin to build up a market share was asserted more than 17 months after it joined in order to resolve an internal conflict within the TACA suffices to show that no such measure existed prior to that dispute and, in any event, that it did not exist when Hanjin

joined the conference. The Commission cannot therefore submit, as it did at the hearing, that the TACA briefing paper of 15 February 1996 illustrates the general context in which Hanjin's letter of 19 August 1994 applying for membership of the conference was sent.

1301 The same considerations apply in respect of the TACA letter of 30 January 1996. As stated above, that letter was sent in the same context as that in which the briefing paper of 15 February 1996 was drafted. Accordingly, even if the general terms of an isolated passage of that letter might perhaps lead one to suppose that the TACA Chairman was inclined to help third parties to join the conference, it cannot reasonably be inferred therefrom, in the absence of any other specific evidence to that effect, that the TACA parties systematically induced potential competitors, including Hanjin, to join the TACA by measures allowing them to become conference members on terms other than those proposed to existing members. The mere fact that the TACA Chairman declared a desire to help third parties to become conference members in no way demonstrates that the TACA parties in fact collectively adopted inducements within the meaning of the contested decision to make potential competitors join the TACA.

1302 Finally, and in any event, in the context of the system of competition instituted by Regulation No 4056/86, market sharing agreements entered into between the members of a liner conference are not necessarily prohibited. Article 3 of Regulation No 4056/86 expressly provides that the block exemption also applies to agreements which have as their objective the regulation of carrying capacity offered by each member and the allocation of cargo or revenue among members.

1303 The contested decision fails to explain why the TACA'S collective willingness to allow Hanjin to build up a particular market share on the relevant trade does not constitute such an agreement to enable that line to join the conference on the same basis as existing members. In paragraph 576 of the contested decision the

Commission itself stated that the contested decision did not prejudice that ability since it did not prohibit, as the Commission confirmed at the hearing, the admission of new members to the TACA *per se*. As stated above, if participation in agreements falling within the block exemption was considered to constitute the inducement to join the TACA, the assumption would be that it is the admission to the TACA itself which constituted the abuse since in that case the measure of inducement imputed to the TACA would reside in the very fact that Hanjin qualifies for the block exemption laid down by Regulation No 4056/86, which authorises restrictions on competition the exceptional nature of which has already been emphasised by the Court.

1304 In the light of the foregoing it must be held that the Commission has not established to the requisite legal standard that the collective willingness of the TACA parties to allow Hanjin to build up a particular market share on the trade in question constituted a measure to induce that line to become a member of the conference.

1305 Consequently, the applicants' complaints on that point must be upheld.

Hyundai's accession to the TACA

1306 In paragraph 564 of the contested decision the Commission found that Hyundai was induced by the TACA parties to become a member of the conference by the fact that 'it was included as a party in the [conference] service contracts in which it wished to be included with effect from its first sailing on the trade'. It is apparent from that paragraph that, according to the Commission, that measure of inducement is demonstrated by the PWSC 95/8 minutes.

1307 It has already been held, at the end of the discussion of the pleas alleging infringement of the rights of the defence at paragraph 187 above, that those minutes were used by the Commission in breach of the applicants' rights of defence and that consequently that inculpatory document must be excluded as evidence.

1308 In so far as the allegation that the TACA induced Hyundai to join the conference by the immediate availability of conference service contracts is based entirely on that document alone, which the Commission confirmed to be the case at the hearing in reply to a question from the Court in that regard, that allegation in the contested decision must be regarded as unsubstantiated by any evidence.

1309 Furthermore, in so far as the Commission seeks to use the letter of 30 January 1996 from the TACA, to which the contested decision refers in general terms at paragraph 561, to prove that measure of inducement it must also be found that for the reasons set out in relation to the pleas alleging infringement of the rights of the defence, since that letter was used in breach of the rights of the defence it must likewise be excluded as evidence.

1310 It follows that in so far as the second abuse consists in the fact that the TACA parties adopted specific measures to induce Hyundai to join the conference it has not been proved to the requisite legal standard.

1311 In any event, it must be held that, contrary to the Commission's submission, the PWSC 95/8 minutes do not demonstrate that Hyundai's admission to the TACA was not the result of an autonomous decision but was induced by the abovementioned measure adopted by the TACA parties.

1312 The minutes as set out at paragraph 230 of the contested decision state that 'Hyundai had sought inclusion in 1995 service contracts, in which three or more members currently participate eastbound, three or more members currently participate westbound, and three or more members currently participate in joint eastbound/westbound service contracts, at the rate levels applicable to the majority of members in such contracts. In this regard, [it is] confirmed that steps were in hand to so notify service contract shipper parties of such inclusion effective coincidentally with Hyundai's first transatlantic sailings'. The Commission states in paragraph 564 of the contested decision that in the light of the fact that 'the widespread existence of service contracts can act as a barrier to entry', the 'immediate access to such [service] contracts would have acted as a powerful inducement to Hyundai to enter the transatlantic trade as a party to the TACA'.

1313 It is apparent from the Court's file, in particular from the correspondence concerning Hyundai's admission to the TACA, that first of all, during February 1995, Hyundai planned to enter the transatlantic trade not by joining the TACA, but by entering into a slot-chartering agreement with an independent line competing with the TACA. Those negotiations having failed in the course of May 1995, Hyundai then entered into negotiations with MSC, a member of the TACA, with a view to entering into a slot-chartering agreement.

1314 It is therefore necessary to ascertain whether, as the Commission submits, the failure of the negotiations with that independent line was due to the fact that the TACA offered Hyundai immediate availability of conference service contracts should it join the conference.

1315 It is not in dispute that Hyundai asked the TACA about the possibility of immediate access to conference service contracts for the first time on 30 August 1995. It is apparent from the minutes of the TACA meeting of 31 August 1995

(PWSC 95/7) that that proposal, which was said to be discussed 'at Hyundai's request', was accepted on that date by the TACA. Hyundai took note of that acceptance by fax of 5 September 1995 addressed to the TACA.

1316 It is therefore established that, following discussions with the TACA prior to joining, Hyundai was informed by the TACA that if it joined it would be included in the conference service contracts for 1995.

1317 However, that fact alone is not sufficient to show that it was that which induced Hyundai to join the TACA.

1318 It is not in dispute that Hyundai had signed a slot-chartering agreement with MSC with effect from 17 August 1995 following negotiations with that TACA party in May 1995. It is apparent from the file that on the same date a final draft of the notification of that agreement to the FMC had already been drawn up. In their response to the request for information of 8 March 1996, the TACA parties explained, without being challenged by the Commission, that Hyundai's decision to enter into a slot-chartering agreement with MSC was connected to its decision to join the TACA. Contrary to what the Commission argues, far from contradicting the applicants' argument such a fact, on the contrary, confirms it, since it shows that Hyundai had decided to join the conference as early as May 1995.

1319 Furthermore, the applicants stated, without being contradicted by the Commission on the point, that they contacted the TACA with a view to joining in July 1995 when the terms of the slot-chartering agreement with MSC had been clearly defined.

1320 Finally, it is apparent from the subsequent correspondence with MSC that as early as 22 August 1995 Hyundai stated to that conference member that its application for membership ought to be sent to the TACA around 30 August 1995, MSC for its part undertaking to notify that decision to the TACA, so that the conference Chairman could instruct its legal adviser in Europe to effect the requisite notifications to the Commission.

1321 It is apparent from this evidence that Hyundai decided to join the TACA as the result of an autonomous decision well before the question of the immediate availability of conference contracts was raised. When Hyundai asked to have immediate access to conference service contracts, it had already signed the slot-chartering agreement with MSC enabling it to enter the trade in question without adding new capacity and taken all the steps necessary to join the TACA.

1322 In those circumstances it is not apparent that Hyundai's accession to the TACA was determined by immediate access to conference service contracts.

1323 Furthermore, the Commission itself stated at paragraph 576 that the contested decision did not prejudice the ability of liner conferences whose activities fell within the scope of the group exemption contained in Article 3 of Regulation No 4056/86 to admit new members on the same terms as existing members. Therefore, as the Commission confirmed at the hearing, since the contested decision does not prohibit the TACA parties from entering into conference service contracts, the Commission fails to explain why the admission of new members on the same terms as existing members did not enable Hyundai to require that it become immediately party to all conference service contracts, and in particular to enjoy the same terms as those offered to MSC, with which Hyundai had entered into a slot-chartering agreement to enter the trade in question. Moreover, according to the letter of 19 August 1994 Hanjin made a request similar to that of Hyundai, which the Commission did not consider to be a measure intended to induce Hanjin to join the TACA.

1324 When questioned at the hearing, the Commission submitted that Hyundai's admission to the TACA should also be interpreted in the light of the TACA letter of 30 January 1996. However, it has already been found above at paragraph 1301 that, in the absence of any other specific evidence to that effect, the Commission could not reasonably infer from the general terms of an isolated passage from that letter, which was sent by the TACA Chairman in the course of a dispute with Hanjin which occurred 17 months after its admission to the TACA, that the TACA parties systematically induced potential competitors including Hyundai to join the TACA by measures allowing them to become conference members on terms other than those proposed to existing members.

1325 In the light of the foregoing it must be held therefore that the Commission has not established to the requisite legal standard that the TACA parties induced Hyundai to join the conference by granting it immediate access to conference service contracts from the time of its admission.

1326 It follows from all the foregoing that in so far as the second abuse consists in the fact that the TACA parties adopted specific measures to induce Hanjin and Hyundai to join the conference it has not been proved to the requisite legal standard.

(2) The general measures to induce potential competitors

1327 By the present pleas and arguments, the applicants challenge the findings in the contested decision concerning the general measures of inducement adopted by the TACA parties, namely the conclusion of a large number of dual-rate service contracts and the fact that the former structured TAA members did not compete for certain service contracts with NVOCCs.

(i) Dual-rate service contracts

1328 Essentially, the applicants deny that Hanjin and Hyundai were induced to join the TACA by dual-rate service contracts. In support of their argument, they submit first that that measure was requested by the shippers. Next, they point out that the decision contains no proof that that measure induced Hanjin and Hyundai to join the TACA. Finally, they stress that Hanjin and Hyundai were parties to a minority of service contracts of that type.

1329 At paragraph 565 of the contested decision, the Commission stated that 'as [it] found in the TAA case..., the purpose and effect of offering a two-tier rate structure was to limit competition from independent shipowners by bringing them inside the conference. Following the prohibition of the TAA in 1994, the TACA parties abandoned their two-tier tariff but nevertheless have continued to offer service contracts with higher prices for the traditional conference members and lower prices for the traditional independents and for the new entrants.' The Commission considers that 'the effect of this would have been to induce potential competitors which wished to enter the market to do so as parties to the TACA'.

1330 The Commission bases its allegation on the fact referred to in paragraph 152 of the contested decision that:

'... it is... apparent from a review of TACA's 1995 service contracts that a significant number (approximately one third) contain a dual-rate structure whereby the former "unstructured" members of the TAA charge lower rates within the same service contract than the former "structured" members of the TAA. The reduction varies between USD 50 and USD 100 per TEU although in at

least one case it is as much as USD 150. These dual-rate structures are also found in TACA's 1996 and 1997 service contracts.'

1331 Whilst the applicants deny that the dual rate in conference service contracts was adopted on their own initiative or that it represents a significant proportion of the service contracts entered into by Hanjin and Hyundai, they do not deny that many conference service contracts entered into by the TACA parties during the period in question in the contested decision contained a dual rate.

1332 In the *TAA* judgment (paragraph 163), the Court has already held that the purpose of introducing differentiated rates in the TAA tariff was to bring inside the agreement independent carriers which, if they were not thus allowed to quote prices lower than those of the old conference members, would continue as outsiders competing against the conference, especially in terms of price. The Court pointed out that that objective was apparent to the requisite legal standard from the minutes of a meeting between all the future members of the TAA in Geneva (Switzerland) on 13 January 1992.

1333 In those circumstances, it is therefore necessary to consider whether, as the Commission contends, the dual rate in conference service contracts also induced potential competitors to join the TACA in the course of the period covered by the contested decision, by allowing them to offer shippers lower rates than those offered by former structured members of the conference.

1334 In order to constitute a measure inducing potential competitors to join the conference, the effect of dual-rate service contracts must necessarily have been to lead potential competitors to become TACA members. The fact that a measure

described as an inducement to join the conference did not lead to any new membership would show that that measure was not in fact an inducement to join the conference.

1335 It is apparent that the alteration of the competitive structure of the market constituting the second abuse recorded in Article 5 of the operative part of the contested decision results from the fact that the measures of inducement adopted by the TACA parties, including dual-rate service contracts, had the effect of leading potential competitors to become conference members, eliminating at the same time the source of potential competition which they represented. The Commission does not identify in the contested decision any other effect flowing from the measures in question.

1336 However, at the hearing the Commission submitted that dual-rate service contracts had other effects upon the competitive structure. It submitted first of all that that measure contributed, on the same basis as the other measures in question, to establishing a favourable permanent environment in the conference in order not only to induce third parties to join the conference rather than to enter the market as independent lines, but also to induce former independent carriers to remain members of the conference. Furthermore, it stressed that, by the measures of inducement in question, the TACA parties neutralised potential competition.

1337 As regards the creation of a permanent favourable environment, it should be noted again, however, that unless dual-rate service contracts induce potential competitors to become members of the TACA they cannot be regarded as having induced those competitors to join the conference. Consequently, if no potential competitor joined the conference, it must follow that that measure did not establish a favourable environment for them. Furthermore, in so far as the Commission alleges that the measures in question created a favourable environ-

ment to ensure that the TACA parties remain conference members, it suffices to observe that that is clearly not the abuse recorded in the contested decision, which refers merely, in paragraphs 562 to 566, to measures intended to induce potential competitors to join the TACA and not measures intended to induce the TACA parties to remain members of the conference.

1338 As regards the neutralisation of potential competition, the fact that a liner conference adopts measures in order to restrict the ability of potential competitors to enter the market as independent carriers might constitute an abusive alteration of the competitive structure of the market. It is true that in that case the mere fact that potential competitors enter the market in any event does not necessarily mean that the conference's conduct is not abusive. The fact that potential competitors entered the market would not mean that those measures had no effect, inasmuch as without such measures the entry to the market might have occurred under different conditions. In such a case, the fact that the result sought is not achieved is not enough to negate the existence of an abuse of a dominant position (see to that effect *CEWAL I*, cited at paragraph 568 above, paragraph 149).

1339 However, the neutralisation of potential competition found in the contested decision results not from measures intended to restrict the ability of potential competitors to enter the market but, conversely, from measures described as inducements to enter the market as TACA parties. In such a case the fact that the result sought is not achieved suffices to show that the measure in question does not constitute an inducement to join the conference and, therefore, that there is no abuse of a dominant position as recorded in the contested decision.

1340 It is therefore necessary to consider whether the dual-rate conference service contracts in fact induced potential competitors to join the TACA.

1341 Notwithstanding the fact that the TACA parties entered into a large number of dual-rate service contracts, only Hanjin and Hyundai joined the TACA during the period covered by the contested decision.

1342 It follows that most of the conference's potential competitors were not induced to join the TACA by the measure in question. However, one potential competitor, UASC, decided not to become a member of the conference, even though it took steps to do so in 1996. Similarly, it has been stated above that lines such as Cosco, Yangming, K Line, Mitsui and APL, which however subsequently entered the trade in question, did not join the TACA during the period covered by the contested decision.

1343 Furthermore, as regards Hanjin and Hyundai the Commission does not mention in the contested decision any evidence to show that those lines joined the TACA because of the inducement represented by dual-rate service contracts.

1344 On the contrary, it has already been stated above that the evidence in the Court's file does not support the conclusion that the admission of Hanjin and Hyundai to the TACA did not arise from an autonomous decision on the part of those lines. In Hanjin's case, it should be stressed that the correspondence between that line and the TACA concerning its admission does not at any point address the question of dual-rate service contracts. As for Hyundai, whilst that question was in fact addressed in a TACA briefing paper of 2 October 1995, it is apparent from that paper that Hyundai asked, in the case of a dual-rate service contract, to be able to apply the higher rate, which directly contradicts the Commission's argument that the former independent carriers were induced to join the TACA by the chance to offer the lower rates laid down by the service contracts. At the hearing the Commission admitted that it had no evidence to challenge the 2 October 1995 briefing paper.

1345 Moreover, it is not in dispute between the parties that Hanjin and Hyundai were party to a small number of dual-rate service contracts. Whilst the Commission points out that Hanjin and Hyundai carried the bulk of their cargo pursuant to dual-rate service contracts or service contracts with NVOCCs, it does not deny that the former type of contract represented a marginal part of the service contracts to which those lines were party.

1346 In those circumstances it is apparent that Hanjin and Hyundai were not induced to become conference members by the fact that the TACA parties entered into a large number of dual-rate service contracts.

1347 Therefore the Commission has not proved to the requisite legal standard that dual-rate conference service contracts constituted a measure which induced potential competitors to join the TACA during the relevant period.

1348 The applicants' pleas and arguments on that point must therefore be upheld.

(ii) Service contracts with NVOCCs

1349 The applicants deny that the TACA parties induced potential competitors to join the TACA by refraining from competing for certain service contracts with NVOCCs.

1350 At paragraph 565 of the contested decision the Commission stated that the former structured members of the TAA, namely ACL, Hapag Lloyd, P&O, Nedlloyd, Sea-Land, Mærsk, NYK and OOCL, did not compete for certain service contracts with NVOCCs, thereby reserving certain cargoes 'for the traditional independents and for the new entrants'. The Commission considers that 'the effect of this would have been to induce potential competitors which wished to enter the market to do so as parties to the TACA'.

1351 In order to determine the merits of those assessments in the contested decision, it is first necessary to ascertain whether the Commission established to the requisite legal standard the existence of an agreement or at least of a concerted practice seeking to reserve service contracts with NVOCCs to traditional independent lines which were not structured members of the TAA and to new members of the TACA.

1352 According to the letter dated 28 December 1995, cited at paragraph 180 of the contested decision, POL stated to Hanjin that:

'... all NVOCC issues are very delicate and sensitive. This can be handled properly only with full harmony within TACA, collectively, without any individualism, as any independence may totally destroy this part of the market, so carefully built by the group throughout the years... We therefore kindly ask you to settle this problem with POL in the spirit of avoiding mutual competition within TACA...'.

1353 The Commission was therefore entitled to infer from the wording of that letter, at paragraph 180 of the contested decision, that there was a 'spirit of cooperation' within the TACA concerning the carriage of cargo by NVOCCs. Contrary to the

applicants' submission, it is clearly irrelevant in that respect that that letter was sent by a traditional independent carrier and not by a former structured member of the conference since that letter reflects the existence of an agreement or at least a concerted practice between the TACA parties seeking to reserve the carriage of NVOCC cargo to certain of those parties.

1354 Furthermore, the Commission stated at paragraph 150 of the contested decision that:

'It is apparent from a review of TACA's 1995 service contracts that a very large number of service contracts with NVOCCs have been entered into only by those TACA parties which were formerly unstructured members of the TAA. These lines were the former independent, non-conference lines operating on the transatlantic routes.'

1355 Far from contradicting that finding in the contested decision, the evidence put forward by the applicants in the present action tends to confirm it. It is apparent from the data set out in the application that in 1994 and 1995 none of the structured members of the TAA carried cargo under service contracts with NVOCCs, apart from Hapag-Lloyd which carried a negligible amount in 1994. Furthermore, whilst Nedlloyd, NYK, OOCL and P&O carried cargo under service contracts with NVOCCs in 1996, it is apparent from the same data that that cargo represented only 8.3% of the cargo carried by the TACA members under that type of contract.

1356 In a letter of 3 May 1995 addressed to the Commission, the TACA's legal adviser explained that the lack of interest on the part of the former structured members of the TAA for NVOCC cargo was the result of an independent commercial policy on the part of the lines with large sales staffs, substantial customer service and an extensive network of agencies.

1357 Whilst such an explanation may of course justify the fact that most of the service contracts with NVOCCs were entered into with former unstructured members of the TAA, which are in fact modest-sized competitors on the trade in question, it cannot justify the total or near total absence over three years of service contracts between the NVOCCs and the former structured members of the TAA. Given the commercial value of that cargo, such a lack of interest on the part of the former structured members of the TAA points undeniably to the existence of an agreement or at least of a concerted practice seeking to reserve service contracts with NVOCCs to certain TACA members.

1358 On that basis the Commission was therefore entitled to consider that there was an agreement or at least a concerted practice amongst the TACA parties seeking to reserve service contracts with NVOCCs to traditional independent lines which were not structured members of the TAA and to new members of the TACA.

1359 However, it is still necessary to consider whether that agreement or concerted practice did in fact induce potential competitors to join the TACA in the course of the period covered by the contested decision. As stated above at paragraphs 1334 to 1339, the fact that a measure described as an inducement to join the conference did not lead to any new membership of the TACA would show that that measure was not in fact an inducement to join the conference.

1360 Notwithstanding the fact that the TACA parties reserved service contracts with the NVOCCs to new members of the conference, only Hanjin and Hyundai joined the TACA during the period covered by the contested decision.

1361 It follows that most of the conference's potential competitors were not induced to join the TACA by the measure in question. It has already been stated above at

paragraph 1342 that one potential competitor, UASC, decided not to become a member of the conference, even though it took steps to do so in 1996. Similarly, it has been stated above that lines such as Cosco, Yangming, K Line, Mitsui and APL, which however subsequently entered the trade in question, did not join the TACA during the period covered by the contested decision.

1362 Furthermore, as regards Hanjin and Hyundai the Commission does not refer in the contested decision to any evidence to show that those lines joined the TACA as a result of the inducement represented by the fact that the former structured members of the TAA did not compete to enter into service contracts with NVOCCs.

1363 On the contrary, it has already been stated above that the evidence in the Court's file did not support the conclusion that the admission of Hanjin and Hyundai to the TACA did not arise from an autonomous decision on the part of those lines. The question of participation in service contracts with NVOCCs is not addressed in any document concerning the admission of Hanjin and Hyundai to the conference.

1364 Finally, and in any event, in the context of the system of competition instituted by Regulation No 4056/86, market sharing agreements entered into between the members of a liner conference are not necessarily prohibited. Article 3 of Regulation No 4056/86 expressly provides that the block exemption also applies to agreements which have as their objective the regulation of carrying capacity offered by each member and the allocation of cargo or revenue among members.

1365 The contested decision does not explain why the fact that the former structured members of the TAA did not compete to enter into service contracts with NVOCCs, thereby reserving that type of cargo for the traditional independent

unstructured members of the TAA and for new members, does not constitute such an agreement, enabling that line to join the conference on the same basis as existing members. In paragraph 576 of the contested decision the Commission itself stated that the decision did not prejudice that ability since it did not prohibit, as the Commission confirmed at the hearing, the admission of new members to the TACA *per se*. As stated above, if participation in agreements falling within the block exemption was considered to constitute the inducement to join the TACA, the assumption would be that it is the admission to the TACA itself which constituted the abuse since in that case the measure of inducement imputed to the TACA would reside in the very fact that the new members qualify for the block exemption laid down by Regulation No 4056/86, which authorises restrictions on competition the exceptional nature of which has already been emphasised by the Court.

1366 It follows that the Commission has not established to the requisite legal standard that the reservation of service contracts with NVOCCs to certain TACA parties constitutes a measure which induced potential competitors to join the conference during the period in question.

1367 The applicants' pleas and arguments on that point must therefore be upheld.

(3) Conclusion on the evidence for the measures constituting the second abuse

1368 It follows from all the foregoing that the Commission has failed to demonstrate to the requisite legal standard that the TACA parties induced potential competitors to join the TACA by the measures referred to in the contested decision.

1369 On that ground alone, therefore, without its being necessary to examine the applicants' other pleas in respect of the second abuse, Article 5 of the operative part of the contested decision, and consequently Article 7 of the operative part in so far as it requires the applicants to put an end forthwith to the second abuse and to refrain in the future from any action having the same object or effect, must be annulled.

IV — *The pleas alleging failure to comply with the procedural requirements laid down by Regulation No 4056/86*

Arguments of the parties

1370 The applicant in Case T-213/98 alleges, first, that the Commission infringed the procedural requirements in Article 9 of Regulation No 4056/86. It is clear that the TACA is governed by both US law and Community law. In particular, the admission of Hanjin and Hyundai resulted directly from the open conference requirements of US law. Accordingly, since the second abuse consists in the compliance by the TACA with the obligation laid down by US law to admit Hanjin and Hyundai to the TACA, the Commission was under an obligation to follow the procedure under Article 9 of the regulation before taking any initiative based on that regulation — in the present case, adopting a decision finding that certain conduct was abusive and imposing fines — which was likely to conflict with US law.

1371 Second, that applicant submits that the Commission infringed the procedural requirements laid down by Articles 7 and 8 of Regulation No 4056/86. In so far as the abuse found consists solely in the conduct of conferences benefiting from

the block exemption the Commission should, before finding that Article 86 of the Treaty had been infringed and a fortiori before imposing a fine, have followed the procedure for withdrawing exemption set out in Article 7 of the regulation. The applicant relies on the wording of Article 8(2) of the regulation, which provides that where the conduct of conferences benefiting from the exemption has effects which are incompatible with Article 86 of the Treaty, the Commission may withdraw the benefit of the exemption and take all appropriate measures to bring an end to the infringement of Article 86 of the Treaty.

1372 The Commission considers that those pleas are unfounded.

Findings of the Court

1373 As regards the plea alleging infringement of Article 9 of Regulation No 4056/86, according to the express wording of the application the applicant merely relies on infringement of that provision with regard to the second abuse recorded in the contested decision, but not the first.

1374 In those circumstances, to the extent that it was found above that the contested decision must be annulled with regard to the finding of the second abuse, it is no longer necessary to rule on this plea.

1375 As regards the plea alleging infringement of Articles 7 and 8 of Regulation No 4056/86, the applicant submits essentially that since the practices regarded as abusive in the contested decision fall within the block exemption laid down by

Regulation No 4056/86 the Commission was required to withdraw that exemption before finding that there were infringements of Article 86 of the Treaty.

1376 In so far as it was found above that the contested decision must be annulled with regard to the finding of the second abuse, it is necessary to consider the present plea solely with regard to the finding in respect of the first abuse in the contested decision, with the exception, however, of the mutual disclosure of the availability and content of individual service contracts, that finding having been annulled for the reasons set out in paragraphs 1151 to 1159.

1377 The Commission is entitled to withdraw the benefit of the block exemption laid down by Article 3 of Regulation No 4056/86 where it finds in a particular case either, under Article 7(2) of that regulation, that agreements qualifying for that exemption have effects which are incompatible with Article 85(3) of the Treaty or, under Article 8(2) of that regulation, that the conduct of conferences benefiting from the exemption has effects which are incompatible with Article 86 of the Treaty.

1378 It is true, as the Commission pointed out at the hearing, that in its judgment in *CEWAL II*, cited at paragraph 595 above, paragraph 136, the Court held that Article 8(2) of Regulation No 4056/86 does not and cannot restrict the Commission's power to impose fines for infringement of Article 86 of the Treaty.

1379 However, the approach adopted in that judgment, in addition to not concerning the withdrawal laid down by Article 7(2) of Regulation No 4056/86, related to practices clearly not qualifying for the block exemption laid down by Article 3 of Regulation No 4056/86, so that it is not necessarily relevant where the practices

in question fall within the scope of that exemption (see to that effect the Opinion of Advocate General Fennelly in *CEWAL II*, cited at paragraph 638 above, paragraphs 163 and 165).

1380 It is not necessary to rule on that question, but it should be noted that in the present case none of the practices in relation to service contracts constituting the first abuse (apart from the mutual disclosure of the availability and content of individual service contracts) is capable of qualifying for block exemption, contrary to the applicant's contention.

1381 The practices in relation to service contracts in question, be it the prohibition of individual service contracts or other restrictions on the availability and content of such contracts, are not referred to in Article 3 of Regulation No 4056/86 among the agreements or practices qualifying for block exemption. It is settled case-law that, having regard to the general principle of the prohibition of agreements restricting competition laid down by Article 85(1) of the Treaty, provisions derogating therefrom in an exempting regulation must, by their nature, be strictly interpreted (*Peugeot*, cited at paragraph 568 above, paragraph 37, and *CEWAL I*, cited at paragraph 568 above, paragraph 48). That applies a fortiori to the provisions of Regulation No 4056/86 by virtue of its unlimited duration and the exceptional nature of the restrictions on competition authorised, so that the block exemption provided for by Article 3 of Regulation No 4056/86 cannot be interpreted broadly and progressively so as to cover all the agreements which shipping companies deem it useful, or even necessary, to adopt in order to adapt to market conditions (*TAA*, paragraph 146).

1382 Furthermore, although as the Commission confirmed in reply to the Court's written questions the fixing of rates for service contracts is not mentioned among the restrictions on competition prohibited by the contested decision pursuant to Article 85 of the Treaty, contrary to the applicants' submission service contracts cannot be treated as agreements which 'have as their objective the fixing of rates and conditions of carriage' as referred to in Article 3 of Regulation No 4056/86.

It is apparent from that provision that in order to qualify for the block exemption the agreements fixing rates and conditions of carriage between the members of a maritime conference must establish 'uniform or common freight rates' within the meaning of Article 1(3)(b) of the regulation (*TAA*, paragraphs 138 to 143), which requires the application of the same freight rate for all conference members vis-à-vis all shippers (*TAA*, paragraphs 144, 151 and 155).

1383 The rates fixed by service contracts are not the same for all shippers, but divide them into categories. As the Commission stresses at paragraph 457 of the contested decision, without being contradicted by the parties on the point:

'... under service contracts the rate is not part of the standard published tariff but is determined more or less ad hoc by the bargaining process between supplier and consumer. The result of that bargaining process is that shippers shipping goods of the same description do not necessarily pay the same service contract rate as one another. Service contract rates are different from tariff rates but do not differ uniformly. This means that although each TACA party may be charging the same rate to a shipper, different shippers (of the same category of goods) are paying different rates...'.

1384 Furthermore, in the present case, the rates fixed by conference service contracts entered into by the TACA during the period covered by the contested decision were not the same for all members of the conference. It is not in dispute between the parties, as stated above at paragraph 1331, that the service contracts laid down a dual-rate structure whereby the former unstructured members of the TAA charged lower rates within the same service contract than the former structured members of the TAA. The Court has already held that the block exemption provided for by Article 3 of Regulation No 4056/86 does not apply to agreements between carriers providing for a variable scheme of tariffs (*TAA*, paragraph 167).

1385 In those circumstances, since the rates fixed by service contracts are not the same for all shippers, or even, in the present case, for all conference members, those rates cannot constitute rate-fixing agreements qualifying for block exemption.

1386 Consequently, since the present plea is based on a false premiss it must be rejected in its entirety.

V — *The plea alleging failure to state reasons in respect of the failure to have regard to US law*

Arguments of the parties

1387 The applicants submit that the obligation under Article 190 of the Treaty to state reasons requires the Commission to explain why its appraisal of certain important issues differs from that of US law as enshrined in the US Shipping Act. In support of that complaint the applicants refer to the judgment in Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 44). In that judgment, the Court annulled a Commission decision on the ground that it did not contain 'any explanation of why the conclusions of [the UK Restrictive Practices Court] and the documents produced by [Publishers Association] in support of its arguments are of no relevance'.

1388 In this case, the applicants observe, the TACA is governed by both Community and US competition law. On several essential respects of the TACA the contested decision adopts a position at odds with that under US law. Contrary to US law,

the contested decision finds that the following are not eligible for exemption, either individually or collectively, and are therefore prohibited: (i) collective rate-fixing by conference members for inland services as part of multimodal transport (paragraphs 400 to 441); (ii) conference service contract powers (paragraphs 442 to 471); (iii) restrictions under the conference rules on the conclusion of service contracts and their terms, in particular with regard to the duration of contracts, contingency clauses, the prohibition of multiple contracts, the level of liquidated damages and the prohibition of independent action on service contracts (paragraphs 464, 487 to 502 and 551 to 558); (iv) the prohibition of individual service contracts and their submission, where permitted, to conference rules (paragraphs 477 to 486 and 551 to 558) and the disclosure of their terms (paragraphs 496 and 551 to 558) and (v) the collective fixing of freight-forwarder compensation (paragraphs 505 to 518). Furthermore, the contested decision relies, in finding that there is a collective dominant position, on the fact that the TACA ensures compliance with its rules by numerous enforcement measures (paragraph 527), lays down a variable tariff structure (paragraphs 534 and 535) and induced Hanjin and Hyundai to enter the trade in question as members of the conference rather than as independents (paragraphs 563 and 564) whereas US law, by contrast, permits conference authority, has never declared variable tariff structures to be unlawful and requires entry to conferences to be 'open' to any undertaking without discrimination and subject to reasonable criteria.

1389 Contrary to what the Commission claims, the applicants do not argue that the Commission is bound by US law or prevented from applying Community law. The applicants' case is that the Commission should have taken account of the position under US law in assessing the lawfulness of the practices in question and, to the extent that it adopts a different position, explain why the assessment of those practices under US law is not relevant.

1390 That obligation applies with particular force in the present case for the following four reasons.

1391 First, the contested decision represents the first case of the application of Community law to service contracts, the agreement of rates of compensation for freight forwarders, and the obligations of liner conferences with respect to the admission of new members (Case 73/74 *Papiers peints* v *Commission* [1975] ECR 1491, paragraph 31). By analogy with the order of the President of the Court of First Instance in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641, which concerns the application of Articles 85 and 86 of the Treaty to a practice applied by both the national competition authorities and the Commission, a contradictory application of Community law and US law should be avoided in the circumstances of the present case.

1392 Second, there is a significant disagreement in this case between the Commission and the undertakings concerned as to material issues of assessment by the Commission of the agreement in question (Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 97). Furthermore, the applicants had challenged the Commission's analysis by reference to US law on numerous occasions.

1393 Third, the applicants observe that the Commission's failure to address the differences between its assessment and that of US law is at odds with the duties of cooperation and positive comity established by the cooperation agreements between the United States of America and the Community. Even if those agreements are not intended to harmonise the substantive law of the parties, their mere existence, as they seek the avoidance of contradictory decisions, makes it all the more incumbent on the Commission to explain why, in the present case, its assessment of the practices and issues raised is different from that of the United States. In the present case the applicants' compliance with the contested decision puts them in conflict with their obligations under US law. The applicants point out that the FMC not only permitted but required them to make individual service contracts subject to the rules of Article 14.2 of the TACA as a condition of the 1995 order conditionally approving settlement. Furthermore, they were also

requested to publish the various 'essential terms' of the service contracts specified at section 8(c) of the US Shipping Act, whereas in the contested decision (paragraphs 496 and 551 to 558) the Commission states that such mutual disclosure is an infringement of Articles 85 and 86 of the Treaty.

1394 Fourth and finally, the applicants submit that Regulation No 4056/86 itself acknowledges, in paragraph 15 of the preamble, that account should be taken of the fact that its application to certain agreements may give rise to conflicts with the laws of certain third countries. They point out that Article 9 of that regulation lays down a procedure to prevent such conflicts.

1395 The Commission considers that that plea is unfounded.

Findings of the Court

1396 By the present plea, the applicants submit that the obligation to state reasons under Article 190 of the Treaty requires the Commission to explain why its appraisal of several important issues differs from that of US law as enshrined in the US Shipping Act.

1397 It should be remembered that the Court has held that although pursuant to Article 190 of the Treaty the Commission is bound to mention the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, in particular, *Remia*, cited at paragraph 575 above, paragraph 26). At most

Article 190 requires the Commission to reply specifically only to the primary allegations made by the applicants in the course of the administrative procedure (*FEFC*, cited at paragraph 196 above, paragraph 426).

1398 In the present case, although the applicants do not state in their application the extent to which they relied on the alleged differences between Community law and US law in the course of the administrative procedure, it is apparent from the TACA parties' response to the statement of objections that they relied on US law in respect of only four specific points, namely TVRIAs, the competition from the Canadian Gateway, conference service contracts and the collective setting of freight-forwarder remuneration.

1399 Therefore, in so far as the applicants complain that the Commission failed in the contested decision to address the possible differences between US law and Community law on other points, their arguments are manifestly unfounded. Clearly the Commission cannot be criticised for not having set out the reasons in its decision for its position on allegations which are made for the first time in these proceedings against that decision. Consequently, the applicants' assertion that in disputing the Commission's assessments they relied to a considerable extent on US law cannot be upheld.

1400 In so far as the alleged differences concern the four points referred to above it is to be noted, with regard first to TVRIAs, that the TACA parties merely stated in their response to the statement of objections that according to FMC rules, TVRs cannot be amended once they have been notified. Such a statement is clearly purely descriptive since the applicants do not base any specific allegation thereon. Consequently, the Commission was under no obligation to give a reasoned response to that statement in the contested decision.

1401 Next, as regards the competition from the Canadian Gateway, it is apparent that the TACA parties stressed in their response to the statement of objections that the antitrust immunity provided by the US Shipping Act did not apply to cargo carried via the Canadian ports to or from the United States. However, the Commission answers that allegation at paragraphs 265 to 273 of the contested decision, in which it sets out to the requisite legal standard the reasons why the Canadian Gateway, notwithstanding the lack of antitrust immunity, did not substantially compete with the TACA parties, pointing out in that regard that there were other factors restricting that competition. There is therefore no failure to state reasons in the contested decision in that regard.

1402 As regards conference service contracts, it is apparent from the response to the statement of objections that the TACA parties submitted, in support of their application for individual exemption, that US law regarded conference service contracts as a traditional practice of liner conferences. However, the Commission answered that allegation at paragraphs 464 to 471 of the contested decision by setting out to the requisite legal standard the reasons why those service contracts were not a traditional conference practice. In particular the Commission stated that the TACA parties' argument failed to account for the findings of fact contained in one of the US law documents to which they referred. Accordingly, the contested decision is not vitiated by a failure to state reasons in that regard.

1403 Finally, as regards the collective fixing of freight-forwarder remuneration, it is apparent from the TACA parties' response to the statement of objections that they relied on US case-law and legislation in support of the contention that US law allowed shipping lines collectively to fix freight-forwarder remuneration. However, at paragraph 512 of the contested decision the Commission expressly stated that the TACA parties' argument on that point based on US law, namely that the conferences operating on the trade in question collectively fixed the levels

of commission to be paid to European freight forwarders since the early 1970s, did not justify the fixing of maximum rates of freight-forwarder remuneration. The Commission set out in the following paragraphs the reasons for which that practice did not satisfy the conditions for individual exemption laid down by Article 85(3) of the Treaty.

1404 It is true that in the contested decision the Commission did not address the relevance or merits of the legal position in US legislation and case-law on that point and, therefore, did not explain why that position was not also justified in Community law.

1405 However, Article 190 of the Treaty does not and cannot require that the Commission discuss such questions, since the obligation to state reasons requires it at most to state why it considers it must reject not US law as such, but the arguments or allegations which the applicants base on US law, at least where they are essential. The Commission cannot be required, as part of its obligation to state reasons, to set out the grounds legally justifying its position with regard to the law of a non-member State; it need only set out the reasons which justify its position in Community law.

1406 According to the case-law, the statement of reasons must enable the parties concerned to obtain adequate indications as to whether the decision is well founded or whether it may be vitiated by some defect enabling its validity to be challenged (*Van Megen Sports*, cited at paragraph 548 above, paragraph 51). The Court has held that national practices, even if common to all the Member States, cannot be allowed to prevail in the application of the competition rules set out in the Treaty (*VBVB and VBBB*, cited at paragraph 162 above, paragraph 40). That is all the more so in the case of the national practices of non-member States (*FEFC*, cited at paragraph 196 above, paragraph 341).

1407 Consequently, since an infringement of US law does not constitute as such a defect resulting in the illegality of a decision adopted under Community law, the Commission cannot be required in its decision to explain why it departs from the legal position adopted under US law. If the Commission were so required it would need to examine the merits in the light of the relevant provisions of US law, since in such a case it would have to explain why the legal approach taken in that jurisdiction does not apply in Community law even though the position adopted by US law cannot take precedence over that adopted by Community law.

1408 Contrary to the applicants' submission, the judgment of the Court in *Publishers Association*, cited at paragraph 1387 above, does not undermine that analysis. Whilst it is true that in that judgment the Court considered that the Commission had not provided a sufficient statement of reasons for its decision in respect of certain aspects of national law relied upon by Publishers Association, it is apparent that the Court found there to be a lack of reasoning solely in so far as the Commission had not set out in its decision the reasons why the findings of fact in the relevant national decisions had no evidential value for the purposes of the exemption procedure before the Commission. In support of its application for individual exemption the applicant in that case had submitted to the Commission decisions of the UK Restrictive Practices Court as 'essential' evidence of the benefits of their agreement laying down uniform standard conditions for the sale of books at a fixed price, where the publisher chooses to market a book as a 'net book'. In particular, it submitted that it was apparent from those national decisions that the abolition of the 'net book' agreement would bring about a decrease in the number and facilities of stockholding booksellers, a rise in book prices and a fall in the number of titles published. In its view, those findings also applied to intra-Community trade, given the single language market in books between Ireland and the United Kingdom.

1409 It follows that, far from undermining the preceding analysis, the *Publishers Association* judgment on the contrary confirms that where an applicant refers to

the approach adopted in national law, the Commission is, at most, required under its obligation to state reasons to explain why it rejects the arguments which the applicant bases on that approach (see, to that effect, *FEFC*, cited at paragraph 196 above, paragraphs 427 and 428).

1410 In the present case, it is apparent for the reasons set out above that in the contested decision the Commission set out to the requisite legal standard the reasons for which the arguments derived by the applicants from US law had to be rejected.

1411 Therefore, the present plea alleging failure to state reasons must be rejected as unfounded.

VI — *The pleas concerning the amount of the fines and various failures to state reasons in that regard*

1412 In support of the present pleas, the applicants submit in the first part that the first abuse, consisting in placing restrictions on the availability and content of service contracts, qualified for immunity from fines in the light of the notification of the TACA agreement with a view to obtaining individual exemption. In the second part they also challenge the amount of the fines imposed by the Commission in the contested decision. They also rely on various failures to state reasons on those points.

1413 As a preliminary point it should be noted that in Article 8 of the operative part of the contested decision the Commission imposed fines on each of the TACA parties solely for the infringements of Article 86 of the Treaty.

1414 In so far as it was found above, in the assessment of the pleas alleging that there was no infringement of Article 86 of the Treaty, that the second abuse, consisting in the abusive alteration of the competitive structure of the market, has not been proved to the requisite legal standard, the part of the fines imposed in respect of that abuse must be annulled for that reason alone.

1415 Furthermore, since it was found above, in assessing the pleas alleging that there was no infringement of Article 86 of the Treaty, that the first abuse, resulting from the imposition of restrictions on the availability and content of service contracts, is not founded in so far as it lies in the mutual disclosure of the availability and content of individual service contracts, the part of the fines imposed in that respect must also be annulled for that reason alone.

1416 Consequently, the applicants' present pleas must be examined solely in so far as they relate to the fine imposed in respect of the first abuse, apart from the mutual disclosure of the availability and content of individual service contracts.

Part one: immunity from fines

A — Arguments of the parties

1417 The applicants allege that the Commission has unlawfully disregarded the applicants' immunity from fines in respect of restrictions on the availability of service contracts.

1418 Contrary to what is stated in paragraph 584 of the contested decision, the Commission could not impose fines for infringement of Article 86 of the Treaty as regards the restrictions on the availability of service contracts where such acts fell within the limits of the activity described in the notification and took place after notification.

1419 The applicants claim that Article 19(2)(a) and Article 19(4) of Regulation No 4056/86 give immunity from fines both for infringements of Article 85(1) of the Treaty and for infringements of Article 86 of the Treaty in so far as the infringement constitutes activity notified for exemption under Article 85(3) of the Treaty. Article 19(4) of Regulation No 4056/86, which lays down the rules on immunity from fines, refers to 'the fines provided for in paragraph 2(a)', which covers those imposed for infringement of 'Article 85(1) or Article 86'. They stress that this reference is in no sense limited to the fines provided for in Article 19(2)(a) of Regulation No 4056/86 for infringement of Article 85(1). Contrary to the Commission's submission, that interpretation certainly does not result in absolute immunity from fines under Article 86 for undertakings in a dominant position. When notification is made and a decision denying exemption under Article 85(3) is taken, immunity is lost both for infringements of Article 85(1) and for infringements of Article 86.

1420 The Court confirmed that interpretation in *United Brands*, cited at paragraph 853 above, in which no fines were imposed under Article 86 in respect of activities which had been notified to the Commission for exemption on the ground that no intentional or negligent infringement had been committed during the exemption procedure. They also refer to the Opinion of Judge Kirschner, acting as Advocate General, in Case T-51/89 *Tetra Pak Rausing* v *Commission* (*'Tetra Pak I'*) [1990] ECR II-309, II-312, point 39, in which he observed that 'Article 15(5) of Regulation No 17... indirectly governs the application of

Article 86 during the exemption procedure' and that 'where an agreement, decision or concerted practice is notified pursuant to Article 4 of the regulation, a fine may not be imposed on the conduct notified on account of either an infringement of Article 85(1) or an infringement of Article 86'. That approach is also consistent with academic opinion.

1421 The applicants also allege that their argument is justified on general policy grounds in that the immunity from fines for infringement of both Article 85(1) and Article 86 is likely to encourage undertakings to notify the Commission. They point to the statement in the sixth recital to Regulation No 17 that 'it may be in the interest of undertakings to know whether any agreements, decisions or practices to which they are party, or propose to become party, may lead to action on the part of the Commission pursuant to Article 85(1) or Article 86'. Similarly, Advocate General Jacobs stated that '[the purposes of Regulation No 17] include encouraging the notification of agreements, decisions and practices and generally facilitating approaches by undertakings to the Commission' (Opinion in Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, I-4806, paragraph 23).

1422 The applicants claim that if immunity were restricted to fines imposed for breach of Article 85(1), the notification system would serve no purpose in the case of dominant undertakings. The Court has acknowledged that where an undertaking takes the risk of reporting the agreement or concerted practice itself, it should enjoy immunity from fines (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 93). In addition to the risk of the Commission's finding that the agreement or practice infringes Article 85(1) and does not qualify for exemption under Article 85(3), and the risk of fines for conduct prior to notification, the undertakings also run the risk, according to the Commission's argument, of the agreement which has been notified for exemption being relied upon by the Commission to justify a

finding that the undertakings are collectively dominant or the conclusion that the agreement or practice notified infringes Article 86. The Commission's approach disturbs the balance necessary for the proper functioning of the notification system by reducing the advantages and increasing the risks of notification.

1423 The applicants do not consider that the Commission's distinction between an individual dominant position and a collective dominant position is relevant in that respect. In the case of an undertaking in a putative dominant position entering into a contract with a non-dominant undertaking, the dominant undertaking would have immunity from fines under Article 85 but might have no immunity if the contract itself were considered by the Commission to give rise to abusive conduct. The applicants consider that the undertaking in an individual dominant position is entitled to protection against fines under both Article 85 and Article 86.

1424 Furthermore, without immunity from fines in respect of infringements under Article 86, the Commission would be able to circumvent the immunity from fines under Article 85 and impose fines in respect of notified activities without following the special procedure for the withdrawal of immunity under Article 19(4) of Regulation No 4056/86. Notwithstanding the fact that the undertakings concerned would not have been able to exercise their procedural rights to object to the withdrawal of immunity, the Commission would be entitled to impose fines with retroactive effect in respect of agreements notified and activities undertaken to implement such agreements in accordance with the terms notified. That result runs contrary to the procedural safeguards described in the judgment in Joined Cases 8/66 to 11/66 *Cimenteries CBR and Others* v *Commission* [1967] ECR 75, which declares that 'the effect [of measures withdrawing immunity from fines] was that the undertakings ceased to be protected by Article 15(5) which exempted them from fines, and came under the contrary rules of Article 15(2) which thenceforth exposed them to the risk of fines. This measure deprived them of the advantages of a legal situation which

Article 15(5) attached to the notification of the agreement, and exposed them to a grave financial risk' (p. 91). The applicants claim that it follows that if the Commission considered that the TACA parties' service contracts constituted an abuse of a collective dominant position for which no exemption could be granted, it could, even before the initiation of the substantive procedure, have withdrawn the applicants' immunity from fines. They note that the Commission did not do so in the present case.

1425 Lastly, the applicants maintain that the Commission does not give reasons as to why it considers that notification confers no immunity from fines for infringements of Article 86, when that is the first time it takes that approach, which runs counter to its practice in decisions, to the case-law of the Court (*Papiers peints*, cited at paragraph 1391 above), to the terms of Regulation No 4056/86 and to academic opinion.

1426 The Commission points out that the second subparagraph of Article 19(4) of Regulation No 4056/86 confers immunity from fines for the period between notification and the adoption of the Commission decision 'in application of Article 85(3)'. That strongly suggests that immunity is granted only in respect of the prohibition from which exemption may be granted, that is to say Article 85(1). The Commission is of the opinion that that interpretation is confirmed by the third paragraph of Article 19(4), which provides that the Commission may withdraw immunity where it considers that the requirements for the application of Article 85(1) are met and the application of Article 85(3) is not justified. If the intention of the legislature had been to include immunity from fines under Article 86, it would certainly have also provided for withdrawal of such immunity. The applicants' interpretation would have the result of making immunity from fines under Article 86 absolute.

1427 The Commission also underlines the fact that since the purpose of immunity is to provide an incentive to undertakings to notify agreements which may infringe

Article 85(1), they must be protected solely against the risk of fines which would arise in the event that the Commission found that their agreements did not fulfil the criteria of Article 85(3). In relation to Article 86, no such balance of interests, no such need for protection and thus no such function for immunity exists.

1428 The Commission draws attention to the fact that if the question of immunity under Article 86 arises in the present case, it is because of the collective dominance of the applicants. In such a case Article 85 may render unlawful the collective nature of the activity, whereas Article 86 relates to the abusive character of the conduct in question. Undertakings which have collectively abused their dominant position should not be in a better position than a single dominant undertaking, which would not have the possibility of notifying its conduct and obtaining immunity.

1429 Finally, as regards the argument based on withdrawal of immunity, the Commission argues that if Article 19(2) of Regulation No 4056/86 does not provide immunity in respect of infringements of Article 86, the Commission cannot be accused of having sought to avoid the procedural safeguards laid down by Article 19(4) for withdrawal of immunity.

1430 As regards compliance with the obligation to state reasons, the Commission asserts that it is unaware of any existence of 30 years or so of practice enshrining such immunity and it stresses that the applicants fail to cite any case in which the Commission decided that notification of an agreement or practice confers immunity from the imposition of fines under Article 86. On the contrary, in *United Brands*, cited at paragraph 853 above, the Commission merely considered it inappropriate to impose a fine, which implies that there was no obstacle to imposing fines.

B — Findings of the Court

1431 By the first plea the applicants allege essentially that the fine imposed in respect of the first abuse, consisting in the abusive imposition of restrictions on the availability and content of service contracts, should be annulled on the ground that it was covered by the immunity from fines laid down by Regulation No 4056/86. They also claim that there was a failure to state reasons in that regard.

1432 It should be noted at the outset, however, that according to paragraph 583 of the contested decision the Commission imposed fines on the TACA parties not only under Article 19(2) of Regulation No 4056/86 but also, in so far as the first abuse also falls within Regulation No 1017/68, under Article 22(2) of Regulation No 1017/68.

1433 The Court has already held that Article 22 of Regulation No 1017/68 does not provide any immunity from fines in respect of notified agreements falling within its scope, whether fines imposed under Article 85 or fines imposed under Article 86 (*Atlantic Container Line*, cited at paragraph 44 above, paragraph 48).

1434 It follows that the applicants cannot rely on immunity for the part of the fines imposed in respect of the first abuse under Article 22 of Regulation No 1017/68.

1435 Therefore, contrary to the applicants' submission, even if the present plea were well founded, it would not result in the annulment of all of the fines imposed in respect of the first abuse, but only of the part of those fines imposed under Regulation No 4056/86.

1436 In assessing the present plea, it is therefore necessary to consider whether the part of the fines imposed under Article 86 of the Treaty pursuant to Regulation No 4056/86 was covered by the immunity laid down by that regulation.

1437 Under Article 19(2)(a) of Regulation No 4056/86, the Commission may impose fines on undertakings which 'infringe Article 85(1) or Article 86 of the Treaty'. However, the second subparagraph of Article 19(4) of the same regulation provides that 'the fines provided for in paragraph 2(a) shall not be imposed in respect of acts taking place after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification'. The third subparagraph of Article 19(4) provides however that that provision shall not have effect 'where the Commission has informed the undertakings concerned that after preliminary examination it is of the opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified'.

1438 The Commission considered in paragraph 584 that the above-cited provisions did not provide for immunity for fines with respect to infringements of Article 86 of the Treaty. Consequently, it imposed fines on the TACA parties on the basis of that provision, notwithstanding the notification of the TACA.

1439 In order to decide whether the Commission was entitled to exclude immunity for the first abuse, it is necessary first to determine the scope of the immunity provided for by Regulation No 4056/86 and then the extent, if any, to which the practices constituting the first abuse are covered by that immunity.

1. The scope of the immunity provided for by Regulation No 4056/86

1440 In order to determine the scope of the immunity laid down by Regulation No 4056/86, it is necessary to have regard to the wording of the relevant provisions of that regulation as well as to their purpose and general structure.

1441 As regards first the wording of the relevant provisions of Regulation No 4056/86, it should be noted as a preliminary point that the Court has already held (*Atlantic Container Line*, cited at paragraph 44 above, paragraphs 50 to 52) that the immunity from fines represents a derogation. Consequently, the relevant terms of the second subparagraph of Article 19(4) of Regulation No 4056/86 providing for immunity from fines in the case of notification must be strictly interpreted and cannot be interpreted so that its effects extend to cases not expressly provided for.

1442 However, the immunity provided for by the second paragraph of Article 19(4) refers expressly to 'the fines provided for in paragraph 2(a)'. The fines laid down by that provision are those which are imposed not only for taking part in an agreement restricting competition, but also for abuses. Article 19(2)(a) expressly refers to fines for infringement of 'Article 85(1) or Article 86 of the Treaty'.

1443 It thus follows that that reference to the express wording of Article 19(4) of Regulation No 4056/86, far from restricting immunity from fines to infringements of Article 85 of the Treaty, expressly provides on the contrary that abuses under Article 86 of the Treaty may also qualify for that immunity.

1444 It is true, as the Commission points out, that the second subparagraph of Article 19(4) of Regulation No 4056/86 envisages acts 'after notification to the Commission and before its decision in application of Article 85(3) of the Treaty' and which 'fall within the limits of the activity described in the notification'. Only agreements falling within Article 85(1) of the Treaty may be notified with a view to obtaining exemption under Article 85(3), since abuse of a dominant position is prohibited without exception (*Ahmed Saeed Flugreisen*, cited at paragraph 1109 above, paragraph 32).

1445 However, contrary to the Commission's submission, it does not follow from this that the immunity only applies to fines imposed for infringement of Article 85(1) of the Treaty.

1446 In the first place, according to the express wording of the passages from the second subparagraph of Article 19(4) cited above, the immunity from fines does not cover 'agreements between undertakings', 'decisions by associations of undertakings' and 'concerted practices' contrary to Article 85(1) of the Treaty, but 'acts', a generic term which may include, without distorting its meaning, unilateral practices falling within Article 86 of the Treaty. As for the requirement that those acts must occur 'after notification', it clearly does not concern the material scope of the immunity, which concerns 'acts', but its temporal scope. As

the Court has already held, that provision is a temporary derogation benefiting undertakings that notify an agreement in respect of acts taking place after notification and before the final decision on that notification (*Atlantic Container Line*, cited at paragraph 44 above, paragraph 46).

1447 In the second place, whilst the requirement that the acts must remain 'within the limits of the activity described in the notification' necessarily means that only activities in fact notified qualify for exemption (Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 74), it in no way has the effect of restricting immunity to infringements of Article 85(1) of the Treaty to the exclusion of those of Article 86 of the Treaty. Even though the abuses cannot be notified with a view to obtaining an exemption, certain activities or agreements notified may be regarded as constituting abuses since, according to the case-law, the Commission is entitled to consider that an agreement restricting competition within the meaning of Article 85(1) of the Treaty also constitutes an abuse under Article 86 of the Treaty if it is the act of an undertaking in a dominant position (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 116, and *Ahmed Saeed Flugreisen*, cited at paragraph 1109 above, paragraph 34 et seq.). Thus an agreement notified by an undertaking in a dominant position, such as an exclusive supply agreement, may constitute not only an agreement prohibited by Article 85(1) of the Treaty but also an abuse prohibited by Article 86 of the Treaty. Such an abuse clearly amounts to 'acts' which remain 'within the limits of the activity described in the notification' within the meaning of the second subparagraph of Article 19(4) since it consists in the notified agreements themselves.

1448 The Commission is wrong to argue that the third subparagraph of Article 19(4) of Regulation No 4056/96, which enables the Commission to withdraw immunity where it considers after a preliminary examination that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified, necessarily prevents infringements of Article 86 of the Treaty from qualifying for immunity since otherwise such infringements would qualify for absolute immunity.

1449 That argument is based on the false premiss that the third subparagraph of Article 19(4) of Regulation No 4056/86 does not permit the withdrawal of immunity from fines imposed in respect of Article 86 of the Treaty. Whilst it is true that the third subparagraph of Article 19(4) of Regulation No 4056/86 provides that the withdrawal of immunity can only occur where after a preliminary examination the Commission considers that the notified agreements cannot be exempted under Article 85(3) of the Treaty, it does not in any case provide that immunity may only be withdrawn for infringements of Article 85 of the Treaty. It is perfectly apparent from the wording of that provision that the requirement that there be an agreement prohibited by Article 85 of the Treaty refers not to the purpose of the withdrawal of immunity, but to the circumstances in which that may be decided. Thus, where an abuse consists in an agreement notified with a view to obtaining an exemption, if the Commission considers at the end of a preliminary examination that that agreement is prohibited by Article 85(1) and cannot qualify for such an exemption and decides to withdraw immunity, that withdrawal will concern not only the infringement of Article 85(1) of the Treaty but also the infringement, if any, of Article 86 of the Treaty.

1450 It thus follows that not only does the second subparagraph of Article 19(4) of Regulation No 4056/86 expressly provide that abuses contrary to Article 86 of the Treaty may qualify for immunity from fines, but also that there is nothing in the wording of the second and third subparagraphs of that provision which prevents that immunity from applying to infringements of Article 86 of the Treaty.

1451 In those circumstances, the Commission cannot argue in the context of these proceedings that the applicants' argument misconstrues the wording of Article 19(4) of Regulation No 4056/86 and that the wording 'strongly' suggests that the immunity only applies to infringements of Article 85(1) of the Treaty.

1452 That conclusion in no way results in a broad interpretation of Article 19(4) of Regulation No 4056/86 incompatible with the principle of interpretation applicable in the present case, since it flows directly from the express wording

of that provision without distorting its meaning or even simply supplementing it. Moreover, the immunity from fines does not apply to all abuses contrary to Article 86 of the Treaty but merely, according to the express wording of the second subparagraph of Article 19(4) of Regulation No 4056/86, to those which remain 'within the limits of the activity described in the notification'.

1453 Furthermore, the scope of the second subparagraph of Article 19(4) of Regulation No 4056/86, as is apparent from its terms, is compatible with the objective pursued by that provision and its general structure.

1454 The Court has already held with regard to the similar provisions of Regulation No 17 that the benefit of immunity for undertakings which have notified an agreement or a concerted practice constitutes the quid pro quo for the risk run by the undertaking in taking the initiative to give notice of the agreement or concerted practice. The undertaking risks not only a finding that the agreement or practice is in breach of Article 85(1) of the Treaty and refusal of the application of Article 85(3) but also the imposition of a fine for its actions prior to the notification (*Musique diffusion française*, cited at paragraph 1422 above, paragraph 93, and *Asociación Española de Banca Privada*, cited at paragraph 1421 above, paragraph 52). The Court also emphasised that if the Community legislature wished to reserve the benefit of the immunity to undertakings which notify their agreements, it is because by divulging them they run the risk of being obliged to terminate them and at the same time correspondingly reduce the Commission's investigation workload (*Stichting Sigarettenindustrie*, cited at paragraph 1447 above, paragraph 76).

1455 Whilst it is true that unlike agreements falling within Article 85 of the Treaty abuses contrary to Article 86 of the Treaty are prohibited without exception, where an undertaking holding a dominant position notifies agreements to the Commission with a view to obtaining an exemption under Article 85(3) of the

Treaty, it runs the risk not only that the Commission considers that that agreement does not qualify for that exemption and is prohibited, but also, if the Commission takes the view that the agreement constitutes an abuse, of its being prohibited under Article 86 of the Treaty and of incurring fines on that basis. As noted above, according to the case-law the Commission is entitled to consider that an agreement restricting competition also constitutes an abuse if it is the act of an undertaking in a dominant position (*Hoffmann-La Roche*, cited at paragraph 765 above, paragraph 116, and *Ahmed Saeed Flugreisen*, cited at paragraph 1109 above, paragraph 44).

1456 Furthermore, where the Commission grants an individual exemption pursuant to Article 85(3) of the Treaty in respect of agreements notified by undertakings holding a dominant position it indirectly bars itself, in the absence of a change in the facts or the law, from considering that the same agreements constitute abuses contrary to Article 86 of the Treaty (see to that effect *Tetra Pak I*, cited at paragraph 1420 above, paragraph 28). Before granting exemption to an undertaking in a dominant position the Commission must check that all the conditions laid down in Article 85(3) of the Treaty, that is to say in particular the consumers' share of the benefit of the cartel, the proportionality of the restrictions imposed and the maintenance of competition in respect of a substantial part of the products or services in question, are met. Therefore, if the Commission makes a positive finding — granting exemption — in respect of a given agreement, the same agreement cannot be held in a second set of proceedings brought for infringement of Article 86 of the Treaty to be an abuse of a dominant position. That provision thus has effects within the ambit of Article 85(3) in so far as the latter precludes exemption in respect of conduct which constitutes an abuse of a dominant position (Opinion of Judge Kirschner acting as Advocate General in *Tetra Pak I*, cited at paragraph 1420 above, paragraphs 40 and 45).

1457 It follows that in terms of the risk involved, an undertaking in a dominant position is in a position similar to that of a non-dominant undertaking which has notified an agreement with a view to obtaining exemption. If the Commission refuses to grant an exemption under Article 85(3) of the Treaty that undertaking

loses the certainty that, if there is no change in the circumstances of fact or law, the Commission will not intervene under Article 86 of the Treaty in respect of the agreement notified and moreover risks being fined for an agreement which it has itself disclosed, thereby facilitating the Commission's investigative workload. It is also clear that the immunity from fines in respect of the risk of infringement of Article 85(1) of the Treaty for which an undertaking in a dominant position qualifies in respect of notified agreements would be largely meaningless if that undertaking could be fined for infringing Article 86 of the Treaty on the basis of having entered into those same agreements.

1458 That is all the more so where, under the competition rules established by Regulation No 4056/86, the grant of an individual exemption under that regulation does not require that an agreement be notified first. Under Article 11(4) of that regulation, the Commission is required to grant an exemption even on its own initiative or following a complaint. In those circumstances, where a shipping line nevertheless chooses voluntarily to notify an agreement with a view to obtaining individual exemption, it must be conceded that it is entitled a fortiori to protection against the risk of fines which might be imposed under Article 86 of the Treaty in respect of the agreement.

1459 It is thus in keeping with the purpose and general structure of the scheme for the immunity laid down by Regulation No 4056/86 to apply also to infringements of Article 86 of the Treaty which consist in notified agreements.

1460 That conclusion cannot be undermined by the fact that dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on a market where competition is already restricted by the fact of their dominant position (*Michelin*, cited at paragraph 337 above, paragraph 57). That special responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings. It cannot on the other hand deprive dominant undertakings of immunity from fines where they have taken the risk of disclosing

to the Commission agreements restricting competition which could be qualified as an abuse should exemption be refused. Such conduct shows precisely that a dominant undertaking is assuming the special responsibility placed upon it. If the Commission is possibly entitled to qualify such conduct as a restriction of competition and abuse of a dominant position and, if so, to impose fines in respect of each of those infringements, it is for it to assume all the legal consequences of that as regards observance of the immunity from fines.

1461 Furthermore, contrary to what the Commission maintains, applying immunity from fines for infringements of Article 86 of the Treaty in no way confers an advantage on undertakings in a collective dominant position when compared with undertakings holding an individual dominant position. An undertaking holding an individual dominant position is equally capable of qualifying for immunity from fines in respect of infringements of Article 86 of the Treaty where the latter consist in notified agreements.

1462 On those grounds it must be concluded that both the wording of the second subparagraph of Article 19(4) of Regulation No 4056/86 and its aim and general structure justify application of the immunity laid down by that provision not only for infringements of Article 85(1) of the Treaty but also for those of Article 86 of the Treaty where the abuse results from notified agreements.

1463 In those circumstances, it remains in the present case to assess the extent to which the applicants' first abuse consists in notified agreements which may qualify for immunity from fines under Regulation No 4056/86.

2. The application of the immunity from fines to the first abuse

1464 It is apparent from paragraphs 551 to 558 of the contested decision that the first abuse lies in the outright ban on individual service contracts in 1994 and 1995 and, where they were authorised with effect from 1996, in the application thereto of certain conditions collectively agreed by the TACA and the mutual disclosure of their terms, and in the application of certain terms collectively agreed by the TACA to conference service contracts.

1465 It is apparent from paragraph 556 of the contested decision that the terms in question collectively agreed by the TACA are those concerning the prohibition of contingency clauses, the duration of service contracts, the ban on multiple contracts and the amount of liquidated damages.

1466 It has already been found above that the first abuse was not founded in so far as it concerns the mutual disclosure of the availability and contents of individual service contracts.

1467 In those circumstances it is therefore only necessary to consider whether the other abusive practices constituting the first abuse consist in agreements notified to the Commission.

1468 The TACA rules on service contracts are laid down by Article 14 of the TACA which was notified to the Commission with a view to obtaining individual exemption under Article 12 of Regulation No 4056/86.

1469 All the abusive practices which are the subject of the present plea are set out in Article 14 of the TACA. Article 14(3)(a) of the TACA expressly prohibits individual service contracts, whilst Article 14(2)(a), (c), (d) and (e) lay down the maximum duration of service contracts, the prohibition of contingency clauses, the amount of liquidated damages and the prohibition of multiple contracts respectively. Furthermore, as is apparent from paragraph 32 of the contested decision, the TACA parties expressly informed the Commission on 9 March 1995 that the FMC had required them to amend their agreement so as to allow the conclusion of individual service contracts in 1996 provided that those contracts complied with the provisions of Article 14 of the TACA. On 21 March 1995, the TACA parties thus sent the Commission an amended version of Article 14 of the TACA notified in 1994.

1470 Consequently, the abusive rules on service contracts at issue in this plea fell within the scope of the immunity from fines laid down by the second subparagraph of Article 19(4) since they were in fact notified to the Commission with a view to obtaining exemption.

1471 Since the initial notification of the TACA took place on 5 July 1994 and the period of the infringement recorded in the contested decision covered, according to paragraph 592 thereof, 'part of 1994 and the whole of 1995 and 1996', all the fines imposed on the TACA parties in the contested decision in respect of the abusive rules in question concern acts which occurred after the notification of the TACA and before the adoption of the contested decision.

1472 The part of the fines imposed under Regulation No 4056/86 in respect of the abusive rules on service contracts laid down by Article 14 of the TACA was therefore covered by the immunity from fines laid down by that regulation.

1473 Consequently, without its being necessary to ascertain whether there is an adequate statement of reasons in the contested decision on that point, this plea of the applicants must be upheld, inasmuch as by imposing fines in respect of the rules on service contracts laid down by Article 14 of the TACA the Commission breached the immunity from fines laid down by Regulation No 4056/86 which the applicants qualified for by reason of the notification of the TACA. That part of the fines must therefore be annulled.

1474 For the remainder, that is, the part of the fines imposed under Regulation No 1017/68, the applicants' plea must be rejected for the reasons given at paragraphs 1432 to 1434 above.

Part two: calculation of the fines

1475 Under the third part of the present pleas relating to the amount of the fines and the various failures to state reasons in that regard, the applicants challenge, first, the method adopted by the Commission to determine the amount of the fines. Second, they submit that the infringements punished by the fines were not committed deliberately or negligently. Third, they submit that the Commission erred in its assessment of the effect, gravity and duration of the infringements as well as the mitigating circumstances. Fourth, they refer to certain specific individual factors which the Commission failed to take into account. Fifth and finally, they challenge the interest rate adopted in the contested decision for late payment of the fines.

A — The method adopted by the Commission to determine the amount of the fines

1. Arguments of the parties

1476 The applicants claim that the Commission adopted an irrational and incoherent approach in calculating the fines, in breach of the fundamental principles of Community law.

1477 Any fine imposed by the Commission in application of its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty ('the Guidelines') (OJ 1998 C 9, p. 3) must observe the principles laid down by the Court. It follows that, even if the Commission's new approach is that a fine should reflect principally the seriousness of the infringement as such, independently of the size and turnover of the undertaking which has committed it, the principles developed by the Court require that other factors also be taken into account. In particular, the applicants consider that the overriding principle derived from the case-law of the Court is that in assessing the seriousness of an infringement the Commission must have regard to all the relevant factors: the total turnover of the undertaking concerned, the proportion of that total turnover accounted for by its turnover on the market where the infringement was committed, the profit derived by it from the unlawful practices, the size of the undertaking and the value of the goods or services concerned (see, for example, *Musique diffusion française*, cited at paragraph 1422 above, paragraphs 120 and 121).

1478 That case-law shows, first, that all the relevant factors must be taken into account by the Commission when it determines the seriousness of the infringement and

the amount of the fines and, second, that failure to take one or more factors into account means that disproportionate importance is attached to those factors which are taken into account.

1479 In the present case, the applicants allege, the contested decision does not comply with the requirements laid down by the case-law for several reasons.

1480 First, the Commission lacked impartiality and infringed the principle of non-discrimination and equal treatment enshrined in the case-law (Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 55) by fining the applicants on the basis of artificial categories and not on the basis of the individual applicant's size.

1481 The Commission fails to provide any explanation or justification for the division of the undertakings into four groups, or for the criteria identifying those groups. Moreover, the categories of fines in Table 13 do not reflect the differences in size in the four groups of carriers identified in Table 12. Thus, small carriers, whose worldwide containerised shipping turnover is only 6% to 12% of the highest turnover, each receive a fine which is 25% of that of the applicant receiving the highest fine. The level of individual fines was differentiated only on the basis of worldwide turnover and only to the extent that the Commission placed the applicants into four groups on the basis of their worldwide turnover. Consequently, the applicants' size played little part in the calculation of fines. If the applicants' size had been taken into account in determining the fines they would have been lower.

1482 DSR-Senator points out on its own behalf in this context that the fine imposed on it is half of that imposed on the large carriers falling within the first group whereas its worldwide turnover from the carriage of containerised cargo is about a quarter of that of the large carriers.

1483 Similarly, the applicant in Case T-212/98 notes that whilst the average size of the undertakings in the third category of 'small to medium carriers' in which it was placed is less than a quarter of that of the largest TACA members, the applicant received a fine which is half the amount imposed on the large TACA members. Furthermore, although in 1996 it held the lowest turnover of the TACA parties on the transatlantic trade, the fine imposed on it was double that imposed on three other applicants whose transatlantic turnover was 400% higher than the applicant's, and the same as that imposed on three applicants whose transatlantic turnover was 800% or more of that of the applicant.

1484 The applicant in Case T-213/98 alleges that the fine infringes the principle of equal treatment in that it has received the second highest fine and yet its turnover on the relevant market is the second lowest. Consequently, notwithstanding an average share of the relevant market in the period from 1994 to 1996 of 0.7%, the amount of the fine imposed on it represents 7.76% of the total amount of the fine imposed on the conference as a whole.

1485 Finally, the applicants in Case T-214/98 submit that the Commission has infringed the principle of equal treatment by failing to carry out an individual assessment of each of the applicants on the relevant market.

1486 Second, the Commission failed to carry out an individual assessment of each applicant in setting the fines (*Musique diffusion française*, cited at paragraph 1422 above, paragraphs 129 to 134).

1487 That is demonstrated by the fact that it placed the applicants, arbitrarily and without any explanation, into four groups and fined the groups rather than the individual applicants which comprise them. Furthermore, the Commission has not taken account of any other factors, such as turnover on the relevant trade or profit derived from the infringement.

1488 The applicant in Case T-213/98 submits that the Commission did not carry out an individual assessment of its position as the smallest line (bar one) on the transatlantic trade. It points out that it received a fine equivalent to 98% of its turnover in 1996 on the transatlantic trade.

1489 Third, the Commission calculated the fines on the basis of total worldwide turnover in respect of transport services relating to the carriage of containerised cargo with no reference to turnover on the relevant market.

1490 The applicants consider that, in accordance with the case-law (*Musique diffusion française*, cited at paragraph 1422 above, paragraphs 120 and 121; Case 183/83 *Krupp* v *Commission* [1985] ECR 3609, paragraph 37; Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 94; *CEWAL I*, cited at paragraph 568 above, paragraph 233; Opinion of Advocate General Slynn in *Musique*

diffusion française, cited above, p. 1914, at p. 1950), the Commission should have taken account of the turnover of the parties from the provision of services on the market to which the infringement relates, that is, from the provision of transatlantic transport services, and the proportion of that turnover in worldwide containerised shipping turnover. Furthermore, at paragraph 588 of the contested decision the Commission states that transatlantic turnover is relevant in assessing the impact of the infringements.

1491 The applicants stress that for many of them the turnover accounted for by their transatlantic services represents a small proportion of their worldwide turnover. The amount of the fines is thus manifestly disproportionate to the turnover on the transatlantic trade. They note that Advocate General Fennelly stated (Opinion in *CEWAL II*, cited at paragraph 638 above) that an infringement by an undertaking in relation to only a small sector of its business will usually be less serious than an infringement in relation to the whole of its business. The disproportion is emphasised in the present case by the fact that only 60% (or less) of their turnover on the transatlantic trade is derived from the service contracts which are the subject of the first abuse and partly that of the second abuse.

1492 As a result, the applicants claim, the Commission has failed to assess 'the scale of the infringements' (*Musique diffusion française*, cited at paragraph 1422 above, paragraph 120) correctly and the fine is 'the result of a simple calculation based on the total turnover' (*Musique diffusion française*, cited at paragraph 1422 above, paragraph 121).

1493 Fourth, the applicants submit that the Commission failed to have regard to all the factors relevant to an assessment of gravity in setting the fines (*Musique diffusion*

française, cited at paragraph 1422 above, paragraph 129, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127).

1494 Since the only factor taken into account by the Commission was the worldwide turnover from containerised shipping services, disproportionate importance is inevitably attached to that factor. The applicants submit that the relevant factors to be taken into account should have included the position of the parties on the relevant market, any profits from the supply of transatlantic services under service contracts and the turnover from service contracts compared with total turnover.

1495 Fifth, the applicants claim that the Commission failed to consider any profits from the relevant market, with the consequence that the fines are disproportionate.

1496 The applicants observe that in the Guidelines (p. 5) the Commission points to the need to relate fines in particular to any 'economic or financial benefit derived by the offenders' (see also the *XXI*st *Report on Competition Policy*, 1992, paragraph 139). Accordingly, the applicants claim, the amount of the fines should not be greater than any profits made from the infringement on the relevant market because it is on that market that the infringement was committed. In the present case, the Commission did not take account of the applicant's net results on the transatlantic trade in 1996 in determining the amount of the fines.

1497 Sixth, the applicants consider that the Commission failed to observe the principle of proportionality. They refer to the foregoing arguments in that regard.

1498 Seventh, the applicants in Cases T-213/98 and T-214/98 consider that the Commission infringed the principle of legitimate expectations.

1499 The applicant in Case T-213/98 alleges that the Commission did not apply in the present case the principles governing the calculation of fines derived from earlier case-law.

1500 The applicants in Case T-214/98 also criticise the Commission for failing to follow its Guidelines in setting the fines. Since the basic amount of the fine was fixed for groups of undertakings and not for each undertaking separately there was no connection between the basic amount of the fine and the turnover (total or relative to the relevant market) of the undertakings in question. Moreover, the Commission made findings as to the seriousness of the abuses without demonstrating their actual impact on the relevant market. It also failed to take account of the size of the geographic market affected by the alleged infringements.

1501 The applicants in Case T-214/98 consider that by not applying the criteria set out in the Guidelines for setting fines the Commission infringed the principle of legitimate expectations. The Guidelines give rise to a legitimate expectation on the part of the undertakings that the Commission will exercise its discretion to set fines in each particular case in accordance with the approach set out in the Guidelines and having regard to all the criteria mentioned therein. The Guidelines themselves state that the principles outlined therein 'should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike', and that 'the new method of determining the amount of a fine will adhere to the rules [they set out]'. In any event the Commission cannot amend a measure of general application such as the Guidelines by an individual decision (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 44 and 45).

1502 Eighth, the contested decision contains no explanation of the calculation of the fines. The approach adopted by the Commission infringes the principle of transparency, contrary to Article 190 of the Treaty and the case-law (*Tréfilunion*, cited at paragraph 498 above, paragraph 142; Case T-147/89 *Société métallurgique de Normandie* v *Commission* [1995] ECR II-1057; Case T-151/89 *Société des treillis et panneaux soudés* v *Commission* [1995] ECR II-1191; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 206).

1503 In this regard the applicants point out that the contested decision explains neither the reasons for which the Commission divided the applicants into four categories (Table 12 of the contested decision) nor the criteria adopted by the Commission for making that division. The decision thus explains neither the relationship between Table 12 and Table 13 (which sets out the amount of the fines imposed), nor the way in which the figures in Table 13 have been calculated. Furthermore, the applicants consider that in setting the fines at a level which represents such a significant proportion of their turnover on the relevant trade, the Commission has departed from its own practice in the past (Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty, Cases IV/33.126 and 33.322 — Cement, OJ 1994 L 343, p. 1; and Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty, Case IV/35.733 — VW, OJ 1998 L 124, p. 60), without giving reasons to the requisite legal standard for that change, contrary to the requirements set out in *Papiers peints*, cited at paragraph 1391 above.

1504 Furthermore, the applicant in Case T-212/98 submits in addition that the Commission does not explain in the contested decision why it imposes a fine on it equivalent to double its relative size but refers solely to its worldwide turnover, contrary to its previous practice in such matters (*Musique diffusion française*, cited at paragraph 1422 above, paragraph 129; *Deutsche Bahn*, cited at paragraph 1493 above, paragraph 127). Nowhere does the Commission explain why it chose not to take into account other factors, such as its position on the market, its profits and its position as a new entrant to the trade and new member of the TACA. Moreover, as regards the role played by the applicants in the alleged infringements, the Commission does not show that the TACA members

acted together to induce third parties to join the TACA, nor does it show that the applicant itself participated in those inducements. In *Musique diffusion française*, cited at paragraph 1422 above, the Advocate General observed that 'an infringement committed by an undertaking in only a small sector of its activities is, in ordinary circumstances, less grave than one committed in the whole of its activities'.

1505 It is only in the defence that the Commission explains in general terms why it chose to calculate the level of fines by reference to worldwide turnover. It fails to explain, however, why that method is justified with respect to the applicant despite the fact that it results in a disproportionately high fine in its case, even when compared with the other applicants by reference to worldwide turnover alone. In *PVC II*, cited at paragraph 191 above, the Court of First Instance reduced the fines on the ground that the Commission overestimated the market share of the undertakings concerned on the relevant market when apportioning the total fine between them.

1506 Finally, the applicants in Case T-214/98 claim for their part that, contrary to the requirements of the case-law, the contested decision does not explain the method used for calculating the amount of the fines, so that the applicants are unable to ascertain whether the Commission applied that method correctly (*Tréfilunion*, cited at paragraph 498 above, paragraph 142, and *Mo och Domsjö*, cited at paragraph 138 above, paragraph 278). In particular, the Commission failed to explain in the contested decision the criterion used to divide the TACA parties into four groups.

1507 The Commission considers that none of these pleas is well founded.

2. Findings of the Court

1508 By the present pleas and complaints, the applicants essentially criticise the Commission for having divided the TACA parties into four groups in order to determine the amount of the fines. They rely on three kinds of argument in that regard. The first kind concerns the lack of individual assessment and breach of the principle of proportionality, as well as failure to state reasons in that regard. The second concerns infringement of the principle of equal treatment and failure to state reasons in that regard. The third group concerns infringement of the principle of the protection of legitimate expectations and failure to state reasons in that regard.

1509 It is not in dispute that the fines imposed in the present case were determined by the Commission on the basis of the method set out in its Guidelines.

1510 In paragraph 595 of the contested decision the Commission stated, after determining, at paragraphs 591 to 594 of the contested decision, the inherent seriousness of the infringements, that in order to take account of the effective capacity of the undertakings concerned to cause significant damage and the need to ensure that the amount of the fine had a sufficiently deterrent effect larger fines should be imposed on the larger TACA parties than on the smaller ones because of the considerable disparity between their sizes.

1511 The Commission therefore divided the TACA parties into four groups according to their size relative to that of Mærsk, the largest of the TACA parties. It is apparent from paragraph 596 of the contested decision that the relative size of each of the TACA parties was calculated on the basis of their turnover in respect of worldwide maritime transport of containerised cargo in 1996. The Commission considered that that turnover provided an indication of the resources and actual size of the undertakings concerned.

1512 Table 12 at paragraph 596 of the contested decision sets out the four groups thus determined and the size of each of the TACA parties in 1996 relative to that of Mærsk. It is apparent from that table that the four groups and the relative size of the TACA parties which make up those groups are calculated as follows: the 'large carriers' (Mærsk (1.00) and Sea-Land (0.89)), the 'medium to large carriers' (P&O (0.50), OOCL (0.44), NYK (0.41), Nedlloyd (0.39), Hanjin (0.33), Hapag Lloyd (0.32) and Hyundai (0.31)), the 'small to medium carriers' (DSR-Senator (0.24), NOL (0.22), MSC (0.21), Cho-Yang (0.18)) and the 'small carriers' (TMM-Tecomar (0.12), ACL (0.06) and POL (0.06)).

1513 Table 13 in paragraph 598 of the contested decision sets out the calculation of the amount of fines for each of those groups, taking into account the nature of the infringements and their duration. Those amounts are ECU 27.5 million for the 'large carriers', ECU 20.63 million for the 'medium to large carriers' (apart from Hyundai, for which the amount of the fine is reduced on account of the duration of its participation to ECU 18.56 million), ECU 13.75 million for the 'small to medium carriers' and ECU 6.88 million for the 'small carriers'.

1514 It is necessary to consider whether, as the applicants allege, that method of determining the amount of the fines infringes the principles of individual assessment, equal treatment and proportionality, and the protection of legitimate expectations.

(a) The principle of individual assessment

1515 The applicants allege first that the Commission failed to examine individually the situation of each of them in determining the amount of the fines. Next, they allege that dividing the TACA parties into four groups meant that in this case the

Commission only took into account in calculating the fines the worldwide turnover in respect of maritime transport of containerised cargo, to the exclusion of other criteria relevant to the assessment of the seriousness of the infringement, in particular turnover on the relevant market, the ratio of that turnover to worldwide turnover, profits made on the relevant market and the actual effect of the infringements on the relevant market. They also refer to various failures to state reasons with regard to those points.

1516 By their first complaint, the applicants thus challenge the adoption of a fixed rate for the basic amount of the fines for each group of undertakings, as shown in Table 13 at paragraph 598 of the contested decision. It is that fixed rate which led the Commission to ignore the differences which might exist between individual undertakings belonging to the same group.

1517 As regards the merits of the contested decision on that point, it is apparent from paragraph 595 of the contested decision that in order to determine the seriousness of the infringements and in view of the considerable disparity between the sizes of the TACA parties, the Commission divided them into four groups so as to impose larger fines on the larger TACA parties.

1518 The Court has already held in *CMA CGM*, cited at paragraph 427 above, paragraph 384, that the Commission did not exceed its powers regarding the imposition of fines by dividing the undertakings concerned into groups according to their size, since by ensuring that undertakings in the groups of larger undertakings incur higher fines than those imposed on undertakings in the groups of the smaller undertakings, that division contributes to the aim of penalising the large undertakings more severely.

1519 The Court emphasised in particular in this regard that the Commission was not required, when determining fines on the basis of the gravity of the infringement in question, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines resulting from its calculations for the undertakings concerned reflect any distinction between them in terms of their overall turnover (*CMA CGM*, cited at paragraph 427 above, paragraph 385).

1520 Consequently, the Court finds that the Commission did not err in fact or in law in dividing the applicants into groups when determining the gravity of the infringement (*CMA CGM*, cited at paragraph 427 above, paragraph 386).

1521 As regards the obligation to state reasons in that regard, the Court has held that the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73).

1522 In the present case it is apparent to the requisite legal standard from paragraph 595 of the contested decision that, first, in order to take account of the effective capacity of the undertakings concerned to cause significant damage and the need to ensure that the amount of the fine has a sufficiently deterrent effect, the inherent seriousness of the infringement was adjusted according to the size of the undertaking in question and, second, in order to impose higher fines on the larger undertakings the Commission divided the TACA parties into four groups. Since the rate of the fines was the result of that division, it must be found that the contested decision does contain a sufficient statement of reasons in that regard.

1523 The applicants' complaints on that point must therefore be rejected.

1524 By the second set of complaints, the applicants criticise the Commission for not having made separate calculations of the fine for each party taking account of criteria other than turnover. They criticise the Commission in particular in this regard for not taking account of their turnover on the relevant market or their share of that market.

1525 As regards the merits of the decision on that point, according to the case-law the gravity of infringements is to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54). It has been consistently held that the factors on the basis of which the gravity of an infringement may be assessed may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking (*Musique diffusion française*, cited at paragraph 1422 above, paragraph 120, and Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 52).

1526 In the present case, it is apparent from paragraph 598 of the contested decision that the basic amounts of the fines set out at Table 13 were fixed on the basis of the nature of the infringements and their duration for each of the four groups identified at Table 12 in paragraph 596. It is apparent from the latter paragraph that that division into four groups was carried out by the Commission on the basis of the size of each of the TACA parties relative to that of Mærsk, according to their worldwide turnover in respect of the maritime transport of containerised cargo. Therefore, the basic amounts set out in Table 13 result indirectly from the reference to the applicants' turnover.

1527 The Court has already held that such a method, in which the turnover of the undertakings in question is used not to calculate directly the level of fine as a proportion of that turnover but to adjust, when determining the gravity of the infringement, the basic amount calculated on the basis of the nature of the infringement and its duration in order to take account of the difference in size between the undertakings concerned, is in accordance with the legal framework of the sanctions as defined by Article 15(2) of Regulation No 17 and the equivalent provisions of Regulations No 1017/68 and No 4056/86 (*CMA CGM*, cited at paragraph 427 above, paragraphs 395 and 397).

1528 In that regard, contrary to what the applicants maintain, the Commission is entitled when determining the size of the undertakings concerned to refer to the total turnover rather than to their turnover on the relevant market(s). Indeed it has already been held that the total turnover of the undertaking concerned constitutes an indication, albeit approximate and imperfect, of its size and economic power (*Musique diffusion française*, cited at paragraph 1422 above, paragraph 121). Thus, in the maritime transport sector, the Court of First Instance has already held that in taking the total turnover of the undertaking concerned for maritime transport of containerised cargo as the basis for calculating the fines, the Commission did not infringe Article 19 of Regulation No 4056/86 (*CEWAL I*, cited at paragraph 568 above, paragraph 233, and *CMA CGM*, cited at paragraph 427 above, paragraph 399).

1529 Furthermore, the applicants err in maintaining that the Commission should have taken account of the fact that only 60% of the turnover of the TACA parties on the trade in question is derived from the service contracts which are the subject of the first abuse. The turnover in respect of service contracts alone does not reflect the effective capacity of the TACA parties to cause damage, since such turnover does not take account of their resources and actual size. In so far as, in fixing the amount of the fines in the present case, the Commission sought precisely to take account of the real capacity of the undertakings concerned to cause damage, it was therefore entitled not to determine the size of the TACA parties on the basis of their turnover in respect of service contracts alone.

1530 Finally, contrary to what the applicants maintain, that method does not lead to the Commission setting the level of the fine by means of a calculation based only on total turnover, without taking account of factors peculiar to each applicant. It is apparent from the contested decision as well as from the Guidelines, the principles of which were applied in that decision, that whilst the gravity of the infringement is initially assessed on the basis of the particular characteristics of the infringement, such as its nature and impact on the market, that assessment is subsequently adjusted according to the individual circumstances of the undertaking, so that the Commission takes into consideration, besides the size and capacities of the undertakings, both aggravating and mitigating circumstances, as the case may be (Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others* v *Commission* [2001] ECR II-2035, paragraph 109, and *CMA CGM*, cited at paragraph 427 above, paragraph 401).

1531 In those circumstances, the Commission was entitled when setting the fines on the basis of the gravity of the infringement to disregard the factors peculiar to each applicant other than their total turnover from maritime transport of containerised cargo.

1532 As regards compliance with the obligation to state reasons in that regard, it has been held that the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration (*Sarrió*, cited at paragraph 1521 above, paragraph 73). Furthermore, the scope of the obligation to state reasons must be determined in the light of the fact that the gravity of infringements must be determined by reference to numerous factors; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order in *SPO*, cited at paragraph 1525 above, paragraph 54, and *LR AF 1998*, cited at paragraph 334 above, paragraph 378).

1533 In the present case, it is apparent to the requisite legal standard from the contested decision, in particular paragraphs 591 to 596 thereof, that the gravity

of the infringements was determined on the basis of their nature and adjusted according to the relative size of the TACA parties expressed in terms of their worldwide turnover in respect of maritime transport of containerised cargo in order to take account of the considerable differences in size between those parties, so that higher fines could be imposed on the larger parties.

1534 Since the decision contains a statement of reasons to the requisite legal standard of the factors used by it to determine the gravity of the infringements and the list of relevant criteria for determining the gravity of the infringements is not binding on the Commission, it cannot be criticised for not stating why it does not rely on other grounds.

1535 As for the alleged fact that in setting fines at a level which represents a significant proportion of turnover on the relevant market the Commission altered its practice in fixing fines, it suffices to state that that complaint amounts to a denial that the Commission can use the turnover of the undertakings in question not to calculate directly the level of fines, but indirectly, to adjust the inherent gravity of the infringement in order to take account of the difference in size between the undertakings concerned. The statement of reasons on this point appears at paragraph 595 of the contested decision and at paragraph 1.A of the Guidelines which the Commission is, in principle required to apply since their publication (*LR AF 1998*, cited at paragraph 334 above, paragraph 390).

1536 Similarly, as regards the fact that the Commission altered its practice by referring to worldwide turnover, it suffices to state that at paragraph 598 it set out the reasons for that choice, namely to take account of the resources and actual size of the undertakings concerned. It is true, as noted by the applicant in Case T-212/98 in particular, that that method can result in a proportionately higher fine for certain applicants. However, the Commission is not required to explain why it applies that method to each of the applicants. Since the Commission explained in its decision why it took account of worldwide turnover, it provided each of the

applicants with all the data necessary to enable it to know whether the decision is well founded in its particular case or whether it may be vitiated by some defect enabling its validity to be challenged.

1537 The analogy drawn by the applicant in Case T-212/98 with the *PVC II* judgment (cited at paragraph 191 above) is false. It is true that in that judgment the Court of First Instance reduced the fine imposed on certain PVC producers on the ground that the Commission wrongly calculated their market share in the PVC sector. However, in its decision, the Commission had apportioned the total fine between the undertakings on the basis of the criterion of the importance of each of them on the PVC market, calculated by reference to their average market share between 1980 and 1984 on that market (paragraph 1191). By contrast, the Commission did not fix the amount of the fines in the present case by taking account of the market share of the undertakings in question. The analogy with the Court's judgment in *PVC II* is therefore groundless.

1538 Consequently, the contested decision contains a sufficient statement of reasons for the criteria adopted to determine the gravity of the infringements. The complaint alleging failure to state reasons on that point must therefore be rejected.

1539 It follows from the foregoing that the complaints alleging infringement of the principle of individual assessment and failures to state reasons in that regard must be rejected in their entirety.

(b) The principles of equal treatment and proportionality

1540 The applicants criticise the Commission for having divided the TACA parties into four groups artificially, without any explanation of the criterion used for that

purpose. They challenge both the definition of the four groups and the basic amounts applied to each of those groups.

1541 First, as regards the definition of the four groups, it should be noted that, in terms of the merits of the contested decision on that point, the Court held in *CMA CGM*, cited at paragraph 427 above, paragraphs 416 to 418, that the Commission is entitled to divide the undertakings concerned into groups for the purpose of setting the amount of the fines, provided however that that division is coherent and objectively justified.

1542 Thus, if the Court considered in that judgment that the division into four groups was defective in substance, it was only to the extent that the coherency of that division was not apparent either from the decision, since the logic underpinning the division was not apparent from a review of it and the decision did not explain the criteria used for that purpose, or from the explanations subsequently given by the Commission, which did not justify the division carried out in the decision.

1543 In the present case by contrast, the coherency of the division into four groups in Table 12 in paragraph 596 of the contested decision is clearly apparent from that table. It reveals that the thresholds dividing each group were fixed starting with the size of the largest of the TACA parties, with successive reductions by half of that size, that is, 50%, 25% and 12.5% of the size of Mærsk.

1544 Such a division is clearly one of the methods enabling the undertakings concerned to be divided into groups in a coherent and objectively justified way. Further, the applicants have put forward no evidence to cast doubt on the coherency of a division using that method.

1545 Contrary to what the applicants argued at the hearing, the Court in its judgment in *CMA CGM*, cited at paragraph 427 above, paragraphs 420 to 422, did not lay down the principle that the Commission was required in dividing the undertakings concerned into groups for the purposes of fixing the amount of the fines to set the thresholds for each of the groups where the relative differences in size were most pronounced, but merely held that in that case the Commission could not maintain, as it had done in reply to written questions from the Court, that the division into groups had been carried out according to that method, since the relative differences in size between the groups adopted in the contested decision were not the most pronounced of those between the undertakings in question. Since the Commission was unable to justify the choice of thresholds between the four groups adopted in the decision, the Court considered that that division infringed the principle of equal treatment.

1546 In *IAZ*, cited at paragraph 1525 above, paragraph 53, the Court held to be lawful a calculation whereby the Commission first determined the amount of the fines to be imposed and then spread that total among the undertakings concerned by dividing them into three groups according to the size of their activities (determined on the basis of the number of conformity labels ordered from the association in question, namely less than 10 000 labels, 10 000 to 50 000 labels and more than 50 000 labels).

1547 Consequently, the applicants erred in their argument at the hearing that the approach adopted by the Court in *CMA CGM*, cited at paragraph 427 above, must also result in a finding that the division into groups in the present case was similarly flawed.

1548 As for compliance with the obligation to state reasons, it suffices to state that since the logic underlying the division in the present case is apparent from Table 12 in paragraph 596 of the contested decision, the applicants were in a position on that basis alone to know whether the decision was well founded or whether it might be vitiated by some defect enabling its validity to be challenged, whilst on

the same basis the Court is able to review its legality (*Van Megen Sports*, cited at paragraph 548 above, paragraph 51).

1549 Consequently, the division into four groups in the present case does not infringe the principles of equal treatment and proportionality and is supported by a sufficient statement of reasons.

1550 Second, as regards the basic amounts of the fines imposed on each of the groups, it is apparent from Table 13 in paragraph 598 of the contested decision that the basic amounts imposed on each group according to the gravity and duration of the infringements were fixed by successive reductions of 25% of the basic amount imposed on the largest undertaking.

1551 As regards the merits of the contested decision on that point, the Court has already held in *CMA CGM*, cited at paragraph 427 above, paragraph 431, that the method of fixing the basic amounts of the fines by making successive reductions of 25% of the basic amount imposed on the largest carrier did not exceed the Commission's margin of discretion in fixing fines. Since the Commission defined four groups on the basis of the applicants' relative size, the successive reduction in steps of 25% of the basic amount used for the group containing the largest applicant may be regarded as a coherent method which may be objectively justified.

1552 As for the alleged fact that in such a system the same basic amount is imposed within each group on undertakings of different sizes, that is an integral feature of any system of division into groups. It has already been held at paragraph 1520 above that that division represents an accurate assessment of the gravity of the infringement.

1553 Therefore, even if the effect of the division into groups is that certain applicants are allocated the same basic amount even though they differ in size, that difference in treatment is objectively justified by the importance attached to the nature of the infringement in comparison with the size of the undertakings in the assessment of the gravity of the infringement (*CMA CGM*, cited at paragraph 427 above, paragraph 411).

1554 Consequently, the Commission was entitled in this case to set the same basic amount for undertakings in the same group and did not thereby infringe the principle of equal treatment.

1555 As regards compliance with the obligation to state reasons on that point, it suffices to state that the logic underlying the determination of the basic amounts of the fines set out in Table 13 in paragraph 598 of the contested decision is apparent from that table, and all the more so since those basic amounts of the fines translate precisely into figures the division into four groups carried out in the contested decision.

1556 In those circumstances the applicants were manifestly in a position on that basis alone to know whether the decision was well founded or whether it might be vitiated by some defect enabling its validity to be challenged, whilst on the same basis the Court is able to review its legality (*Van Megen Sports*, cited at paragraph 548 above, paragraph 51).

1557 It is true that the contested decision does not set out the method or the calculation whereby the Commission determined, in assessing the gravity of the infringement, the amount of EUR 2 million chosen for the 'large carrier' group, on the basis of which the other amounts were determined, any more than its relationship with the other groups identified in Table 12.

1558 However, according to the case-law, the essential procedural requirement to state reasons does not require the Commission to set out in its decision the figures showing the method of calculating the fines, but only requires it to indicate the factors which enabled it to determine the gravity of the infringement and its duration (*Sarrió*, cited at paragraph 1521 above, paragraphs 73 and 76).

1559 Those factors are apparent to the requisite legal standard from paragraphs 591 to 596 of the contested decision.

1560 Thus, in terms of the gravity of the infringement, the Commission states at paragraph 591 that in so far as the first abuse sought to restrict price competition that abuse must, given its nature, be regarded as a serious infringement within the meaning of the Guidelines, which provide in such a case that the amount which may be imposed in respect of the gravity of the infringement may vary from EUR 1 million to 20 million. Furthermore, it is apparent from paragraphs 595 and 596 of the contested decision that the Commission's intention was to adjust the amount calculated on the basis of the nature of the infringement according to the size of the undertakings in question in order to take account, in the light of the considerable disparity between their sizes, of the TACA parties' effective capacity to cause damage and the need to ensure that the amount of the fine has a sufficiently deterrent effect.

1561 In those circumstances, the applicants cannot rely, as they sought to at the hearing, on the judgment in *CMA CGM*, cited at paragraph 427 above, in support of the complaint that the Commission did not explain why it imposed on the large carriers an amount higher than the minimum laid down by the Guidelines for serious infringements. Whilst the Court found in that judgment that the statement of reasons was defective in that regard, it was not because the Commission used a basic amount higher than the minimum amount laid down by the Guidelines for serious infringements but because, after expressly stating in its decision that 'the basic level of fine [should] be set at the very lowest end of the scale of fines appropriate for a serious infringement', the Commission, without

giving any explanation, ultimately adopted another amount. In the present case, by contrast, the Commission at no point in the contested decision stated that it intended to impose the lowest amount laid down by the Guidelines for serious infringements.

1562 Next, as regards the duration of the infringement, the Commission states at paragraph 597 of the contested decision that since the duration of the infringement was two to three years, the level of the fines imposed on the basis of gravity should be increased by 25%.

1563 Consequently, the contested decision contains a sufficient statement of reasons for the determination of the basic amounts appearing in Table 13. Therefore, the applicants' complaints in that regard must be rejected.

1564 It follows from the foregoing that the applicants' complaints relating to the determination of the basic amount of the fines must be rejected in their entirety.

(c) The principle of the protection of legitimate expectations

1565 The applicant in Case T-213/98 considers that the Commission has infringed the principle of the protection of legitimate expectations by not applying the principles established in previous practice for calculating the fines. Furthermore, the applicant in Case T-214/98 criticises the Commission for not having applied the criteria set out in the Guidelines.

1566 As regards, first, the complaint alleging failure to apply previous practice, the applicant in Case T-213/98 essentially criticises the Commission for having altered its practice in applying the Guidelines.

1567 As regards the setting of fines for infringements of the competition rules, the Commission exercises its powers within the limits of the discretion conferred on it by Regulation No 17, Regulation No 1017/68 and Regulation No 4056/86. It is settled case-law that traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained (Case 245/81 *Edeka* [1982] ECR 2745, paragraph 27, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33, and *LR AF 1998*, cited at paragraph 334 above, paragraph 241).

1568 Thus, it has already been held that the Commission was entitled to raise the general level of fines, within the limits laid down in Regulation No 17, if that was necessary to ensure the implementation of the Community competition policy (*Musique diffusion française*, cited at paragraph 1422 above, paragraph 109).

1569 In the present case, whilst it is true that the Commission applied the Guidelines to facts which occurred prior to their publication, it has already been held above that the method for fixing the amount of the fines laid down by the Guidelines respects the legal framework defined by Regulation No 17, Regulation No 1017/68 and Regulation No 4056/86.

1570 It follows that the Commission has not infringed the applicant's legitimate expectations in following the method defined in the Guidelines for fixing the fines imposed in the contested decision.

1571 In any event, in so far as the applicant criticises the Commission for not calculating the amount of the fines on the basis of an individual assessment of the undertakings concerned and for not taking account of all the relevant factors, it is apparent from the case-law prior to the adoption of the Guidelines that the criteria for determining the gravity of the infringement are neither exhaustive nor binding (order in *SPO*, cited at paragraph 1525 above, paragraph 54).

1572 Thus, well before the adoption of the Guidelines, the Community judicature had already upheld the lawfulness of a calculation method whereby the Commission first determines the overall amount of the fines to be imposed and then divides that total among the undertakings concerned according to their activities in the relevant sector (*IAZ*, cited at paragraph 1525 above, paragraph 53).

1573 Since the Commission's previous practice did not consist solely in using a method based on an individual assessment of the undertakings concerned on the basis of all the relevant criteria, the applicant could not legitimately expect that such a method would be applied to it in the contested decision.

1574 Therefore the applicant's complaints on that point must be rejected.

1575 Second, as regards the complaint made by the applicant in Case T-214/98 alleging failure to apply the criteria set out in the Guidelines, it is apparent from the foregoing that in determining the amount of the fines on the basis, first, of the inherent gravity of the infringements, adjusted according to the size of the undertaking, and, second, of the duration of the infringements, the Commission

in the present case accurately applied the criteria set out in the Guidelines, which is incidentally alleged against it by the other applicants in the complaints examined above.

1576 Further, the Guidelines expressly include the possibility of adjusting the inherent gravity of the infringement on the basis of the size of the undertakings concerned. In the sixth paragraph of section 1.A of those guidelines, the Commission states that for infringements involving more than one undertaking it may be necessary in some cases to apply weightings to the amounts of the fines determined 'in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type'. The Commission states in the seventh paragraph of section 1.A that 'the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetical calculation'.

1577 Therefore the complaints of the applicants in Cases T-213/98 and T-214/98 alleging infringement of the principle of the protection of legitimate expectations must be rejected.

(d) Conclusion on the method adopted by the Commission to determine the amount of the fines

1578 It follows from all the foregoing that the applicants' pleas and complaints in respect of the Commission's method in the present case for fixing the amount of the fines must be rejected in their entirety.

B — The assessment of the mitigating circumstances

1. Arguments of the parties

1579 The applicants allege that the Commission failed to adjust the level of the fines to reflect mitigating factors.

1580 The first mitigating factor put forward by the applicants is that, in accordance with its practice in other cases (Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty, Case No IV/30.178 Napier Brown — British Sugar, OJ 1988 L 284, p. 41, paragraph 87; Commission Decision 94/985, paragraph 159), the Commission should have taken account of the fact that Community law has not been sufficiently developed in certain respects.

1581 First, they refer to the fact that, as the Commission admits in other contexts (see, for example, the Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, OJ 1998 C 265, p. 2, paragraph 76), the conditions for the existence of a collective dominant position in the case of liner conferences were not clearly defined. Contrary to its statement at paragraph 522 of the contested decision, the Commission earlier expressed the view that a collective dominant position requires there to be no competition at all between the companies on the relevant market (Notice, cited above, paragraphs 78 and 79). The applicants also deny that they 'have known since at least 10 December 1993 that the Commission has considered that the TAA parties were in a dominant position' (paragraph 603 of the contested decision). The applicants stress that that assertion, formulated in the statement of objections in the TAA case, was not repeated in the TAA decision. They add that market conditions have changed since then.

1582 Second, the contested decision is the first case in which the Commission has addressed the obligations of members of a conference with respect to new members in a case in which the conference is also governed by US law.

1583 Third, the contested decision is the first application of competition law to agreements between the members of a liner conference on service contracts. Accordingly, even if the parties were aware from October 1994 that the Commission considered the ban on individual service contracts to be a serious restriction of competition (paragraph 603), it should have imposed no fine, or only a low one (see Commission Decision 87/1/EEC of 2 December 1986 relating to a proceeding under Article 85 of the EEC Treaty, IV/31.128 — Fatty Acids, OJ 1987 L 3, p. 17, paragraphs 34, 35, 58 and 59). The TAA decision makes no finding as to the lawfulness of prohibiting individual service contracts in the light of Articles 85 and 86. As for the Commission's letter of 15 December 1994, referred to at paragraph 604 of the contested decision, it could not in any case have put the parties on notice that the Commission intended to impose fines under Article 86. Lastly, contrary to the assertion at paragraph 601, it is apparent from the letter from the applicants' lawyers set out at paragraph 153 that they did not receive legal advice to the effect that dual rates were contrary to the TAA decision where they are requested by the shipper.

1584 Fourth, the contested decision is the first case in which a fine has been imposed under Article 86 in respect of an agreement notified to the Commission. Judge Kirschner, acting as Advocate General, has concluded (in his Opinion in *Tetra Pak I*, cited at paragraph 1420 above) that a fine could not be imposed in such a case. The applicants also note that in other cases of that type the Commission has not imposed fines (Commission Decision 76/353/EEC of 17 December 1975 relating to a procedure under Article 86 of the EEC Treaty, IV/26.699 — Chiquita, OJ 1976 L 95, p. 1, paragraph 119; Commission Decision 89/113/EEC of 21 December 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty, IV/30.979 and 31.394, Decca Navigator System, OJ 1989 L 43, p. 27).

1585 Fifth, the applicants repeat that the activities to which the Commission objects in the contested decision are permitted or required by US law.

1586 The applicant in Case T-212/98 considers that uncertainty as to the state of Community law and, in particular, the lack of clarity concerning the concept of collective dominant position apply a fortiori in its case, as a non-Community carrier with a weak position on the Community market. Furthermore, the Commission failed, contrary to its previous practice (Commission Decision of 15 March 1994 declaring a concentration to be compatible with the common market (Case No IV/M.422 — Unilever France / Ortiz Miko (II) according to Council Regulation (EEC) No 4064/89, paragraph 19), to take account of the imbalance between the market shares of the undertakings concerned. It also points out that when it became a member of the conference the TAA agreement had just been amended to take account of the Commission's requirements. Since the modified agreement, that is, the TACA, had been notified, it was legitimate for the applicant to assume that its admission to the TACA was compatible with Article 86. Lastly, in the light of the foregoing factors the applicant considers that it had a legitimate expectation that the Commission would not impose a fine in its case.

1587 The applicant in Case T-213/98 does not understand the significance that the Commission seems to attach to the opinions it expressed during the administrative procedure in the TAA and TACA cases, and to which it refers at paragraphs 603 and 604 of the contested decision. If the Commission intended to take these into account in calculating the fine, the applicant considers that, given the uncertain state of Community law during the period in question, the Commission's opinions should not affect the position of the parties adversely, in particular as regards the amount of the fines. The applicant submits that any undertaking to which a statement of objections is addressed is entitled to continue to believe in good faith in the lawfulness of the conduct under review and in the possibility of having the Commission's final decision annulled.

1588 In any event the Commission should have taken account of the novelty of the legal situation addressed by the contested decision as a mitigating factor. The applicant stresses the particularity of the competition rules established by Regulation No 4056/86. It submits that it is because of that particularity that well-established notions of competition law such as the prohibition of horizontal price agreements, market sharing arrangements and capacity control agreements do not apply in the maritime transport sector. In those circumstances, and in the absence of authority from the Court on the scope of the block exemption, the applicant considers that the amount of the fine should have taken account of the fact that it was reasonable for the applicants to believe that their practices complied with competition law.

1589 The second mitigating factor advanced by the applicants is the degree of cooperation with the Commission. The applicants stress first that they notified the TACA in July 1994, and other agreements on inland cooperation, namely the EIEIA and the 'hub and spoke' system, after that date. They consider that such notification informs the Commission of all material facts and potential infringements of which it was previously unaware, so that, by analogy with the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) and in accordance with its previous practice (Decision 89/113; Commission Decision 79/68/EEC of 12 December 1978 relating to a proceeding under Article 85 of the EEC Treaty, IV/29.430 — Kawasaki, OJ 1979 L 16, p. 9; Commission Decision 96/438/EC of 5 June 1996 relating to a proceeding pursuant to Article 85 of the EC Treaty, IV/34.983 — Fenex, OJ 1996 L 181, p. 28, paragraph 89), the Commission should not have imposed a fine or should have reduced the amount of it. The applicants point next to the lengthy correspondence and the meetings which took place on the subject of service contracts and the fixing of tariffs for inland transport. Lastly, they observe that the TACA is a modification of the TAA agreement following the TAA decision and that the TACA was modified on numerous occasions in the course of the procedure to take account of the Commission's objections.

1590 The applicant in Case T-213/98 stresses that, far from being a hidden cartel, the TACA conference has at all times acted openly and transparently, filing its tariffs

with the US authorities and making them publicly available as required by Article 5 of Regulation No 4056/86. The applicant also refers to the fact that the Commission was kept continually informed of the TACA practices, which were notified in detailed applications for individual exemption. The applicant points out that under Regulation No 1017/68 and Regulation No 4056/86, notification was not obligatory. Finally, the applicant has always entered into open discussion with the Commission with a desire to arrive at a solution which complied with Community law and was at the same time commercially satisfactory.

1591 The third mitigating factor put forward by the applicants concerns the difficult market conditions and the financial losses made by the TACA parties. The applicants allege that they incurred losses of about USD 600 million in 1991 and 1992, and following the entry into force of the TACA many of them continued to make losses or only small profits. In its earlier decisions (Commission Decision 83/546/EEC of 17 October 1983 relating to a proceeding under Article 85 of the EEC Treaty, IV/30.064 — Cast iron and steel rolls, OJ 1983 L 317, p. 1, paragraphs 72 and 74) the Commission took that type of factor into account in order to reduce the amount of the fine. Moreover, the Community legislature has recognised the importance of liner conferences for Community industry (see the third and fifth recitals of the preamble to Regulation No 479/92).

1592 The applicant in Case T-212/98 further submits that because of its weak position on the relevant market and its status as a new entrant it could not have played a significant role in the alleged infringements, nor could it have committed the infringement deliberately or negligently.

1593 The Commission observes first as regards the state of Community law that in the present case there is no new factor justifying the reduction of the fines. There is nothing new in the idea that the members of a conference may occupy a dominant

position or in the idea that the measures taken in a concerted effort to subvert or eliminate potential competition can constitute an abuse of a dominant position. The fact that the TACA is also subject to the requirements of US law adds nothing to the debate. As regards the application of the competition rules to service contracts, the Commission stresses that the abuse in question is a classic one consisting in the imposition of unfair trading conditions on customers and the refusal to supply users except on the conference's own terms. As for the lack of immunity from fines for an infringement of Article 86, the Commission observes that this is not a case of a new development in the substantive law relating to abuse of a dominant position. Lastly, since there is no obligation under US law to carry out the activities giving rise to the infringements, that is not a factor justifying a reduction of the fines.

1594 Second, as regards cooperation with the Commission, the applicants cannot rely on the Notice on the non-imposition or reduction of fines in cartel cases, cited above, since the present case is not one in which a cartel was denounced. On the contrary, in the course of the procedure the applicants contested the Commission's view of the law and the facts.

1595 Third, as regards the difficult market conditions, the Commission points out that the applicants' claim of unfavourable conditions relates to a period well before both the abuses in question and the contested decision.

1596 In Case T-213/98 the Commission repeats that the issues raised in the present case are not new. The Commission cannot accept that since Regulation No 4056/86 creates in certain respects a favourable competition regime for shipping lines, they were entitled to believe that none of the established rules of Community competition law applied to them.

2. Findings of the Court

1597 As a preliminary point, it must be remembered that the result of the consideration of the pleas prior to this one was that the fines imposed by Article 8 of the operative part of the contested decision must be annulled inasmuch as they relate to the second abuse and, where they relate to the first abuse, in so far as they concern the mutual disclosure of the availability and content of individual service contracts and, for the other practices constituting the first abuse, namely the practices in issue relating to service contracts laid down by Article 14 of the TACA, in so far as they were imposed pursuant to Regulation No 4056/86.

1598 Consequently, the present plea must be considered solely in respect of that part of the fines which was imposed in respect of those practices pursuant to Regulation No 1017/68.

1599 It is apparent from paragraph 92 of the contested decision that the carrier haulage services within the territory of the Community which fall within Regulation No 1017/68 represented some 48% of the cargo that the TACA parties carried on the transatlantic trade in 1995.

1600 Since it is apparent from Table 13 in paragraph 598 of the contested decision that the amount of the fines imposed for the first abuse is about 9% of the total fines imposed by the contested decision, the part of the fines imposed pursuant to Regulation No 1017/68 represents about 5% of that amount.

1601 It is therefore necessary to determine whether that part of the fine remains justified notwithstanding the mitigating circumstances put forward by the applicants.

1602 In paragraphs 601 to 606 of the contested decision, the Commission excluded the existence of mitigating circumstances essentially on the grounds that no reason was put forward to explain why the TACA parties should be considered to have acted as a follower as opposed to a leader and that the TACA parties could not have been unaware that their activities had as their object the restriction of competition and did not fall within the block exemption laid down by Regulation No 4056/86, and could have had no doubt as to the possibility that fines would be imposed on them under Article 86 of the Treaty notwithstanding the notification of the rules in respect of service contracts.

1603 First, as already held above at paragraphs 1468 and 1469, the abusive practices laid down by Article 14 of the TACA were all notified to the Commission with a view to obtaining individual exemption. Although the TACA parties made that notification under Regulation No 4056/86, the Commission itself informed them by letter dated 15 July 1994 that their application for individual exemption would also be examined in the light of Regulation No 1017/68 as some of the notified activities did not fall within the ambit of Regulation No 4056/86.

1604 Furthermore, the TACA parties expressly informed the Commission on 9 March 1995 that the FMC had required them to amend their agreement so as to allow the conclusion of individual service contracts in 1996 provided that those contracts complied with the provisions of Article 14 of the TACA. On 21 March 1995, the TACA parties thus sent the Commission an amended version of Article 14 of the TACA notified in 1994.

1605 It is clear that in so doing the applicants on their own initiative revealed the practices regarded by the Commission as constituting an abuse contrary to Article 86 of the Treaty.

1606 That is all the more so since neither Regulation No 4056/86 nor Regulation No 1017/68 establishes a system of compulsory notification for the grant of individual exemption, so that the applicants notified the TACA voluntarily.

1607 In those circumstances, the notification of the TACA enabled the Commission to establish more easily that the practices provided for in that agreement relating to service contracts were an abuse, and thus facilitated the Commission's task of establishing infringements of the Community competition rules and bringing them to an end which, according to the case-law, is a factor justifying a reduction in the fine (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 36; see also, to that effect, Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 179).

1608 It is apparent that in the contested decision the Commission did not consider in assessing whether there were any mitigating circumstances in the TACA parties' case the extent to which they cooperated during the administrative procedure. Neither in its written pleadings nor at the hearing did the Commission deny that the notification of the TACA amounted to cooperation, however. It merely submitted in the defence that during the administrative procedure the applicants persistently contested the facts and the legal assessment thereof, so that it could not be said that there was any cooperation within the meaning of the Notice on the non-imposition or reduction of fines in cartel cases.

1609 However, the applicants do not claim that they did not dispute the facts or the infringements recorded in the contested decision, but merely that they enabled the Commission to establish the existence of those facts and infringements more easily. That being the case, the applicants do not rely on that notice at all, which concerns cooperation with the Commission in relation to the exposure of secret cartels, which is not the situation in the present case. They rely rather on the cooperation to which the Commission must have regard in any proceedings applying the Community competition rules where the conduct of the undertakings in question during the administrative procedure facilitates the Commission's task within the meaning of the case-law cited above. In any event, under the sixth indent of section 3 of the Guidelines, the Commission itself provides for the possibility of reducing fines in order to take account of 'effective cooperation by the undertaking in the proceedings, outside the scope of the Notice... on the non-imposition or reduction of fines'.

1610 Finally, it is irrelevant that the abusive practices in question were disclosed for the purpose of obtaining individual exemption under Article 85(3) of the Treaty. Since, by their notification, the TACA parties enabled the Commission to detect and more easily prove the existence of the relevant practices constituting the first abuse, they necessarily facilitated the Commission's task within the meaning of the case-law cited above.

1611 Second, the contested decision is the first decision in which the Commission directly assessed the lawfulness, in the light of the Community competition rules, of the practices on service contracts adopted by shipping conferences.

1612 As regards in the first place the application of Article 85 of the Treaty, the Commission errs in relying on paragraph 410 of the TAA decision in order to claim at paragraph 603 of the contested decision that the applicants 'have known

since October 1994 that the Commission considered the banning of individual service contracts to be a serious restriction of competition'. Under that paragraph of the TAA decision, the Commission does not in the least find that the prohibition of individual service contracts constitutes a restriction of competition within the meaning of Article 85(1) of the Treaty; it merely finds that the agreement fixing maritime transport rates entered into by the TAA members does not satisfy the first condition for the grant of individual exemption laid down by Article 85(3) of the Treaty, in particular on the ground that 'by prohibiting direct and individual business negotiations between structured members of the TAA and shippers... the TAA limits the opportunities for direct cooperation and partnership in the medium or long term between suppliers and clients'.

1613 Furthermore, in so far as, given the reference in paragraph 286 of the TAA decision to paragraphs 13 to 15 thereof, that decision may be interpreted as prohibiting the rules and conditions laid down by the TAA on service contracts described in those paragraphs, namely those concerning their duration, the minimum quantities to which they must apply and the procedures for entering into individual service contracts (an interpretation not advocated by the Commission either in the present proceedings or in the TAA case), it is clear that since, according to the TAA decision, the TAA was not a shipping conference, that decision cannot be regarded as having already assessed the lawfulness of the rules adopted by shipping conferences on service contracts. In any event, the TAA decision merely assesses the lawfulness of two of the five practices considered to be abusive in the contested decision. By contrast, the TAA notified in 1992 also contained rules for the prohibition of contingency clauses, the prohibition of multiple contracts and the amount of liquidated damages, which were considered to be abusive in the contested decision.

1614 Next, as regards the application of Article 86 of the Treaty, whilst it is true, as the Commission states at paragraph 602 of the contested decision, that in the statement of objections in the TAA case it informed the TAA parties that it intended to impose fines for abuse of a dominant position in relation to service contracts, in the final decision the Commission did not find that there had been

an infringement of Article 86 of the Treaty on that point. In those circumstances, given the provisional nature of the statement of objections, the applicants were entitled to believe that the Commission had withdrawn its complaints concerning the application of Article 86 of the Treaty to the rules on service contracts.

1615 Third, it cannot seriously be denied that the legal treatment that should be reserved for the practices of shipping conferences on service contracts, particularly because of their close links with agreements which are the subject of block exemption pursuant to a wholly specific and exceptional set of rules under competition law, was not at all straightforward and, in particular, raised complex legal issues (see by analogy *FEFC*, cited at paragraph 196 above, paragraph 484).

1616 In the present case, as is apparent from paragraphs 496 to 507 and 520 to 528 above, although the grounds of the contested decision are set out in 611 paragraphs, it was only at the hearing that the Commission explained the extent to which the TACA practices on service contracts were, according to that decision, contrary to Articles 85 and 86 of the Treaty, and the Commission itself admitted at the hearing and in reply to the Court's written questions on that point that both the operative part and certain paragraphs of the contested decision could, taken separately, be interpreted otherwise. In particular, the contested decision contains several contradictory passages concerning the question whether the TACA parties were entitled to enter into conference service contracts and whether those parties were free to determine the content of such contracts even though, as is apparent from paragraphs 421 to 423 of the *TAA* judgment, the TAA decision already gave rise to difficulties of interpretation on that point.

1617 Fourth, the abuse resulting from the practices on service contracts do not constitute a classic abuse within the meaning of Article 86 of the Treaty.

1618 Contrary to the Commission's submission, the practices in question can certainly not be likened to cases of an outright refusal to supply, which have already been held to be abusive by the case-law relating to, inter alia, ceasing to deliver to an existing customer where there is nothing unusual about that customer's orders (*United Brands*, cited at paragraph 853 above, paragraph 186), refusing to supply a customer so as to reserve for oneself a derivative market (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 24) or the refusal to supply a customer so as to protect exclusive rights (Case C-238/87 *Volvo* [1988] ECR 6211, paragraph 9, and Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743, paragraph 54). In the present case, whilst it is true that by the practices in question the TACA parties restricted the availability and content of service contracts, they in no way deprived shippers of the possibility to have their cargo carried by conference members on the trade in question, whether under service contracts or at tariff rates. The Commission itself stated at paragraph 553 of the contested decision that the practices in question did not constitute an 'outright refusal to supply' but, in its own words, 'a refusal to supply other than on the basis of unfair conditions'.

1619 Furthermore, whilst the relevant restrictions in relation to service contracts may be qualified, at paragraph 592 of the contested decision, as a 'serious' infringement within the meaning of the Guidelines, given their objective of seeking to restrict price competition, which the applicants cannot seriously deny since they justify those rules by the need to preserve the stability of tariff rates, it is not manifestly clear that such rules constitute an abuse within the meaning of Article 86 of the Treaty.

1620 In addition to the fact that in the TAA decision the Commission abandoned the complaints of abuse initially formulated on that point, in the present case it was only in the statement of objections, after three years of examining the rules in question, that the Commission informed the TACA parties for the first time that it intended to apply Article 86 of the Treaty to the practices even though it is

apparent from the exchange of correspondence during the administrative procedure that it had already examined them in detail at the end of 1994 and at the beginning of 1995. At that stage, however, the Commission at no time alluded to a possible application of Article 86 of the Treaty. Thus, in its letter of 15 December 1994 the Commission merely emphasised that the practices on service contracts did not fall within the block exemption laid down by Regulation No 4056/86 and that they should be amended in order to qualify for individual exemption. Similarly, when the Commission was informed by the TACA parties, following the intervention of the FMC, of the application of the rules laid down by Article 14 of the TACA to individual service contracts, it merely informed them, in its letter of 16 May 1995, that that application appeared to restrict competition and was unlikely to qualify for individual exemption.

1621 In those circumstances, the TACA parties could, notwithstanding the case-law to the effect that agreements entered into by a dominant undertaking are liable to constitute an abuse, legitimately have been unaware that their practices on service contracts were likely to be regarded as such. It was only at the hearing that the Commission explained for the first time that, whilst the contested decision found that the rules laid down by Article 14 of the TACA were contrary to Article 85 of the Treaty only in so far as they applied to individual service contracts, but not in so far as they applied to conference service contracts, the decision established that those rules were in any event contrary to Article 86 of the Treaty, including in their application to conference service contracts.

1622 Fifth, the applicants had every reason to believe during the administrative procedure in question that the Commission would not fine them in respect of their practices on service contracts.

1623 First, in so far as those practices fall within the ambit of Regulation No 4056/86, it has already been held above that the TACA parties enjoyed immunity from

fines under that regulation for the infringements of Article 86 of the Treaty. Although the part of the fines imposed pursuant to Regulation No 4056/86 need no longer be considered in the context of the present pleas, the Commission was thus wrong to find against the applicants at paragraph 604 of the contested decision that 'all of the TACA parties had access to sufficient legal advice to know of the possibility of fines for breaches of Article 86 notwithstanding the notification of the TACA'.

1624 Furthermore, in so far as the practices in question fall within Regulation No 1017/68, there existed at that time genuine uncertainty as to whether there was any immunity from fines under that regulation. Although the Court held in *Atlantic Container Line*, cited at paragraph 44 above, that there was no immunity from fines under Regulation No 1017/68 and that such immunity could not be inferred from general principles, it cannot be denied that there was a serious doubt in that regard, since, according to the decision at issue in that judgment, the Commission itself had considered it necessary by way of a precaution to 'withdraw' from the TACA parties the immunity from fines in respect of the TACA provisions fixing inland rates, should those parties have qualified for immunity under Regulation No 1017/68. It follows that the complaint set out at paragraph 604 of the contested decision, to the effect that the TACA parties could not have been unaware of the risk that they would be fined under Article 86 of the Treaty in respect of the notified agreements, likewise cannot be upheld in respect of the part of the fines imposed pursuant to Regulation No 1017/68, which is the only one still to be examined for the purposes of the present pleas.

1625 Therefore, even if the Commission informed the TACA parties by letter of 15 December 1994 that in its view the TACA practices on service contracts did not fall within the block exemption laid down by Regulation No 4056/86, which admittedly suggested that it had reservations in that regard, it was nevertheless legitimate for the TACA parties to believe that they were protected from the risk

of fines under Articles 85 and 86 of the Treaty by the fact of notifying those rules. The Commission could not therefore, at paragraph 604 of the contested decision, hold that letter against the applicants so as to exclude the existence of mitigating circumstances.

1626 Second, notwithstanding the continuous exchange of correspondence with the TACA parties during the administrative procedure in the present case, the Commission did not inform them prior to issuing the statement of objections that it intended to treat the practices in question not only as restrictions of competition within the meaning of Article 85 of the Treaty, but also as an abuse of a dominant position under Article 86 of the Treaty.

1627 It must be remembered, however, that all the fines imposed by the contested decision were in respect of the period between the notification of the TACA and the issue of the statement of objections.

1628 It follows that even if the TACA parties considered that the notification of the practices on service contracts did not give them immunity from fines for infringements of Article 86 of the Treaty, they had no reason to amend them in order to escape fines under that provision since, at that time, they were unaware that the Commission considered them to be an abuse.

1629 For that reason too, the complaint in paragraph 604 of the contested decision that 'all of the TACA parties had access to sufficient legal advice to know of the possibility of fines for breaches of Article 86 notwithstanding the notification of the TACA' cannot be upheld.

1630 Third and finally, as the applicants submitted in their written pleadings, the Commission has already conceded in earlier decisions that where the same conduct was contrary to Articles 85 and 86 of the Treaty, no fines should be imposed where that conduct had been notified with a view to obtaining individual exemption under Article 85(3) of the Treaty. Thus it is apparent from Decision 89/113, in which the Commission found that Racal Decca had infringed Articles 85 and 86 of the Treaty in respect of certain agreements notified for the purposes of an exemption, that no fine was imposed on that undertaking, either under Article 85 or under Article 86, inter alia on the ground that from the beginning Racal Decca had brought the abusive practices to the Commission's attention. Similarly, the Court has already held that in Decision 76/353 the Commission did not impose a fine on United Brands under Article 86 of the Treaty for having prohibited its ripener/distributors from reselling its bananas while still green, as that prohibition appeared in the general conditions of sale notified by United Brands with a view to obtaining an exemption (*United Brands*, cited at paragraph 853 above, paragraphs 291 and 292).

1631 At the hearing the applicants also pointed out rightly that in the Van den Bergh Foods case (Commission Decision 98/531/EC of 11 March 1998 relating to a proceeding under Articles 85 and 86 of the EC Treaty, Case Nos IV/34.073, IV/34.395 and IV/35.436 — Van den Bergh Foods Limited, OJ 1998 L 246, p. 1) the agreements notified by the dominant undertaking in question with a view to obtaining individual exemption, which made provision for the supply of freezers to sales points distributing that undertaking's ice cream, on condition that they be used exclusively for those products, were regarded as being both a restriction of competition and an abuse, but were not penalised with fines.

1632 The Commission has not put forward any other decisions in which a fine was imposed for infringement of Article 86 of the Treaty in respect of conduct notified under Article 85(3) of the Treaty.

1633 In the light of all of those factors, without there being any need to make a finding in respect of the other pleas and complaints raised by the applicants, the Court in the exercise of its unlimited jurisdiction considers that there is justification for not imposing a fine in the present case in respect of the abusive practices provided for in Article 14 of the TACA in so far as they fall within the ambit of Regulation No 1017/68.

1634 Consequently, Article 8 of the operative part of the contested decision must be annulled.

VII — *The plea alleging infringement of the second paragraph of Article 215 of the Treaty*

Arguments of the parties

1635 The applicant in Case T-213/98 submits that the Commission caused it unlawful injury in requiring it to provide a bank guarantee for the fine imposed on it.

1636 The Commission considers that that plea is inadmissible and unfounded.

Findings of the Court

1637 Under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to proceedings before the Court of First Instance by virtue of the first

paragraph of Article 53 thereof, and under Article 44(1)(c) and (d) of the Rules of Procedure, the application must include the subject-matter of the dispute, the forms of order sought and a brief statement of the pleas in law. Those particulars must be sufficiently clear and precise to enable the defendant to prepare the defence and the Court of First Instance to rule on the application without further information, as the case may be. In order to guarantee respect for the adversarial system, legal certainty and sound administration of justice it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order in *de Hoe*, cited at paragraph 281 above, paragraph 20; *Ismeri Europa*, cited at paragraph 281 above, paragraph 29; and order in *Partido Latinoamericano*, cited at paragraph 281 above, paragraph 6).

1638 It is apparent from the case-law that in the light of those requirements it is first and foremost for the party seeking to establish the Community's liability to adduce proof as to the existence or extent of the damage it alleges and to establish the causal link between that damage and the conduct complained of on the part of the Community institutions (Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 22 and 23, and Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 71).

1639 In the present case, as the Commission rightly pointed out at the hearing, the application does not adequately identify the conduct on the part of the Commission alleged to be defective.

1640 In its written pleadings the applicant merely points out that 'the Commission's insistence on a bank guarantee placed NYK in the undesirable position of having to arrange such an instrument at considerable cost' and that 'given the wholly exceptional nature of the case, characterised as it is by almost unprecedented examples of maladministration on the part of the Commission, NYK respectfully

submits that the Commission has caused it unlawful injury'. Similarly, at the hearing, the applicant merely submitted that the illegalities alleged in the context of the pleas seeking annulment are 'so serious' that they justify compensation under Article 215 of the Treaty.

1641 The passages from the application cited above and the evidence submitted at the hearing do not enable the Court to identify the alleged fault of the Commission, or even whether that conduct is distinct from the illegality of the contested decision (Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, paragraph 90; in the sector of the ECSC Treaty: Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, paragraph 45). In particular, the application does not clearly indicate whether the alleged fault is the adoption of the contested decision, the fact that the Commission required a bank guarantee, or both.

1642 It follows that the forms of order seeking compensation set out in the application must, for that reason alone, be rejected as inadmissible.

1643 Furthermore, in so far as at the hearing the applicant submitted in the context of its claim for compensation under Article 215 of the Treaty that the enforcement of the Court's judgment setting aside that aspect of the decision would require the Commission to reimburse the costs in connection with providing the bank guarantee pursuant to Article 176 of the EC Treaty (now Article 233 EC), it suffices to recall that, according to the case-law, a request such as that, made independently of the application for costs, must be rejected as inadmissible because it in fact concerns enforcement of the judgment. Under Article 176 of the Treaty it is for the Commission to take the measures necessary to comply with the judgment (*Cimenteries CBR*, cited at paragraph 172 above, paragraph 5118, and Case T-224/00 *Archer Daniels Midland and Others* v *Commission* [2003] ECR II-2597, paragraph 356). In any event, in the present case it should be noted that such a plea alleging infringement of Article 176 of the Treaty, since it does not appear in the application and is not based on any evidence adduced during the proceedings, constitutes a new plea within the meaning of Article 48(2) of the Rules of Procedure.

1644 For all those reasons, the forms of order seeking compensation must be rejected as being inadmissible in any event.

Costs

1645 Under Article 87(3) of the Rules of Procedure the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

1646 In the present case, it is true that the contested decision is one of the longest ever adopted by the Commission in application of Articles 85 and 86 of the Treaty, that that decision raises relatively complex issues of fact and law in respect of which, when the actions were brought, there was no relevant case-law and that as Community law stands at present there is no provision limiting the length of the written pleadings or the number of documents lodged in support of an action for annulment under Article 173 of the Treaty. However, the four applications lodged by the applicants and the annexes thereto are unusually long — each application is some 500 pages long whilst the annexes make up approximately 100 files — and even if some of the pleas they contain have been upheld they are for the most part unfounded, and their number is so great as to amount to an abuse.

1647 In those circumstances, and notwithstanding the fact that some heads of the application have been upheld, since by their conduct the applicants have substantially added to the burden of dealing with this case, thus needlessly adding in particular to the costs of the Commission, the Court considers it fair, having regard to the circumstances of the case, to order each party to bear its own costs.

1648 As regards the ECTU, the intervener, the Court considers it fair, having regard to Article 87(4) of the Rules of Procedure of the Court of First Instance, to order it to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. Annuls Article 5 of Commission Decision 1999/243/EC of 16 September 1998 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty (Case No IV/35.134 — Trans-Atlantic Conference Agreement);

2. Annuls Article 6 of Decision 1999/243 in so far as it applies to mutual disclosure by the applicants of the availability and content of their individual service contracts;

3. **Annuls Article 7 of Decision 1999/243 to the extent required by the annulment of Articles 5 and 6;**

4. **Annuls Article 8 of Decision 1999/243;**

5. **Dismisses the remainder of the applications;**

6. **Orders the applicants and the Commission each to bear their own costs;**

7. **Orders the European Council of Transport Users ASBL to bear its own costs.**

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 30 September 2003.

H. Jung K. Lenaerts

Registrar President

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